Business Guide USA

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Edited by Danske Bank

Danske Bank

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Preface

Danske Bank is pleased to present to you this "Business Guide – United States".

The guide is written by attorney at law and advokat Finn Martensen, LL.M. and Ph.D., who is admitted to the Danish Supreme Court, the US Federal Supreme Court and the California Supreme Court. Finn Martensen is solely responsible for the content of this guide. A previous edition was published in Danish and aimed solely at Danish customers. This edition has been adapted and now targets customers in all of the Nordic countries. The guide was originally published in November 2004. The current version is last updated in October 2008. The guide is a useful tool for companies with interests in the US or companies who want to enter the attractive US market.

Managers and advisors of Nordic companies who need information on US legal matters will find the guide useful. It includes comparisons of US and Nordic legislation, highlighting some of the differences to make it easier to understand the US legal system. Moreover, it is written in a language that seeks to avoid unnecessarily complex legal terminology.

The guide does not comprise all aspects of US law, as the author has selected those areas which, in his experience, are of most interest to companies in the Nordic region. The selected areas are described in general terms, and in most cases, it is advisable to seek professional assistance in the handling of specific legal matters in the US.

Written by Finn Martensen, Danish Supreme Court Attorney and Attorney at Law , and edited by Danske Bank
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Danske Bank

Measured by total assets, the Danske Bank Group is the largest financial enterprise in Denmark and one of the largest in the Nordic region. The Group offers Danish and international customers a wide range of services in the fields of banking, mortgage finance, insurance, leasing, real-estate brokerage and asset management.

Banking, insurance, mortgage finance and asset management

The Group serves personal and business customers through banks with nationwide branch networks in Denmark, Sweden, Norway, Northern Ireland, the Republic of Ireland, Finland and the Baltic states. In addition, customers in Denmark are served by head office departments, finance centres and subsidiary companies. Customers in Sweden are also served by a large corporate client department and several head office departments.

The Group also has branches in London, Hamburg, and Warsaw. A subsidiary in Luxembourg specialises in private banking services, and one in St. Petersburg serves the Bank's corporate customers. In addition, the Group is represented in the leading international financial centres and in Denmark's most important export markets.

The Group's insurance activities are handled by the Danica Pension insurance group, which offers life and pension products under its own brand name. Mortgage finance activities are provided by Realkredit Danmark. Apart from banking, insurance and mortgage finance services for personal and business customers, the Group provides asset management services to institutional clients and life insurance providers.

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In total, the Group serves 5 million retail customers and a significant number of public sector and institutional organisations. Some 2 million customers use the Bank's online services.

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Estonia
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www.danskebankas.lt

Northern Ireland
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www.northernbank.co.uk

Norway
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Poland
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Russia
ZAO Danske Bank
www.danskebank.com/ru

Sweden
Danske Bank
www.danskebank.se

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The author of this guide, Finn Martensen, LL.M. and Ph.D., is a partner at the law firm of Martensen • Wright, LLP., in Sacramento, California, and operates the law firm in Denmark under the name Martensen Wright Advokatanpartsselskab.

Martensen, who is licensed to practice law in both Denmark and the United States, has concentrated his practice on advising Danish companies with interests in the US and American companies with interests in Denmark. The practice covers many issues, including the establishment of companies in the US, tax law, immigration law, board of directors work, commercial contracts and business acquisitions. In addition to his legal practice, Martensen has written many articles and other publications, primarily on Danish-American legal issues in recent years.

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2. Choice of business entity

2.1 Introductory remarks

A basic consideration when planning to carry out business activities in the United States is in which legal format such activities should be carried out. The answer to the question depends solely on the nature of the business activities in question. If, for example, the purpose of the activities is to include the United States as a market for the Nordic business, then the business activities in the United States will often be carried out via a commercial agent or a distributor who will market the products in the United States. In this case, no physical establishment takes place in the United States. An alternative example is the situation where a Nordic business plans to establish production facilities in the United States. In this case, physical establishment will of course be necessary, and the activities will then be carried out via a US subsidiary of the Nordic business entity.

Besides the fact that the establishment of a business should always be arranged to match the business activities, tax consequences and liability consequences should always be considered. For example, the establishment of a subsidiary in the United States will always result in the subsidiary being taxed in the United States. This has administrative consequences, and will thus give rise to certain costs. The establishment of a subsidiary will also result in the subsidiary being directly liable for its activities in the United States and – if planned correctly – the Nordic parent company will be relieved from certain liabilities. In a situation where the activities in the United States are planned to be limited to marketing of the Nordic company's products, it may be too far-reaching to establish a subsidiary or a branch to carry out these activities. If, on the other hand, it is the plan to carry out physical activities in the United States, such as the establishment of a sales office or production, it is natural to establish a subsidiary or a branch.

The purpose of this chapter is to illustrate the most commonly used methods of establishing business activities in the United States and to describe in which situations the various forms are most suitable. Focus will first be on situations without physical establishment in the United States and subsequently on situations where physical establishment is desired.

2.2 Export to the United States without physical establishment

2.2.1 Sales via a sales agent

In all situations where a Nordic business entity desires to market its products or services in the United States, such marketing may be carried out via one or more independent entities in the United States who solicit offers from potential American buyers. Once the offer has been solicited, the offer is brought to the attention of the exporter who then may accept or reject the offer. Thus, the Purchase Agreement is entered into directly

between the Nordic seller and the American customer. As in the Nordic countries, a sales agent is characterized by the following:

- The sales agent usually does not carry a stock of the products to be sold.
- The sales agent usually receives a commission for the sales solicited. Commission is most often calculated as a percentage of the sales volume generated by the sales agent.
- The sales agent operates under the name of the producer as an independent contractor and not as an employee of the exporter.
- The agreement regarding the sale of the products or the services rendered is entered into directly between the exporter and the American purchaser. Thus, in the case of the sale of goods, the sales agent does at no point in time take title to the goods.
- The sales agent is usually not authorized to accept orders on behalf of the producer, but limited to solicit such orders.[1] Contrary to what is the situation in the Nordic countries, there is no general legislation in the United States pertaining to the sales agent's legal rights or obligations.[2] Thus, the parties have broad latitude to determine the parties' rights and obligations via the agreement that is established between the exporter and the sales agent. Such agreement should always, as it is the case with all types of commercial agreements, be meticulously tailored to the specific situation. Standard agreements should only be used as a source of inspiration. However, a number of topics should always be considered and form an integral part of a Sales Agent Agreement with an American sales agent. The most important of these topics are the following:

  The territory within which the sales agent shall operate must be specified in the agreement. It is the author's experience that Nordic exporters often accept that the sales agent is granted very large geographical territories. It should always be considered closely if the territory granted to the sales agent is of a size that is realistic for the sales agent to efficiently market the products within. If the exporter does not know the agent's qualifications, it is often advisable to start out with a smaller geographical territory and then expand this territory at a later point in time provided that it is found that the agent has carried out the marketing activities to the exporter's full satisfaction. If the perspective sales agent maintains that he or she is capable of efficient marketing within a very large territory, it is advisable to insert a mechanism in the Sales Agent Agreement that allows the exporter to terminate the agreement at short notice provided certain minimum sales volume requirements are not met.

  It must always be determined in the Sales Agent Agreement whether the sales agent shall be an exclusive agent or not. The most common situation is that the agent is appointed exclusive agent, thus disallowing the exporter to carry out other marketing activities within the territory.

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[1] As it will appear from the following, the tax consequences of marketing via a sales agent will vary radically depending upon whether the sales agent is authorized to accept orders or to (only) solicit orders.

[2] European countries who are members of the European Union have adopted a uniform legislation based on the EU directive on sales agents.

Non-exclusive agreements often give rise to conflicts and should normally be avoided.

The mechanisms regulating how commission is earned and paid should also be specified. In this context, it is important to specify that commission is earned only on the basis of orders accepted by the exports and subsequently paid for by the American customer.

Further, the agreement should specify in unambiguous language that the Sales Agent Agreement is indeed a Sales Agent Agreement. Thus, it should be specified that the Sales Agent Agreement does not establish a partnership, a distributorship, employment relation or any other relationship that allows the sales agent to act on behalf of the exporter.

Termination provisions are an essential part of the agreement. Most conflicts arise in conjunction with termination of a commercial relationship. It is therefore very important that that the termination provisions are established and specified at the outset of the business relationship. The termination provisions will normally be bifurcated with one set of rules to apply if termination is without cause, and another set of rules to apply if termination is with cause. In case of termination without cause, the terminating party shall normally give prior written notice of termination within a time span of 3 to 6 months. It is not advisable to establish agreements that are non-terminable without cause for a longer period of time. This is due to the fact that it is never advisable to uphold a commercial relationship if one of the parties wishes to opt out. Termination with cause may be effectuated at short notice, normally a few calendar days. It should be specified what constitutes such breach of the contract that termination with cause may be effectuated. As mentioned above, such remedy may include situations where the sales agent has not met certain specified minimum sales volume requirements.

Further, it should always be stated in the agreement if the agent shall receive compensation from the producer when the agreement is terminated. The EU Convention on Sales Agents contains detailed regulations pertaining to the agent's compensation when the Agency Agreement is terminated. Such rules are not found in the United States. Thus, it may legally be agreed that the agent shall not receive any compensation when the agreement is terminated, even in situations where it is the exporter that has given notice of termination.

Also, it should always be stated in the agreement which country's laws shall govern the agreement and how possible conflicts should be resolve. Sales Agent Agreements give rise to specific considerations. If it is agreed that the laws of one of the Nordic countries shall govern the agreement, this will result in the agent being protected by the rules in the EU Convention on Sales Agents and consequently in the agent often being eligible to receive compensation when the agreement is terminated. Further, the specific rules in the Convention regulating the parties' rights and obligations will come into force unless these rules are explicitly set aside in the agreement. If the parties agree that the laws of one of the Nordic countries shall govern the agreement, it should be considered to

expressly state in the agreement that the rules giving the sales agent the right to compensation upon termination of the agreement shall be set aside. Nothing hinders the partial application of the laws of one of the Nordic countries as long as the sales agent is domiciled in the United States.

Finally, the reach of the sales agent's authorization will give rise to tax consequences. The usual situation is that the sales agent's authorization is limited to soliciting orders from the potential customers, and that such orders are subsequently approved or rejected by the exporter. In other words, the Sales Agreement is entered into directly between the exporter and the American customer. However, it is not unusual that the sales agent is authorized to accept orders on behalf of the exporter. In this situation, the agreement is still entered into directly between the exporter and the American customer but the agent represents the exporter in the agent's capacity as proxy holder. The two situations just described give rise to very different tax consequences as described below.

Determination of whether the exporter will be taxed in the Unites States of the sales to American customers depends on whether the exporter is deemed to have established a "permanent establishment" in the United States.

The term "permanent establishment" is defined in the specific tax treaty which the United States has entered into with each of the Nordic countries. The definition of the "fixed place of business" contains a provision stating that business activities in the United States via an independent representative do not mean that the Nordic exporter has established a "permanent establishment" in the United States unless the independent representative (here the sales agent) has obtained a proxy to enter into agreements on behalf of the exporter. If this is the case, the Nordic exporter will be liable to pay income tax in the United States on the profits generated by the sales agreements established by the agent in his or her capacity as proxy holder for the exporter. On the other hand, the exporter will not be tax liable to the United States if the agent is not provided with a proxy to accept orders on behalf of the exporter. The above-mentioned leads to the conclusion that the agent's authority to act on behalf of the exporter should always be closely regulated by the Sales Agent Agreement. In this context, it should be noted that the tax liability to the United States is not only established in situations where the sales agent has a direct authorization to accept orders but also in situations where the sales agent is given a more limited proxy to act on behalf of the exporter, for example to negotiate prices and rebates.

2.2.2 Sales via a distributor

An alternative to establishing marketing and sales via a sales agent is to have these functions carried out by a distributor domiciled in the United States. As it was the case in regard to sales agents, the United States has not enacted any legislation that generally regulates the exporter/distributor

relations. Accordingly, the Distributor Agreement may, within broad limits, be tailored to the actual situation.

The role of the distributor is different from the role of the sales agent in the following basic ways:

- The distributor purchases the goods from the exporter and then resells the goods to American customers. Thus, the distributor takes title to the goods.
- The distributor operates under its own name and may therefore enter into agreements in regard to the sale of the goods to American customers without any acceptance from the Nordic exporter.
- The distributor's profit is obtained via the price difference between the distributor's purchase price from the exporter and the distributor's sales price to American customers.
- The distributor usually holds a stock of goods.

Matters to be considered when drafting a Distributor Agreement are basically similar to those listed above in chapter 2.2.1 regarding Sales Agent Agreements. However, the calculation of commission and matters pertaining to the EU Convention on Sales Agents are not relevant.

The provision regarding choice of law gives rise to special consideration. This is due to the fact that the sales from the exporter to the distributor are international sales that will be regulated by the Convention on the International Sales of Goods. This Convention is ratified in whole or in part by all the Nordic countries and by the United States. Therefore, when formulating the clause on choice of law in the Distributor Agreement, it should always be decided if the Convention on the International Sales of Goods will be part of the choice of law or whether national legislation is preferable. If reference in the agreement is made only to the laws of the United States or to the laws of one of the Nordic countries, the provisions in the Convention on the International Sales of Goods will apply. This is due to the fact that the Convention – as mentioned above – has been ratified and thus is part of the national legislation.

Without going into detail, it is the general picture that the Convention on the International Sales of Goods puts the seller in a less favorable position than the Nordic legislation on sales. It should therefore always be considered to state in the agreement's clause on choice of law that the Convention on the International Sales of Goods will not apply. The consequence of the choice of United States legislation combined with the exclusion of the rules in the Convention on the International Sales of Goods is that the rules in the American Uniform Commercial Code[3] will apply to the agreement. What has been mentioned above in regard to choice of law should always be closely considered in each case in order to make sure that the choice of law puts the exporter in the best possible position.

[3] The so-called Uniform Commercial Code (abbreviated UCC) is a large set of rules which among many other things covers the rights and obligations of sellers and purchasers of tangible property. Despite the fact that this Code is referred to as the "Uniform" Commercial Code, it should be noted that the Code is indeed not uniform. This is due to the fact that each of the states in the United States has ratified the Code in various forms.

It falls outside the scope of this publication to give a detailed description of the pros and cons of the various provisions, but the exporter and its advisors should be aware that the various sets of rules contain significant differences when it comes to the rights and obligations of the parties in a sales transaction.

2.2.3 Sales agent or distributor?

Whether to carry out the marketing and sales functions via a sales agent or alternatively via a distributor calls for no straight answer. Both alternatives have the advantage that they are fairly simple and straightforward to establish, and that the financial exposure is rather limited. The use of a sales agent has the advantage that the exporter obtains more control than when the sales take place via a distributor. This is due to fact that the sales – when using a sales agent – are established directly between the exporter and the American customer. It is the author's experience that the choice more depends on commercial considerations than on legal considerations. Indeed, it is often seen that the agreements established contain both elements of Sales Agent Agreements and elements of Distributor Agreements. Such "hybrid" agreements often prove particularly useful when the sales to be carried out in the United States cover different sectors of which some, but not all, require direct contact between the exporter and the American end customer.

2.2.4 Sales carried out by the exporter's employees

An alternative to carrying out the marketing and sales functions in the United States via either a sales agent or via a distributor is to have the exporter's own employees carry out these functions. The employee can conduct business either during brief visits to the United States or during a more temporary stationing in the United States.

Seen from a business point of view, marketing and sales activities via an employee has the obvious advantage that the exporter has full and direct control over the activities in the United States. On the other hand, such marketing – and sales activities – will also be more costly than marketing and sales activities carried out via a sales agent or via a distributor. Also, very importantly, it should be noted that sales generated in the United States via employees who have obtained authority to enter into sales agreements on behalf of the exporter always will result in the exporter being tax liable to the United States for the profits generated[4]. A further consequence of these tax liabilities is that the Nordic exporter will have to be registered in the United States with the Secretary of State and with all relevant tax authorities. This in turn leads to administrative costs and exposure to liability in the United States. Reference is made to chapter 2.3.3 of this publication.

[4] This is because the employment of such person in the United States constitutes a "permanent establishment" in the United States. See also the discussion in Chapter 2.2.

Further, stationing of employees in the United States always gives rise to visa considerations. Reference is made to the detailed description in chapter 5 of this publication.

2.3 Business activities via physical establishment in the United States

2.3.1 Introductory remarks

Commercial considerations often make it desirable to physically establish business activities in the United States, such as an office, a production plant or a storage facility. The commercial considerations in this respect are manifold. It may, for example, be desirable to station employees in the United States to carry out marketing and sales activities or to carry out service functions. It may be desirable to have a presence close to the activities that are important for the exporter's specific business activities (for example a high tech business based in Silicon Valley in California). Also, for duty purposes it may be advantageous to produce goods in the United States. In general, it creates more and better business opportunities for the exporter to be physically present in the United States. This is due to the obvious fact that such presence sends a strong signal of seriousness to potential American customers and other business partners.

In situations where the consideration of the aforementioned – and other elements – has led to the conclusion that physical establishment is to take place, it becomes crucial to determine whether the establishment is to take place via a separate legal entity or whether the establishment is to take place via a branch of the exporter's business in one of the Nordic countries. As it will appear from the following chapters, it is the general advice of the author that establishment in the United States via a branch office should be avoided. This is due to the fact that such establishment has adverse tax and liability consequences. Reference is made to chapter 2.3.3 of this publication.

2.3.2 Establishment via a US corporation

As in the Nordic countries, the United States legislation contains provisions regarding the establishment of corporations that have the same characteristics as a company with limited liability established under the laws of one of the Nordic countries. Specifically, this means that a United States corporation is characterized as being a separate legal entity with the result that the corporation's shareholders and management usually are not liable for the corporation's obligations. The legislation in regard to corporations is part of the individual states' legislation. Thus, no uniform rules for the establishment and maintenance of a US corporation exist. However, the legislation in the various states of the United States in regard to corporations is almost uniform. Therefore, the following description contains a general picture of the legislation on corporations, but special

attention should in each instance be given to the legislation in the state where the corporation is to be established. The description below contains the following elements: First, it is described where the corporation should be established. Second, it is described how to establish the corporation and how the management is structured. Third, it is described how to issue shares. Then, the risk of piercing the corporate veil is described, and finally, some general remarks in regard to taxation of the corporation are made.

It has for many years been a widespread tradition to establish subsidiaries of foreign corporations in the state of Delaware. This tradition rests on the fact that Delaware originally had the most elaborate and best functioning corporate laws. However, during the past decades most of the states have enacted corporate legislation that is almost similar to the Delaware legislation. Therefore, unless the subsidiary to be established is part of a complex international group of companies, there are generally no obvious advantages to establishing the US subsidiary in Delaware. The general advice is to establish the corporation in the state where the corporation is expected to be physically located. This has the advantage that registration will then only have to take place in one state. If, on the other hand, the corporation is established with authority in one state and physically located in another state, the corporation must also be registered as a so called "foreign corporation" in the state where it is physically located. Thus, the corporation has to be registered in two states which gives rise to increase in administration and costs.

In situations where business activities are carried out in many states (for example via branch offices or via employment of personnel stationed in many states), corporate registrations will have to be made in all of those states where activities of the nature just mentioned are carried out. In such situations, it is not of great importance in which state the corporation is originally incorporated, and Delaware will then often be a natural choice.

In all of the states, the initial establishment of a corporation is carried out via registering with the Secretary of State. The incorporation is carried out by an incorporator who is normally an attorney at law or a representative for businesses specializing in the establishment of corporations. The incorporation is carried out by filing a rather simple document named "Articles of Incorporation". The Articles of Incorporation, as a minimum, contains the corporation's name[5], the purpose of the corporation, the address of the corporation located within the state and the number of shares that the corporation shall be authorized to issue. The legislation in some states requires that the Articles of Incorporation contain further information, such as the names of the directors and the determination of the fiscal year. Most states' legislation does not require any minimum paid-in share capital. A few states, such as Texas, require a nominal paid-in capital. The minimum capital requirement in any state does not exceed $1,000. Regardless of the minimum capital requirements (or the lack thereof), it must always be considered how the corporation shall be capitalized so that the capitalization

[5] The name of an American corporation shall end with either "Incorporated", "Company", "Limited" or the abbreviations thereof, namely "Inc.", "Co." or "Ltd.". The use of the abbreviation "Inc." is the most widespread, and it is often not advisable to use the abbreviation "Ltd." in that this abbreviation may be associated with corporations established as tax shelters.

fulfills the US tax law requirements for the balance between equity and debt. It falls outside the scope of this publication to describe these mechanisms in detail.

The incorporation itself does not entail appointment of the management or the issuance of shares. It is very important to note that the corporation is not established as a separate legal entity until the shares are issued to the shareholders and the management has been appointed. Thus, the corporation offers no protection to its shareholders until the steps just mentioned have been taken.

The first step that is taken after the registration of the corporation with the Secretary of State is that the incorporator appoints the Board of Directors[6]. The Board of Directors is responsible for the overall management of the corporation. It may consist of one or more members, and all members may be foreigners[7]. The board members (directors) will normally be appointed immediately following the establishment of the corporation. Once the members of the board have been appointed, the first meeting of the Board of Directors will be conducted. The purpose of this meeting is to appoint the daily management (in the United States called the "officers"). Also at the first meeting, decisions will be made in regard to many other topics, such as the corporation's Bylaws, the issuance of shares and the determination of the corporation's fiscal year.

The day-to-day management (the "officers") shall in most states consist of at least three positions, namely a president (alternatively named Chief Executive Officer (CEO)), a treasurer (alternatively named Chief Financial Officer (CFO)), and a corporate secretary. Some states are more lenient in their requirements as to which officers shall be appointed. For example, Florida's legislation simply requires that the corporation shall have such officers as deemed appropriate by the Board of Directors. All states' legislation allows for the appointment of supplementary officers such as vice presidents, senior vice presidents etc.

The term "corporate secretary" is not known in the Nordic corporate legislation. The obligations of the corporate secretary are to make sure that the company carries out its activities in accordance with the mandatory provisions in the state corporate legislation. Also, it is the task of the corporate secretary to prepare minutes of meetings and to prepare other necessary corporate resolutions. The role of the corporate secretary is almost similar to what is known in the commonwealth countries as the "company secretary".

One person may take upon himself or herself multiple officer positions, and the officers may be members of the corporation's Board of Directors.

It is prudent practice to establish liability insurance to cover acts and omissions by board members and officers in an American subsidiary of a

[6] As mentioned above, a few states require that the Board of Directors is appointed in the Articles of Incorporation.
[7] It should be noted that a few states allow corporations to be established without a Board of Directors.

Nordic parent company. Such insurance can either be established via an "umbrella insurance" under the Nordic parent company's existing insurance policy or via a separate insurance established with an American insurance carrier.

The corporation's Bylaws contain a series of provisions that regulate how the corporation shall be managed. Examples are provisions pertaining to general meetings of the shareholders and meetings of the Board of Directors. Most states' legislation leaves it very open to the individual corporation to structure its Bylaws in accordance with the needs of the corporation. For example, most states' legislation allows meetings to be carried out abroad, and even without the establishment of a physical meeting. When drafting the corporation's Bylaws, it is always important to consider the corporation's specific needs and then draft the Bylaws accordingly.

The shares are issued in two stages. First, it is decided in the Articles of Incorporation how many shares the corporation shall be authorized to issue. At a later stage – typically at the first meeting of the Board of Directors – it is then decided who the shareholders are and how many shares should be issued. Shares are normally issued without any specific value. Such shares are named "shares with no par value". It is possible to issue shares with face value ranging from a nominal value, for example $0.01 and up to any amount that the Board of Directors deems feasible. When quoting the price of a share in the United States, reference is always made to the specific purchase price for the share in question. If, for example, the trade value of a company is deemed to be $10,000,000 and one million shares have been issued, the share price will be quoted as "$10 per share". This is different from the tradition in the Nordic countries where prices on shares are normally quoted as the exchange rate. The following example illustrates this: "A company has a trade value of $10,000,000. Five hundred thousand (500,000) shares of a face value of $2.00 have been issued. This means that the share capital of the company is $1,000,000. In this case the value of the share will be quoted as "exchange rate 1,000 for each share of a face value of $2.00". This means that the price for each share with the face value of $2.00 is $20.00.

All of the states' legislation allows that the corporation may be solely owned by one foreign shareholder or by several foreign shareholders. Shareholders may be either physical persons or legal entities. Thus, all states allow the establishment of subsidiaries that are 100% owned by Nordic business entities.

Shares in American corporations are issued by way of physical share certificates. Each share certificate may cover one or more shares. A share certificate is a bearer instrument. Therefore, it is always very important that the share certificate is kept in a safe place.

When shares have been paid for and issued, the corporation is finally established and viewed as a separate legal entity. This has the important consequence that the shareholders and/or the management from that time

on can normally not be held personally liable for the corporation's obligations.

As it has appeared from the above, the corporate structure in an American corporation resembles what is known from the corporate legislation of the Nordic countries, namely that the final decision-making power rests with the shareholders. The shareholders appoint the members of the Board of Directors (except the first Board of Directors which is appointed by the incorporator) and the Board of Directors appoints the daily management (the officers). The legislation in each of the states contains provisions pertaining to the obligation and liability of the management. The general denominator is that the management has a fiduciary duty of loyalty to the company. It is common to state in the Articles of Incorporation and in the Bylaws that the management's liability to the company and its shareholders shall be limited as much as possible within the framework of the law. It is the author's opinion that the management's liability towards the corporation and the shareholders is generally at the same level as what is known in the Nordic countries.

As it is the case in the Nordic countries, there is a risk that the corporation's shareholders and/or management in certain situations may be held liable for claims against the corporation. Such direct claims against the shareholders and/or the management[8] are rare and found only in extraordinary situations. Detailed regulations in regard to piercing of the corporate veil are found in the various states' court practices. All states' practices contain the following common features: First, the basic requirement for successfully piercing the corporate veil is that the corporation's creditors can prove that the shareholders and/or the management acted fraudulently towards the creditor or creditors. Second, the person who claims that the corporate veil shall be pierced must prove that one or more extraordinary and criticizable situations are present. This may for example be that the corporation has been severely undercapitalized, that no shareholders' meetings or Board of Directors' meetings have been conducted, that the corporation is not registered with the relevant authorities, that no shares have been issued or that no management has been appointed. The conclusion of the aforementioned is that piercing of the corporate veil will not occur if the corporation has been established and maintained as prescribed by the corporate legislation and if the corporation has been managed according to generally accepted management principles.

Once the corporation is registered with the Secretary of State, supplementary registrations will always have to be carried out. The corporation must be registered as a taxpayer with the federal and state tax authorities. Further, most counties require that the corporation obtain a business license. It is normally a formality to obtain a business license. The purpose of this license in most counties is to obligate the corporation to pay certain local business taxes. Also, it is important that all mandatory subsequent registrations are carried out. For example, most states' Secretary of State requires that the corporation within each calendar year file a report stating who the members of the corporation's management are

[8] In the United States named "Piercing of the Corporate Veil".

and who the members of the Board of Directors are. Further, business licenses shall normally be renewed on a yearly basis. Lack of such registration may result in fines and/or revocation of business privileges within the state and may give rise to the argument that there is basis for piercing of the corporate veil.

Compared to what is the case in the Nordic countries, only a few facts regarding a corporation are accessible to the public. The only document that is publicly accessible is the Articles of Incorporation which contain only little information. Further, and as mentioned above, most states also require that the members of the management team be registered with the Secretary of State. Accordingly, it may be concluded that important corporate information is not revealed to the public, such as the number of shares issued, who the shareholders are, as well as the financial status of the company. This makes it difficult in the United States to obtain reliable information on corporations.[9] The fact that an American corporation is viewed as a separate legal entity has the very important consequence that the shareholders are not liable for claims against the corporation.[10] This has the important consequence that the Nordic shareholders in an American corporation will not be liable for the corporation's obligations to contracting parties or to third parties.[11] By establishing an American subsidiary, the Nordic parent company hereby establishes a situation where the parent company guards itself from being sued in the United States for claims against the subsidiary. In other words, the establishment of a subsidiary results in the risk of the activities of the subsidiary being confined to the net value of the subsidiary. An exception to the general rule is found in a situation where a claim based on product liability is made against the subsidiary and the liability is grounded in products produced and/or sold by the parent company. In such situations, the Nordic parent company may be sued in the United States because product liability claims may be made against all parties of the production, sales and distribution chain.

The fact that an American corporation is viewed as a severable legal entity further results in the corporation being taxed separately. This means that the profit generated by the corporation in the United States will be taxed in the United States and only in the United States.[12] A corporation must always pay federal income tax. The federal income tax is fixed according to a progressive scale between 15% and 39.6% of the corporation's net income. In addition to federal income tax, most states require payment of state income taxes. Such state income taxes vary drastically, mainly from 0% (for example in states, such as Nevada, Texas and the state of Washington) and

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[9] It should be noted that the minimal reporting requirements pertain to companies that are not publicly traded or otherwise regulated by the rules and regulations set forth by the Securities and Exchange Commission. Publicly traded companies are subject to extensive and detailed regulations involving rigorous reporting requirements. A further description of these regulations falls outside the scope of this publication.

[10] Except in the rare situation where there is basis for piercing of the corporate veil.

[11] Exceptions to the general rule are claims pertaining to product liability. See chapter 8 of this publication.

[12] Dividends paid to the corporation's Nordic shareholders will be taxed in the Nordic countries on the basis of the rules found in the Nordic countries' local legislation and in the tax treaty established between the individual Nordic countries and the United States.

up until around 10% (for example in states, such as California and New York). State income tax will have to be paid in the state where the business activities generating the income have taken place. Thus, in a situation where the corporation has been established in a low-income state (for example in Nevada), but the business activities have been carried out in a high-income state (for example in California), tax shall be paid to the state of California. This means that it is not advantageous to establish a corporation in a low-income state unless it is the plan to carry out the business activities from this state. If a corporation sustains a business loss, such loss may be offset in future years' income. According to the federal rules, the loss may be carried forward up until 15 years. The various state tax laws vary in this respect, but most states adhere to a system similar to the federal tax laws.

In addition to the federal and state income taxes, many cities and counties collect local taxes. Such taxes vary radically from place to place. It is therefore always important to consider where to establish the business activities in the United States, not only at state level, but also at local level in the state in question.

In regard to tax filings, it is a requirement that tax returns be filed with the federal and state tax authorities. It is not a requirement that the bookkeeping is conducted in the United States. Therefore, specifically when the US activities are limited, it is customary that the bookkeeping is conducted by the financial personnel of the Nordic parent company. Also, it is not a requirement to provide the tax authorities with a copy of the corporation's financial report. In other words, the tax authorities are provided only with the tax returns and not the background material. Further, it is not a requirement that the financial report is audited. However, it is customary that the parent company's Nordic accounting firm requires such audit in that the corporation's results will be part of the consolidated group results.

It is the author's general recommendation to the use a US corporation as the legal entity when doing business via physical establishment in the United States. In short there are three major grounds for that recommendation: Firstly, the corporation protects (if correctly established) the foreign parent company from liability for claims (except for product liability claims) against the US subsidiary; Secondly, the use of a US corporate subsidiary gives a clear tax situation. Thirdly, the use of a US corporation sends a positive signal to American business partners: It is en entity well known to such partners and it opens up for the possibility to give the management of the subsidiary titles, that are will known in the United States. None of the above listed advantages can be obtained via the establishment of a branch office – See Chapter 2.2.3

2.3.3 Branch office in the United States

Nordic businesses who wish to establish a physical presence in the United States may do so via the establishment of a branch office. The characteristics of a branch office is that it is not legally separated from the Nordic business, but simply viewed as a part of that business situated in the

United States. A very important consequence of this is that the Nordic business will be liable in the United States with all its assets, also assets situated outside the United States. Further, the establishment of a branch office has as a consequence that the Nordic business may be sued in the United States. This is due to the fact that establishment of a branch office forms the basis for general jurisdiction in the United States. The formal consequence of general jurisdiction is that the Nordic business may be sued in the United States not only for claims related to the United States activities, but also for non-US related claims. Thus, the Nordic business becomes at risk to be involved in lawsuits in the United States for claims that are totally unrelated to the US activities .

The consequence of the establishment of a branch in the United States is further that income and expenses related to the US activities are subject to taxation in the United States[13]. The fact that the branch is subject to US taxation has as a consequence that a separate bookkeeping system must be established in regard to the US activities. The taxation of the branch's activities is basically the same as for a US corporation. Thus, the tax will be calculated from the surplus that is generated via the activities of the American branch. For that reason it is always necessary to establish a detailed bookkeeping system pertaining to the American activities so that these can be separated from the businesses of the Nordic parent company's activities. The surplus generated from the American branch will also be subject to taxation in the relevant Nordic country. However, the tax treaties entered into between each of the Nordic countries and the United States allow credit exemption from most types of tax paid in the United States. The exact scope of the credit exemptions must, for each Nordic country, be determined via the relevant tax treaty combined with the tax laws of the Nordic country in question. The end result of the taxation of the branch is in other words, that the American activities will ultimately be taxed with the highest of the tax levels in the United States and the relevant Nordic country.

What has just been described in regard to taxation is theoretically not complicated. However, the reality is that the Nordic and the American tax authorities do often have different views of what activities may be allocated to the "American activities". This brings about a latent risk for partly double taxation and does certainly give rise to elevated administration – and accounting costs.

If it is decided to establish a branch in the United States, such branch must be registered with the American corporate authorities. Due to the fact that the branch is not a separate legal entity, but simply a part of the Nordic business entity, it is the Nordic business entity that will have to be registered. Such registration is rather complicated in that the Nordic business entity's corporate papers will have to be translated into the English language and brought into a format that fits the American corporate authorities' standard formats. It is the author's experience that registration of a branch will rise to substantial higher legal fees than the establishment of a subsidiary of the Nordic business entity.

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[13] This is due to the fact that the establishment of a branch constitutes a "permanent establishment". See also Chapter 2.2.1.

Further, the branch must obtain federal and state tax numbers and local business licenses as it is the case for American corporations.

Doing business in the United States via a branch has the disadvantage that the name of the business does not reflect an entity commonly known to the Americans. For example, only few Americans would recognize that the abbreviation AB is equivalent to the American abbreviation Inc. Further, by doing business via branch it is not practically possible to provide the American employees with titles that are commonly known to the Americans.

For the above reasons it is generally not advisable to carry out business activities in the United States via a branch office. For several reasons it is more feasible to carry out such activities via an American corporation established as a subsidiary of the Nordic business entity. First, the establishment of a subsidiary reduces the liability risk for the Nordic parent company in the United States. Second, the taxation of the subsidiary is straightforward and foreseeable. Further, for plain business reasons the subsidiary is to prefer due to the fact that the nature of such entity is well known in the United States.

2.4 Business entities involving more parties

2.4.1. Introductory remarks

The business entities described above are all characterized by the Nordic business entity being the only participant in the US activities. However, situations often occur where the Nordic entity desires to carry out the activities in the United States with one or more American partners or together with one or more foreign partners. In this situation, there are several possibilities for structuring the business activities. These structures are briefly discussed below. The general conclusion is that the most feasible solution is obtained by business activities in the United States via a corporation in which the various partners are shareholders, either directly or via a US holding company.

2.4.2 A US corporation

A US corporation may have more than one shareholder. Thus, collaborating parties may carry out common activities in their capacity as shareholders in a corporation. The parties' status as shareholders in regard to taking out dividends, transfer of shares etc. may be regulated by way of a Shareholders' Agreement. This agreement is regarded as "the constitution" regulating the parties' internal position. Accordingly, as it is the case in the Nordic countries, it is very important to set up a detailed and operational Shareholders' Agreement thus comprising situations where business activities are carried out via a corporation which has more than one shareholder. For tax purposes, it is often advisable to establish a structure

where the Nordic shareholder does not directly own the shares in the American corporation, but instead exercises its right as a shareholder via an American holding company that is 100% owned by the Nordic entity.

In situations where the corporation has American shareholders, these shareholders often have the desire to have the corporation registered as a so-called "S corporation". An S corporation is a regular business corporation that is subsequently registered with the tax authorities in a fashion which relieves the corporation from income tax with the effect that the shareholders are instead taxed on the corporation's income. In other words, registration as an S corporation makes the corporation tax transparent. Shareholders of S corporations may not be domiciled outside of the United States. Therefore, if the corporation is registered as an S corporation, it is always necessary for the Nordic participant to establish an American holding company to act as shareholder of the S corporation.

2.4.3 General partnership

Two or more persons who have the desire to carry out a common business project may, without formalities, establish a so-called "general partnership". A general partnership is a partnership in which each partner is directly and jointly liable for activities carried out on behalf of the partnership (i.e. the actions of one partner are binding on each of the other partners). Further, each partner is directly and personally liable for the fulfillment of the partnership's contractual obligations. It is important to note that the joint and direct liability of each partner comprising the partnership may not be limited in the Partnership Agreement. Thus, such liability may be limited only via express agreements entered into with the partnership's contracting partners.

Further, a general partnership is characterized by the fact that it is not subject to taxes. Consequently, the partnership's income or loss is divided among the partners according to their partnership share. That part of the income is added to each of the partners' income.

As a result of the above, the Nordic partner will be tax liable in the United States of all income derived from the partnership. The rules for such taxation is basically the same as described above in chapter 2.3.3 regarding branches. However, the partnership may choose to establish a system under which the partners are taxed according to the income tax rules pertaining to corporations. For an American partner, this means that this partner will not immediately be taxed on the partnership's income but only on the amounts that are taken out of the partnership (these partners are thereby tax wise in the same situation as shareholders of a corporation). For the Nordic partner, the choice of such corporate tax status will give rise to economic double taxation. This economic double taxation is established in that the Nordic partner's part of the income will be taxed in the United States according to the corporate tax rules and subsequently also in the relevant Nordic country. Based on the above, it may be concluded that a Nordic partner in an American general partnership should always make sure that

the Partnership Agreement contains a provision according to which the partnership may not choose to be taxed as a corporation.

In all states, general partnerships are regulated by the rules of the Uniform Partnership Act (abbreviated UPA). The provisions of this Act contain, among many other things, rules according to which a general partnership may be viewed as established via the partners' acts even though no written agreement pertaining to the partnership has been established. The Act does not contain specific rules to determine when a general partnership is established via the partners' acts, but it is generally the view that a partnership is indeed established if the partners by way of their joint decision-making act in the same way as the partners in a general partnership would usually act. Thus, for example, if more parties have jointly made a decision in relation to important business transactions, and if such parties share profits among them in accordance with their individual capital contribution, a partnership is usually established despite the lack of a written Partnership Agreement.

This fact should caution a Nordic business entity to enter into business transactions with American partners if such transactions are to be viewed as a partnership transaction. Thus, if it is the intention to establish a general partnership, a written Partnership Agreement should always be prepared. Lack of such agreement brings about great uncertainty with a view to the parties' rights and obligations. On the other hand, if it is not the intention to establish a general partnership but another type of business relationship (for example a Sales Agent Agreement or a Distributor Agreement), it should always be expressly stipulated in such agreement that the agreement does not constitute a general partnership.

The legislation contains no guidance as to which provisions should be part of a Partnership Agreement. Generally, and as it is the case in the Nordic countries, such agreement will normally as a minimum contain provisions with regard to the partners' capital contribution, the allocation of profits and losses, the daily management, proxies, partnership meetings, the partnerships' activities and the dissolution of the partnership.

General partnerships are not registered with the Secretary of State or other corporate authorities, but the partnership must obtain a federal and a state tax identification number and a business license. If the partnership carries out its activities under a name that contains other words than the partners' names, the partnership must register its name with the local trade register.[14]

A Nordic partner in an American general partnership is at risk of being sued as a defendant in an American court case. This is due to the fact that the Nordic partner as a partner in an American general partnership is per se viewed as carrying out such activities in the United States which give rise to jurisdiction over that partner. Reference is made to the description in chapter 2.3.3 regarding branches.

[14] This registration is known as a "fictitious business name" (FBN) registration. The name register is normally maintained by the county in which the partnership carries out its activities.

As a consequence of the aforementioned, it is the general recommendation that Nordic business entities should not participate as partners in an American general partnership. If such structure is desired for business purposes, the Nordic partner should always establish an American corporation to act as the partner in the American partnership. The establishment of an American corporation as partner in the partnership will confine the liability risk to that corporation with the positive consequence that the financial exposure in the United States of the Nordic business entity will be limited to the assets of the partner-corporation.

2.4.4 Limited partnership

A limited partnership is a business entity that consists of one or more directly liable general partners and one or more limited partners. The general partners carry out the business activities of the limited partnership, and the limited partner's role is to provide capital to the partnership. The limited partners are not liable for claims against the limited partnership in excess of their capital contribution.

Due to certain tax advantages, limited partnerships are very popular in the United States. Opposed to what is the case when dealing with general partnerships, a limited partnership is always established via an Express Agreement. Such agreement should as a minimum contain the elements that are described above regarding general partnerships. Further, it is always necessary to insert provisions according to which the daily management of the partnership is carried out by the general partners. If a limited partner takes part in the management of the partnership activity, such limited partner is at risk of being directly liable for the partnership's obligations.[15] A limited partnership must always be registered with the Secretary of State in the state where business activities are carried out. Also, the limited partnership must obtain federal and state tax identification numbers and local business licenses.

The American tax regulations pertaining to limited partnerships are the same as described above in chapter 2.4.3 regarding general partnerships. This includes the possibility of having the partnership obtain tax status as a corporation. The Nordic partner in a limited partnership should be aware of the negative tax consequences as described in chapter 2.4.3 above.

In situations where the limited partnership is organized in such a fashion that there is no business risk stemming from its activities, it may be that the partnership is deemed to be taxed as a corporation. Section 761(a) of the federal tax code (the Internal Revenue Code) contains detailed rules in this regard. As described in chapter 2.4.3 above, such taxation will lead to economic double taxation of the Nordic limited partners' profit from the

[15] Most states have enacted detailed codes pertaining to limited partnerships. Most of these codes are structured according to principles described in two uniform codes. Limited Partnership Codes vary drastically from state to state. Thus, it is always necessary to tailor a Limited Partnership Agreement in close accordance with the local legislation.

partnership. Therefore, in all situations where a Nordic entity participates in an American limited partnership, special attention should be paid to the contents of Section 761(a) of the Internal Revenue Code.

2.4.5 Limited liability company

All states have enacted legislation pertaining to the so-called "limited liability company" (abbreviated LLC). The characteristics of an LLC are the following: The members of an LLC are not liable for claims against the LLC, and the LLC is not taxed as a separate entity, rather the LLC's income or loss is allocated directly to the members. The two characteristics just referred to shows that the LLC is a hybrid between a corporation and a partnership. With regard to liability, the members are in the same position as the shareholders in a corporation, and tax wise in the same position as the partners in a partnership.

All limited liability companies are established through registration with the Secretary of State. The members' rights and obligations are regulated by the so-called "Operating Agreement" which has the same function as a Shareholders' Agreement and a Partnership Agreement. An LLC must be registered with the tax authorities and with the local business authorities as it is the case with corporations and partnerships.

An LLC is a practical vehicle for smaller business entities with more participants when all members are American entities. A Nordic entity which considers being part of an LLC should be cautioned that such participation may have certain negative tax consequences. This is due to the fact that the tax treaties between the Nordic countries and the United States do not make special reference to the tax consequences of being a member of an LLC. Thus, it is advisable to obtain an opinion from the tax authorities in the relevant Nordic country prior to becoming a member of an LLC.

A foreseeable tax situation may be established by having the member of the LLC be a wholly owned American subsidiary of the Nordic business entity. In this situation, the wholly owned American subsidiary will be taxed as a general participant in the LLC, and the subsidiary's net income after tax may then be distributed to the Nordic participant as dividends. Rules on taxation of such dividends are found in the tax treaties entered into between the respective Nordic countries and the United States.

2.5 Joint ventures

Collaboration between two or more business entities is often referred to as a "joint venture". There is no specific legal definition of a joint venture. This is due to the fact that such collaboration is not characterized by legal features but by the mere fact that certain business activities are being carried out in collaboration. The joint venture term is very broad. In the United States, it is characterized by a business venture where two or more independent participants, in the anticipation to gain a profit, have allocated assets and/or activities to a common venture controlled by the participating entities. This broad definition covers almost any situation where two or more businesses work together on a common project.

According to American terminology, a joint venture can be established either as an equity joint venture or as a contract joint venture. An equity joint venture is established when the collaboration is carried out via a separate joint venture entity, such as a corporation or a limited partnership. A contract joint venture is established when the collaboration is based only on the contents of an agreement entered into between the participating entities. With reference to what is described above in chapter 2.4.3 regarding general partnerships, such contract joint ventures will often be treated as general partnerships. Thus, certain negative tax consequences will often result from the establishment of a contract joint venture.

Each of the business entities that are described in chapter 2.3 and in the foregoing text of chapter 2.4 may serve as vehicles in a joint venture collaboration. The general advice is to carry out joint venture activities either in the form of an American corporation where the participants are shareholders or – if any of the other forms are used – to establish an American subsidiary of the Nordic entity to be the direct participant in the joint venture activities. This advice covers all situations where the joint venture is established for the purpose of carrying out business activities, such as sales or production. If, on the other hand, the business activities are very limited (for example in a research project that is not expected to result in any income), the joint venture may without negative consequences be established via an agreement between the participants and without the establishment of a separate joint venture entity.

Statistically, less than half of the international joint ventures have a life span of more than 5 years. In this context, it has been shown that the most common reason for the breakdown of the international joint ventures is that the partners did not have a common goal when the joint venture was established. Thus, prior to the establishment of a joint venture of any nature, it is always very important to choose joint venture partners that all have common goals. For this purpose, it is always advisable to perform due diligence prior to the establishment of the joint venture. The performance of due diligence provides each of the participants with an inside knowledge of the other participant's background and of relevant business affairs. The due diligence process requires the establishment of initial agreements prior to the time when the Joint Venture Agreement is established.

The first step in the process is to establish a Confidentiality Agreement. The Confidentiality Agreement is very important for the purpose of ensuring that confidential information revealed to a possible joint venture partner is not misused by that partner if the joint venture is never established. The Confidentiality Agreement should closely specify which type of information should be exchanged and which information should remain confidential. Also, consequences of breach of this agreement should be described in detail. Further, the Confidentiality Agreement should contain provisions regarding the return of confidential material if no joint venture is established.

The Confidentiality Agreement should be combined with a so-called "Non-Circumvention Agreement" which binds the parties not to conduct additional negotiations pertaining to similar projects with third parties while the initial negotiations are ongoing. The Confidentiality Agreement and the Non-

Circumvention Agreement should specify the terms of these agreements in order to clarify when the prospective parties in a joint venture are relieved of their obligations.

If the parties, after the exchange of information has taken place, are still interested in moving toward a joint venture collaboration, the next step will be to prepare a Letter of Intent.[16]

A Letter of Intent is not intended to bind the parties contractually. Thus, the purpose of the Letter of Intent is solely to stipulate the expected process of the possible establishment of a joint venture. The Letter of Intent will contain a time schedule for the negotiations and also specify the place of the negotiations, as well as the participants in the negotiations. In order to avoid claims for damages in the situation where the joint venture may not be a reality, it is important to expressly stipulate in the Letter of Intent that the parties have no obligation to establish a joint venture but only to negotiate in good faith.

In the process of preparing the Letter of Intent, it becomes very important to make sure that the provisions pertaining to confidentiality and non-circumvention are formulated so that they are indeed binding. This goal can be achieved either by drafting separate documents in regard to on the one side the Letter of Intent, or on the other side the Confidentiality and Non-Circumvention Agreement. Alternatively, all provisions may be contained in one document which expressly states which part of the document shall be viewed as a binding agreement and which part shall be viewed (only) as a Letter of Intent.

2.6 Sales via the Internet

Sales of goods, software and services via the Internet have become increasingly common, and there is no doubt that the sales volumes via the Internet will continue to increase within the foreseeable future. One of the future characteristics pertaining to sales via the Internet is that there is no limitation as to the geographical scope of marketing. Thus, any Internet sales site may be accessed by potential American purchasers. This fact should give rise to specific concerns in regard to jurisdiction and choice of law when setting up the site. Generally, the site should be formulated and structured in such a fashion that the Nordic company which offers products and services via the Internet does not put itself at risk of being sued in the United States.

Court practice in the United States makes it clear that a foreign company which offers sales of goods or services to American customers may be sued in the United States if the site is set up in such a fashion that information may be exchanged between the foreign seller and the potential American purchaser. Thus, if a site is set up in such a fashion that an American purchaser can order goods via the home site in one of the Nordic countries, the Nordic entity is under American jurisdiction.

[16] A Letter of Intent is alternatively referred to as "Heads of Agreement".

Further, it is the common rule that the American court will apply American law in a dispute between an American purchaser and a foreign entity which has sold goods or services to the American purchaser.

In order to eliminate the risk of being sued in the United States, the site should be set up in such a fashion that the American purchaser expressly accepts jurisdiction in the relevant Nordic country when he orders the goods or services. Such agreement is binding if the purchaser of the goods or services is not a consumer. If, however, the purchaser is a consumer, most states' consumer protection laws make such clauses unenforceable with the result that the Nordic seller may be sued in the United States by the American purchaser. The only way for sellers of consumer goods or services to fully avoid the risk to be sued in the United States is therefore not to sell to American customers.

It is important to note that an agreement regarding choice of venue and choice of law is only binding on the purchaser of the specific product. Thus, third parties who may make a claim against the Nordic exporter based on the effectiveness of the products sold or on the services rendered will not be bound by such agreement. Therefore, such prospective claimants may bring suit against the Nordic exporter in the United States based on product liability despite any agreement stating the contrary. In accordance with the general recommendation found in chapter 8 regarding product liability, it should always be ensured that products sold to the United States are in accordance with US safety standards. Further, the product liability insurance policy should be extended to cover the United States. If one or both of the scenarios just described are not present, the Nordic exporter of goods should refrain from selling to American customers except in situations where the goods to be sold clearly do not entail a risk of being met with a product liability claim.

3. Protection of trademarks

3.1 Introductory remarks

When a foreign business entity initiates business activities in the United States, the activities will always include the use of the business entity's business name and possible trademarks.

In situations where the US business activities include the use of brand names attached to certain products, the shape of the product or the product's packaging or include the use of brand names for services offered by the business, it is important to efficiently protect such characteristics, which identify the source of the products or services (in the following referred to as "trademarks"). However, prior to taking any steps in using such trademarks, it is advisable for the foreign business entity to carry out an initial search to ensure that the use of that entity's names and marks are not in conflict with trademarks already registered. This search is a prudent step in order to avoid lawsuits from owners of marks and names that may be infringed upon by the use of the foreign entity's trademarks.

In order to efficiently prohibit other parties' use of a business' trademarks, it is strongly recommended that the foreign business entity take the necessary steps to protect its names and marks. A variety of steps can be taken in order to achieve this protection.

3.2 Federal trademark registration

In the typical situation where a Nordic business entity establishes a subsidiary within one of the American states and such subsidiary sells products or performs services within multiple states, it is strongly recommended that the foreign business entity take the necessary steps to have the trademarks it wishes to protect registered in the federal trademark register according to the requirements established by the Lanham Act. Protection of a trademark via registration with the federal trademark register offers a number of benefits. First, federal registration provides nationwide protection for trademarks that would otherwise be protected only locally via the common law rules. Second, the registration constitutes so-called "prima facie evidence" (meaning that the burden of proof is upon the third party challenging the trademark) of the owner's exclusive right to use the trademark in connection with the business activities for which the trademark has been registered. Third, if it becomes necessary to protect the owner's rights via a lawsuit, the owner of the name has the right to triple damages and attorneys' fees against a non-permitted intentional use of the trademark.

The Lanham Act opens up for the filing of an application for the registration of a trademark based upon either use in commerce regulated by Congress

(meaning international or interstate commerce), intent to use the trademark in commerce or upon registration of the trademark in a foreign country.

With respect to the filing of a trademark application based upon use in commerce, proof must be provided that the trademark is in actual use in interstate commerce or commerce between the United States and a foreign country. It should be mentioned that the contents of the trademark application is carefully examined. European business entities should be aware that such examination is much more extensive than what is the case with trademark applications within the European Union. Furthermore, filing must specific, not only within certain classes of trademarks but also within an approved range of products and services. In addition, a trademark that is generic, descriptive without secondary meaning, deceptive or contains a scandalous matter will be denied registration just to mention a few of the grounds for denial of registration of a trademark.

The filing of a trademark application based upon intent to use the trademark in commerce will be as extensively examined as described above. However, due to the possibility of filing the trademark application prior to commencement of the use in commerce regulated by Congress, the examination will take place in two phases: First, it will be determined whether the trademark is recordable under the relevant trademark class(es). If so, the application will receive priority from the filing date, contingent on later documentation of use of the trademark in commerce. When proof of use in commerce regulated by Congress is submitted, another probe establishing whether the trademark may be registered based upon such proof of use will be carried out.

Provided the application passes the first phase, a notice of allowance will be issued. Proof of use of the trademark in commerce regulated by Congress must be submitted within six months from the date of notice. This time period may be extended by additional six-month periods at a time up to a total of 36 months from the date of the notice of allowance. However, the applicant should be prepared to provide an explanation for multiple applications of extension of the deadline.

If the application is based on foreign registration by an applicant whose country is a party to an international convention relating to trademarks to which the United States is also a party, the trademark may initially be registered in the United States without filing a statement of use within the United States. If the application within the United States is filed within six months of the filing date in the foreign country, the trademark application receives priority from the date of the foreign filing of the trademark. All the Nordic countries are parties to trademark conventions, which in turn have also been ratified by the United States. Thus, the intent to use the above process is only relevant for applicants from the Nordic countries in the situation where the trademark in question has not been used in the United States, and if the trademark is not already registered in the Nordic country in question or in the EU.

When the registration is finalized, the applicant generally is given nationwide priority over others. The nationwide priority protects against infringements

caused by other confusingly similar trademarks. In determining whether likelihood of confusion exists between two trademarks, the courts use different tests comprising several factors, such as whether the products or services for which the trademarks are used are competing products, how the products or services are marketed and sold, the sophistication and care of consumers purchasing the products or services, the strength of the prior owner's trademark, whether evidence of actual confusion exists, as well as the defendant's good faith and intent.

3.3 Common law trademark protection

In the United States, a trademark is protected by virtue of the commercial use of such trademark. However, such so-called common law protection is not adequate and should not be relied upon. First, protection is only obtained in very limited geographical areas where the Trademark has been actively used for business purposes, even if the use had been commenced before a competitor's registration of his trademark. Second, it may prove difficult for the owner of the trademark to provide sufficient evidence that he indeed obtained common law protection.

3.4 State trademark registration

Most of the American states have enacted state trademark registration codes, which are structured after the US Trademark Association's "Model State Trademark Bill", which is largely structured as the federal Lanham Act (the federal trademark act). However, state registration is only useful in situations where a business entity only does business locally and is not eligible for federal registration. For this reason, local registration is rarely relevant for Nordic business entities doing business in the United States. The advantages of obtaining such state registration are that registration is issued quickly, almost automatically and inexpensively. In addition, state registration is often listed in comprehensive trademark search reports, and it can be more persuasive to other local businesses and to state courts than federal registration. However, federal registration rights generally take precedence over state registration rights.

The following example illustrates the situation where state registration may be useful: A Nordic business entity establishes a subsidiary in California. The subsidiary produces a certain product under a certain trademark. The subsidiary only sells its products in California and only to citizens of California. In the event that the Nordic business entity does not sell a similar product to other states, federal trademark registration cannot be obtained because no commerce regulated by Congress (international or interstate commerce) has taken place. Thus, in this situation the business entity should register its marks or names with the trademark register in California.

3.5 Registration of fictitious business names

Names that refer exclusively to a business name not used for any particular product or service are not granted any trademark protection but may be registered locally by way of a so-called "fictitious business name registration". However, such protection is limited to a very small geographical area, and the protection does not extend as far as the protection of secondary or subsidiary names known in Europe. Obviously, if the company name is also used as a trademark, it can be registered as such according to the procedures described below.

4. Antitrust and unfair competition

4.1 Introductory remarks

The United States federal and state legislation combined with a myriad of court decisions have creates a complex set of antitrust and unfair competition rules. A business entity who breaches the antitrust and unfair competition rules exposes itself to damages and fines. Thus, when planning marketing and sales activities en the United States it should always be examined that the planned activities are not in breach of the rules on antitrust and unfair competition. The text below is intended as a brief description of the relevant concepts of such federal and state laws which may affect a Nordic company doing business within the United States.

4.2 Federal legislation

The relevant federal antitrust laws consist of the Sherman Act, the Clayton Act and the Federal Trade Commission Act.

Section 1 of the Sherman Act, one of the most important provisions, pertains to "….contracts, combinations and conspiracies in restraint of trade or commerce". Such contracts, combinations and conspiracies are declared to be illegal under Section 1 of the Sherman Act. The provision is often analyzed in combination with Section 5 of the Federal Trade Commission Act, and if the courts do not find any violation of Section 1 of the Sherman Act, there is no violation of Section 5 of the Federal Trade Commission Act.

The enactment of the Sherman Act in 1890 marked the beginning of the development of the modern antitrust law. The purpose of the enactment was to preserve free, unfettered competition in trade, and consequently today the United States courts will not enforce contracts which unreasonably restrain trade.

The antitrust case law and analysis have been under critical scrutiny for the past 30 years. Today, the antitrust case law and analysis are greatly influenced by the so-called "Chicago School approach" developed in the Department of Economics at the University of Chicago.

This approach has provided a more relaxed view of certain antitrust violations within the United States compared to the European Union in that the approach favors limited enforcement of the antitrust rules with a focus on price-fixing and a more relaxed approach to market concentration, vertical arrangements and mergers than has previously been seen. This is true with respect to arrangements, which are considered as enhancing the allocation of efficiency, the productive efficiency with least cost and maximum profit conditions as well as technological progress in society.

The development of the United States courts' standards for evaluating the antitrust rules have shown that today the antitrust laws are aimed at market

practices that materially impede progress, breach accepted norms of commercial rivalry without promoting efficient use of resources and have impact on a significant sector of the economy. The courts have also tried to adapt their standards to the rapid changes in technology, licensing, health care markets and global competition.

Since 1911, the courts have used two complementary analyses in antitrust cases: The so-called "Per Se Rule" and the so-called "Rule of Reason".

The Per Se Rule adopts the approach that only agreements which unreasonably restrain trade automatically are deemed illegal. The approach pertains to agreements which on the face of it are unreasonable because the nature and necessary effects show such clear anticompetitive tendencies that no elaborate study of the industry is needed to establish illegality. This has the effect that certain types of agreements, which are inherently unreasonable will be deemed illegal without any special inquiry into whether such agreements could be viewed as reasonable within a certain industry.

The Rule of Reason has been developed in common law and adopts the approach that the competitive effect of an agreement which seems to restrain competition in a reasonable manner must be thoroughly assessed by looking at the specific business, the history of restraints and the reason why such restraints were imposed before such agreement is deemed illegal.

In deciding whether a Per Se Rule or a Rule of Reason approach should be taken, the court looks at the evidence presented to it. If the court decides that a Rule of Reason analysis should be applied, it fully inquires into pro- and anti-competitive aspects of a case. In a Rule of Reason analysis, the court will look at the restraints in question and consider both the competitive justifications for such restraints, the potential anti-competitive effects of such restraints on price and output, as well as whether the parties have sufficient market power to make a difference in the competitive environment.

Agreements in partial restraint of trade which are incidental or ancillary to other agreements, the purpose of which is consistent with a competitive market, have traditionally been regarded as valid in the event that such agreements contain non-competition clauses, e.g. where a seller of a business undertakes not to compete with the buyer of a business, where a retiring partner undertakes not to compete with the firm from which he retires, an agreement by which a partner pending the entry into partnership undertakes not to interfere with the business of the firm, and where a buyer of a property undertakes not to use the property in the competition with seller's business. In addition, joint venture agreements whereby the participants agree to joint warehousing are not illegal.

Among the most important horizontal agreements traditionally considered illegal are price-fixing agreements among competitors which seek to fix prices for the purpose or potential effect of increasing, suppressing, fixing or stabilizing the price of a commodity in interstate or foreign commerce among competitors.

It is usually not necessary to prove that a certain amount of market power among the competitors who have entered into a price-fixing agreement exists if the market has been effectively influenced by the price-fixing agreement, as such agreements traditionally have been considered illegal per se.

As mentioned above, a concerted action unreasonably restraining trade must be proved for types of agreements where the Per Se Rule does not apply in order for the agreement to be illegal and for the court to apply the Rule of Reason in its analysis.

Agreements regarding price-fixing which are necessary to determine prices of goods and services within joint ventures and in cooperative agreements are not necessarily unlawful. However, establishment of efficiency enhancing selling agencies in a joint venture for the purpose of forcing prices down may also be found illegal. In these situations, the courts will consider both the pro- and anti-competitive effects of such agreements, as well as whether the companies involved possess market power. If there are no pro-competitive effects of such arrangements, the courts will most likely consider the agreement illegal under a Rule of Reason approach.

Also, agreements dividing the sales territory may be illegal per se if competition is completely eliminated. The courts sometimes take the same approach with respect to boycotts among horizontal competitors whereby customers and distributors are induced to avoid a single competitor if such boycotts have an anti-competitive effect and the horizontal competitors possess market power.

Finally, horizontal conspiracies among competitors whereby goods or services necessary for competitors to compete in a market are cut off by restricting delivery will often be considered illegal by the courts if there is evidence of concerted behavior among competitors cutting such necessities off, a shift in dealing and/or the requirements for dealing among such competitors is seen and they seem to act against their own interest.

Among the most important vertical restraints, which are often considered illegal per se are price-fixing agreements whereby distributors agree to adhere to minimum prices instead of setting prices themselves for goods to be sold and to which the distributors have obtained ownership.

In addition, non-price vertical restraints may be considered illegal by the courts in the event that such restraints lead to the termination of a distributor and there is proof that a manufacturer acted together with other distributors.

Section 1 of the Sherman Act is also often analyzed in conjunction with Section 3 of the Clayton Act. This is especially relevant with respect to tying arrangements whereby a seller of a product demands that the buyer purchases an additional product. Such tying arrangements are considered as monopolistic leverage for the purpose of foreclosing competitors from the market and may be considered illegal if the seller has market power.

In connection with tying agreements, it should be mentioned that exclusive dealing arrangements will be considered unlawful by the courts in the event that such agreements significantly reduce the number of outlets available to a competitor through which such competitor is able to reach prospective customers and if such agreements as a result limit the competition substantially. The courts will focus on the structure of the market and whether the restraint on the competition is unreasonable when determining whether such arrangements are illegal under a Rule of Reason approach.

4.3 State legislation

Most states have enacted laws corresponding to the federal antitrust laws. It should be noted that if a conflict exists between federal and state laws, federal laws will precede state laws. Where the federal laws, such as the Sherman Act, the Clayton Act and the Federal Trade Commission Act, do not include certain business areas and where state laws have been enacted, such state laws will regulate the areas not included in the federal laws. This is the case with respect to certain aspects of the insurance industry. In this connection, it should be mentioned that some states have enacted laws which seem to be broader and more comprehensive than the federal laws. This is true of certain provisions of the California Business and Professions Code.

In addition, most laws related to the protection of companies against unfair competition in general have been enacted at state level. This is the case with respect to laws protecting trade secrets of companies. For states that have enacted such protection, the laws are generally modelled according to the Uniform Trade Secrets Act, a model act drafted in national cooperation between legal scholars and representatives of the individual American states. The Uniform Trade Secrets Act protects knowledge and information not known to everyone and for which reasonable precautions have been taken to protect or prevent disclosure of such information. For states which have not enacted protection of trade secrets, common law to some extent protects trade secrets of companies. Protection of trade secrets has also been provided at the federal level by the enactment of the United States Economic Espionage Act.

5. Visas to the United States

5.1 Introductory remarks

Every year thousands of Nordic citizens visit the United States. The purpose of these visits naturally varies. Some persons wish to stay in the United States as tourists, others wish to study in the United States, and others wish to stay in the United States as employees with a firm affiliated with a Nordic company, or as an employee with an American employer. The situation where a person stays in the United States as employee with an affiliated firm of a Nordic company is a situation which would be the most relevant for Nordic companies that consider conducting business activities in the United States. Thus, the following description of the visa rules will mainly concentrate on this situation.

Also, the duration of the stays in the United States may vary. One extreme is that the person stays in the United States for a very short time, e.g. in order to participate in an exhibition or in a meeting. The other extreme is that the purpose of the stay in the United States is to stay there on a permanent basis.

The American legislation with relation to visas is utterly complex. The legislation is part of the Federal Code and thus is uniform for all states within the United States. Immigration matters are therefore treated according to the same rules, regardless of in which state the applicant plans to live. Generally, the rules are very detailed and various types of visa pertaining to persons in different situations exist. Therefore, in order to obtain a visa, it is of pivotal importance that the person applying for a visa can demonstrate that his or her situation is of such nature that it matches the detailed requirements to one of the visa types offered and thus obtainable. If this is not the case, it is not possible to obtain a visa. Thus, the person who seeks to obtain a visa and the prospective employer need to structure the employment and other relevant factors in such a way that it complies with the legislation. At a glance, the complexity and the details of the American immigration rules may seem overwhelming. However, a closer look shows that the rules are very logically structured and closely matches the development in immigration law and practice that has taken place over the past decades.

Many are the myths pertaining to the difficulties in obtaining a visa to the United States, and it is a common notion that the visa rules are very restrictive. In fact, the opposite is the case. The immigration rules pertaining to business visas are structured in such a fashion so that persons who have a specialized education, and persons who have managerial experience can normally obtain a work visa to the United States. Also, the visa rules allow persons to come to the United States to study and allow entrance for persons who wish to stay in the United States without working for a United States employer. Put differently, the situation is that it is difficult to obtain a visa to the United States for persons who have little or no education. The

basic structure just described will be dealt with in greater detail in the following chapters.

On November 25, 2002, President Bush signed into law the Homeland Security Act of 2002, thereby creating the New Department of Homeland Security (DHS). DHS has five divisions: Border and Transportation Security, Information Analysis and Infrastructure Protection, Emergency Preparedness and Response, Science and Technology, and Bureau of Citizenship and Immigration Services. Since March 1st, 2003, DHS has been responsible for securing US borders and managing the immigration process.

The Bureau of Citizenship and Immigration Services (BCIS) now offers immigration services. The Immigration and Naturalization Services (INS) previously offered such services. The services offered consist primarily of adjudication functions, such as adjudicating visa petitions, naturalization petitions, and asylum and refugee applications.

The Border and Transportation Security division (BTS) has assumed the primary role in visa issuance, a function which was previously administered by the State Department. Under the new law the BTS division is responsible for issuance, administration and enforcement of regulations on the grant or denial of visas and is responsible for the functions of consular officers overseas. Consular officers still remain State Department employees but are subject to the rules established by the BTS directorate.

Most immigration enforcement functions are placed with the Bureau of Border Security (BBS) within the Border and Transportation Security Division. The BBS performs the following immigration functions: Border patrol, detention and removal, inspections, intelligence, and investigations. The BBS also administers the Student and Exchange Visitor Information System.

As a consequence of tighter security precautions, the immigration authorities have enacted the so-called "Zero-Tolerance Policy". It is not publicized what exact changes in the handling of immigration matters the policy has brought about and will bring about. However, it is obvious that the authorities now scrutinize all applications to a much higher degree than what was previously the practice. This has resulted in a significant increase in the number of cases where supplementary evidence is requested and where applications are denied. However, it is worth noting that the "Zero Tolerance Policy" not yet has resulted in a change in the immigration legislation thus limiting the possibilities of obtaining a visa. This means that no visa types have been removed from the legislation.

Generally, Nordic citizens have access to apply for a visa according to the general rules in the American immigration legislation. It is always a requirement that the applicant has obtained a valid passport and it is a requirement that the person has previously not been deported from the United States. Further, it is a requirement to obtain a visa that the applicant has not been found guilty of a serious crime.

The following chapters describe the possibilities of obtaining a visa to the United States. The review below focuses on the most common visa types, specifically the visa types that are of most relevance when planning to station Nordic employees for the purpose of working in the United States.

5.2 Temporary visa types

5.2.1 B-1 visa (Business Visa)

Persons who wish to stay in the United States on a temporary basis for the purpose of working for a business domiciled in one of the Nordic countries may obtain a so-called B-1 visa. Such visa may be obtained following a rather simple application procedure at the American embassy in the applicant's home country. A B-1 visa is normally issued for a time period of six months, and the visa may be extended for another six months, if the need for extension can be documented.

It is a condition to stay in the United States on a B-1 visa that wages paid to the visa holder do not come from an American employer. Further, it is a condition that the applicant maintains his or her home outside the United States. Thus, the B-1 visa is relevant for employees of Nordic companies who have the need to stay in the United States for shorter periods of time, e.g. in connection with negotiations, participation in meetings, preparation for future business activities etc. It is important to note that the employee's activities in the United States may not be of the nature of employment with an American employer. Thus, it must be a foreign employer that obtains the financial benefit of the employee's work. Provided the situation is that an employee of a Nordic business is temporarily stationed in the United States to support the subsidiary of the Nordic business in the United States, a presumption is easily established that the activities in the United States in reality are for the benefit of the subsidiary. If this is the case, it will be necessary to apply for a visa to the employee under which the employee is allowed to work for the subsidiary. Such visa may for example be an E, L visa or a B visa, see chapters 5.2.4, 5.2.5 and 5.2.6 below.

The not very well-defined distinction between allowed and not allowed business activities in the United States when staying there on a B-1 visa often gives rise to questions from the immigration officer when entering the United States. Therefore, it is always of great importance that the person who plans to enter the United States on a B-1 visa is able to make it clear to the officer that entrance to the United States is as an employee of a foreign business for the purpose of assisting the business in the United States. Naturally, such explanation should only be given if it is in strict accordance with the truth.

Particularly in connection with Nordic businesses' establishment of business activities in the United States, there is often a need for stationing Nordic employees in the United States in the start-up phase. During that phase it may be difficult to determine whether the benefit of the employees' activities

in the United States go to the Nordic company or to the branch or subsidiary of the company. Due to the fact that it is not legal to carry out activities for an American employer on a B-1 visa, it is in such situations the recommendation that the employee obtains a visa allowing him or her to work in the United States for an American employer. In this connection, it is important to be aware that issuance of a B-1 visa to an employee following an application for a visa to work for the American subsidiary (typically an H or L visa) normally gives rise to critical questions and examinations from the immigration authorities and subsequently from the immigration officer when entrance to the United States is attempted. In particular, the authorities are very much aware that a B-1 visa may not be used as a pre-stage to an L or a B visa, e.g. due to the fact that the employer did not start the visa application in due time. Therefore, planning well ahead in this situation - as always when dealing with visa matters - is recommended.

5.2.2 Tourist Visa

Nordic citizens who wish to stay in the United States as a tourist may via a simple application procedure at the American embassy in this person's home country obtain a B-2 Tourist Visa. Such visa is normally issued with a validity period of 180 days. Persons who enter the United States on a B-2 visa may apply for an extension of the stay without leaving the United States. Also, such person may while she or he stays in the United States apply for change to another visa type. These features are not offered when entering the United States under the Visa Waiver Program, see chapter 5.2.3 below. It should be emphasized that entry on a B-2 visa requires that the person entering does not perform any activities as an employee in the United States neither paid nor unpaid. Also, entry on a B-2 visa does not give access to study in the United States.

5.2.3 The Visa Waiver Program

The Visa Waiver Program allows a Nordic citizen (and citizens of a number of other countries) to stay in the United States for up to 90 days without the issuance of a visa. The right to stay in the United States under the Visa Waiver Program is obtained by filling in a form prior to entry into the United States. This form (green in color) is distributed to the passengers on board the flight to the United States.

The person who stays in the United States under the Visa Waiver Program may not work for an American employer. Therefore, the Visa Waiver Program is useful for persons who wish to stay in the United States as a tourist for no more than 90 days and for persons who plan to go the United States to carry out business activities for a non-American employer as described above in regard to the B-1 visa. The downside of using the Visa Waiver Program instead of obtaining a B-1 visa is that the Visa Waiver Program does not offer any possibilities to prolong the stay in the United States or does not allow for any possibility of changing visa status during the stay in the United States.

The person who enters the United States under the Visa Waiver Program must hold a valid return ticket. The person should expect that critical questions in regard to the purpose of the stay may be asked. If subsequent entries take place under the Visa Waiver Program, this will always give rise to critical questions from the officer when attempting to enter the United States and entrance may be denied. Thus, the advice is that persons who have the need to often enter the United States for the purpose of staying for shorter periods of time should obtain a visa that matches this person's special needs. As a consequence of the "Zero Tolerance Policy" referred to in chapter 5.1 above, it is now much more common than before that the person who attempts to enter the United States has to go through a detailed interview before he or she is allowed entry. It is the experience that persons who have previously stayed in the United States without a proper visa will be denied entry. This even applies to the situation where the illegal stay in the United States took place many years ago and where the period of overstaying was very brief. Therefore, persons who have previously stayed in the United States without a valid visa should always obtain a visa before attempting to enter the United States and not attempt to enter under the Visa Waiver Program.

Also, and with a view to the extended processing time, it is often advisable to take advantage of the premium processing service feature. The premium processing service may be used in connection with applications for H-1B and L visas by paying an extra fee of $1,000 to the immigration authorities. Hereby, the processing time is reduced to a maximum of two weeks.

5.2.4 L-1 Visa (Intracompany Transfer Visa)

The L-1 visa is often the natural choice in the situation where an employee who is employed with a Nordic employer will be stationed in the United States for a limited period of time in the Nordic employer's group-related company (typically a subsidiary). It is a prerequisite for obtaining an L-1 visa that for the past 3 years prior to the application the employee in question has been employed for at least 1 year outside of the United States in the American employer's foreign group-related companies (typically the Nordic parent company of the American prospective employer). Thus, an L-1 visa cannot be obtained unless the employer has had a previous employment with the prospective American employer's group-related companies as just described. If the requirement is not met, the applicant will have to look for alternative visas, such as for example an H or an E visa, see chapters 5.2.5 and 5.2.6.

There are two L-1 visa categories, namely the L-1A visa and the L-1B visa. The L-1A visa may be issued to employees who have previous management experience and who are to be employed in a managerial position with the American employer. An L-1B visa may be issued to employees who are offered a position that requires specialized knowledge and/or experience. The visa authorities have recently – in mid 2008 – raised its requirements to the degree of specialization required to obtain an L-1B visa. Thus, the beneficiary's special skills and the nature of her/his specialized knowledge

should always be closely considered before an L-1B visa application is launched.

The L-1 visa is normally issued for 3 years and the maximum aggregate visa period is 7 years for L-1A visas and 5 years for L-1B visas. Provided that the American employer (typically a subsidiary of the Nordic parent company) has not been in existence for 1 year when the application is launched, the L-1 visa will be issued for an initial term of 1 year.

Prior to the expiration of the initial visa term (and any subsequent term) an application for an extension of the visa must be submitted. An extension will only be granted if all the legal requirements for obtaining the visa extension are still met. As a consequence of the "Zero Tolerance policy" referred to in chapter 5.1 above, the authorities now scrutinize the extension applications and it is not uncommon that the application for extension is not granted.

A person who has obtained an L-1A visa (an employee in a managerial position) is granted a special easy access to apply for and to obtain permanent residentship in the United States. This is due to the fact that a person who has obtained an L-1A visa avoids the complicated and time-consuming labor certification process as referred to in chapter 5.3 below. Therefore, if the employee fulfils the conditions for obtaining an L-1A visa and an L-1B visa, the L-1A visa should always be applied for.

The processing time for L visas vary from service center to service center and a processing time of 3-5 months should be expected. By paying an extra fee of $1,000 to the immigration authorities, the applications may be processed under the so-called "Premium Processing Program" under which the processing time is guaranteed to be no more than 15 calendar days.

Spouses and children of L-1 visa holders are granted L-2 visas. It is not legal to work in the United States under such visas. However, the spouse is entitled to apply for employment authorization which would allow the spouse to work in the United States. The processing time for obtaining employment authorization is approximately 90 days. After having obtained a permit to work in the United States by virtue of an employment authorization, the spouse may work for any American employer.

The Bureau of Citizenship and Immigration Services (BCIS) handles matters pertaining to L-1 visas. After the BCIS has approved the application, the approval notice is sent to the American embassy in the country of which the employee is a citizen. Before issuing the visa by affixing the physical visa to the applicant's passport, the applicant must always come to an interview at the embassy. This counts for all visa types, not only L-1 visas. The procedures for this vary from embassy to embassy and the specific procedures that apply can be found on the respective embassies' home pages, however it should as a general rule be expected that the processing time from issuance of approval notice by the BCIS and until the physical visa is received will be about 2 weeks.

5.2.5 H1-B Visa (Specialized Knowledge Visa)

The H1-B visa category will often be the natural choice for persons who will be employed by an American employer that is not partly or wholly owned by the employee's current employer outside the United States. The basic condition for obtaining an H1-B visa is that the employee has an education which in quality and duration as a minimum is equivalent to an American Bachelor's Degree. Many years' of employment within a special field without having obtained a Bachelor's Degree will also in certain situations be sufficient to qualify for obtaining an H1-B visa. A further requirement for qualification is that the employee will utilize his or her special skills when employed by the American employer and that these skills normally are required for the job in question.

An illustrative example is that a person who has undergone a long and advanced engineering education does not qualify for an H1-B visa if it is the intent that the person in his or her employment with the American employee shall carry out the management tasks without utilizing his or her engineering degree.

Further, with regard to the educational requirements it is worth noticing that many educations obtained in the Nordic countries do not readily translate into the requirements for a Bachelor's Degree. In case of doubt, it is possible to have an American evaluation institution evaluate the education and determine whether the requirements for a Bachelor's Degree is met. It is always advisable to take this step prior to filing the application if there is any doubt in regard to the quality of the prospective employee's educational level.

The American employer (called the “sponsor”) must be registered as an American employer. Certain conditions with regard to the wages must be complied with. Specifically, it must be documented to the BCIS that the wages are at least equivalent to what is common for jobs of a similar nature. This condition is controlled by the U.S. Department of Labor which issues a so-called “Certified Labor Condition Application” provided that the wages are approved. Subsequent to this approval, the visa application is handled by the BCIS. When the matter has been approved by the BCIS, the matter is sent to the American embassy in the country of which the employee is a citizen. The embassy in question issues the visa by following the same procedure as is described above for L-1 visas.

An H-1B visa is normally issued for a period of 3 years and with a possibility of an extension for another 3 years. As it is the case for the L-1 visas, it is not a matter of routine to obtain an extension. The authorities will thoroughly examine the matter again in relation to the extension application.

There is a quota limitation as to how many H1-B visas can be issued per annum. Applications for a visa year (October 01 though September 30) can be filed from April 01 of the upcoming visa year. The current quota is 65,000 visas per annum for applicants with a foreign Bachelor degree. Presently (October 2008) this quota is far from sufficient to cover the number of qualified applicants. Indeed, when the application period for the 2008/2009 visa year started on April 01, 2008 more than 120,000 applications were

received during the first 2 days after the application period started. Thus, extra careful and timely planning when considering an H1-B visa is recommended

There is an additional quota for applicants holding an American Masters Degree. That quota is 20.000 visas per year. Historically that quota has not been filled, but the increased number of H1-B applications may very well lead to the result that this quota will also be insufficient.

The processing time with the service centers for H1-B visas is rather extensive, often more than 6 months. By paying an extra fee of $1,000 to the immigration authorities, the application may be processed under the so-called “Premium Processing Program” under which the processing time is guaranteed to be no more than 15 calendar days.

Spouses and children of persons who obtain an H1-B visa are granted H-4 visas. A spouse who holds an H-4 visa is not allowed to work in the United States. Thus, he or she must go through a separate visa application procedure provided that he or she wishes to obtain employment in the United States.

5.2.6 O-1 Visa (Extraordinary Ability Visa)

Persons hwo can demonstate extraordinaty abilities within their field may qualify for an O-1 visa. The requirements vestly exceeds what is required to obtain an H1-B visa. Applicants must demonstrate that they fulfill at least 3 of 8 requirements listed in the code. These 8 requirements cover - among other things - the following: That the applicant has produced and published scholarly articles of major significance; that the applicant has commanded a high salary; that articles about the applicant has been published in major media or professional publications; that the applicant has received nationally or internationally recogniced prizes or awards within his field; and that the applicant has acted as a judge of the work of others within the applicant's field of specialization.

The quota limitation on the H-1B visa category has increased the use of the O-visa, and it seems that the requirements to obtain an O-1 visa have remained unchanged. Thus, an O-1 visa may be an alternative to and H-1B visa in situation where the beneficiary can demonstrate extraordinary abilities.

5.2.7 E-1 Visa (Treaty Trader Visa)

The United States has entered into treaties with Denmark, Finland, Norway and Sweden pertaining to the “Treaty Trader Visa”. According to these treaties, companies which are owned by citizens of Denmark, Finland, Norway and Sweden respectively and which have established a substantial trade activity between the United States and the Nordic country in question

can often obtain an E-1 visa for an employee to be employed in the United States.

In addition to the ownership requirement referred to above, it is a condition to obtain an E-1 visa that either the Nordic company or the American employer company which is owned by the Nordic company can demonstrate that its international trade or service activity between the United States and the Nordic country in question is more than 50% of the company's total international trade or service activity. Thus, a treaty trader status in regard to international trade will typically be found in situations where a Nordic business has established a distribution company in the United States with the purpose of having this company sell and distribute goods produced in the Nordic country in question.

The following example illustrates this situation:
A Swedish business domiciled in Sweden produces goods that are being exported to many countries around the world. The sale and the distribution in the United States take place through the American subsidiary of the Swedish business. The subsidiary's most important activity is consequently the purchase of goods from Sweden and the resale of these goods in the United States. The subsidiary's international sales activity is thus concentrated to be between Sweden and the United States. Therefore, the subsidiary - but not the Swedish parent company - qualifies as a treaty trader company.

A further requirement for obtaining an E-1 visa for an employee is that the employee is a citizen of the same country as the owners of the American employer company. Thus, if a Swedish owned company qualifies as a treaty trader company, this company can only sponsor E-1 visas for Swedish citizens who seek to work in the United States.

Another example illustrating how a treaty trader status can be established is the following: A Finnish owned company domiciled in Finland produces goods. Some of the goods produced are exported to many countries around the world and more than 50% of the goods produced are exported to the United States. The Finnish company has established a subsidiary in the United States. The purpose of this subsidiary is to act as importer of the Finnish goods and to resell the goods. In addition to the goods imported from Finland, the American subsidiary imports goods from many other countries and the Finnish import amounts to only 20% of the total trade of the American subsidiary. In the situation just described, the Finnish parent company qualifies as a treaty trader where the American subsidiary does not. Since it is a requirement that only one of the companies qualifies as a treaty trader company, it will be possible for the group to have Finnish citizens employed with the American subsidiary provided all other requirements to obtain an E-1 visa are met.

Further the job duties must fulfil special requirements in order to form the basis for obtaining an E/1 visa. The employee to be stationed in the United States must be employed in either in a managerial position or in a position that requires special knowledge, specifically tailored to the job offered. This requirement is somewhat similar to the specialist requirements pertaining

to L1-B visas and H1-B visas. However, it is the author's experience that the specialist requirements pertaining to E-1 visas are somewhat more rigorous than those applied to the two other visa categories just mentioned.

It is worth noticing that there are no specific educational requirements pertaining to E-1 visas. Further, it is not a requirement that the prospective employee to be hired by the American employer has previously been employed with a group-related company in one of the Nordic countries. If either the Nordic company or the American company in question therefore qualifies as a treaty trader, it will often be possible to employ foreigners to work in the American company even though these employees would qualify for neither an L-1 visa nor an H1-B visa.

The American embassy in the Nordic country where the Nordic company in question is domiciled handles the applications for E-1 visas. The consequence hereof is that the applications are normally handled within a shorter time period than what is the case for H1-B and L-1 visas (provided that these applications are not handled under the Premium Processing Program).

An E-1 visa is normally issued for an initial time period of 5 years and there is a possibility of extension without any time limitation. Extension is only granted provided that all requirements to obtain an E-1 visa are still met at the time when the application for extension is submitted.

Spouses and children of E-1 visa holders are granted E-1 visas. It is not legal to work in the United States under such visas. However, the spouse is entitled to apply for employment authorization which would allow the spouse to work in the United States. The processing time for such employment authorization is approximately 90 days. After having obtained a permit to work in the United States by virtue of an employment authorization, the spouse may work for any American employer.

5.2.8 E-2 Visa (Treaty Investor Visa)

The United States has entered into treaties with Denmark, Finland, Norway and Sweden pertaining to the so-called "Treaty Investor Visa". However, the Treaty with Denmark has yet (October 2008) to take effect. The expectation is that Danish nationals will be eligible for E-2 visas from the beginning of 2009, but the authorities cannot guarantee the date with certainty. Danish nationals who seek to obtain a visa to the United States and who believe they might qualify for an E-2 visa should contact the US Embassy in Copenhagen to inquire of the status of the ratification process.

The treaties form the basis for issuing a treaty investor visa to citizens of the respective three countries provided that such citizens establish a business in the United States and make a business investment for an amount that is normally called for to make such an establishment. There is no minimum investment amount stipulated in the treaties. However, the amount invested and the business established must be of such nature that it would under normal circumstances form a basis for providing the investor with an adequate income.

The treaty investor visa is especially useful for persons of the entrepreneurial type and who are not in a position to meet the requirements for L-1 visas, H1-B visas, O-1 visas or E-1 visas.

The American embassy in the respective Nordic country handles the applications for E-2 visas and the visas are normally granted according to the same rules that apply for the E-1 visas.

Also, spouses and children of the applicant are granted a permit to stay in the United States and are granted the opportunity to obtain employment authorization as it is the case with the E-1 visas.

5.2.9 H-3 Visa (Trainee Visa)

Issuance of an H-3 visa is relevant in situations where an American employer is willing to employ a foreign employee with the aim of training the person. This may for example be the situation where a Nordic employee is offered a temporary position with a Nordic company's American subsidiary. Typically, an H-3 visa is issued to younger employees who as part of their education wish to stay in the United States for a short period of time for the purpose of obtaining further education within their field.

Issuance of an H-3 visa requires that the employer prepare a training program containing both practical and theoretical training. The training program must be very detailed. It is a further requirement to obtain an H-3 visa that the employer can demonstrate that he or she will not benefit

financially from the trainee's activities. In other words: It must be demonstrated that the position is indeed a training position. Further, it must be demonstrated that the training is a natural continuation of the employee's former education and/or practical training.

An H-3 visa is issued for a time period of no more than 2 years. It is not possible to change the visa status from an H-3 visa to another visa category unless the employee has lived outside the United States for a time period of at least 6 months following the stay in the United States under the H-3 visa. Thus, an H-3 visa cannot be used as a pre-stage to a more permanent visa to the United States.

As with the H1-B visas and L-1 visas, the Bureau of Citizenship and Immigration Services (BCIS) handles matters pertaining to H-3 visas. Also, after the BCIS has approved the application the approval notice is sent to the embassy in the country of which the employee is a citizen. The embassy will then affix the physical visa to the applicant's passport. The procedures for this vary from embassy to embassy and the specific procedures that apply can be found on the respective embassies' home pages.

There are no quota limitations on the H-3 visa. Therefore, he quota limitation on the H-1B visa category often makes it relevant to consider if the beneficiary qualifies for an H-3 visa.

5.2.10J Visa (Exchange Visitor Visa)

A number of organizations have obtained authorization to administer exchange visitor programs under which foreigners (including citizens of the Nordic countries) may temporarily work in the United States with the aim of developing international and cultural understanding. The United States Information Agency (USIA) authorizes such organizations. J visas are mainly of interest for younger persons who have a desire to stay in the United States for a shorter period of time in order to supplement their previous education. Thus, the J visa is often an alternative to the H-3 visa described in chapter 5.2.8 above.

Often the J visa is preferable over the H-3 visa. Firstly, it is not uncommon that the case-handling time is shorter vis-a-vis the organization than vis-a-vis the BCIS. Secondly, both the employer and the employee are exempt from payment of social security taxes in relation to the wages paid to the employee. The aggregate social security taxes amount to approximately 16% of the gross wages so the tax savings are substantial. Thirdly, the employee who obtains a J visa is eligible to obtain health insurance on very favorable terms.

There are no quota limitations on the J visa. Therefore, he quota limitation on the H-1B visa category often makes it relevant to consider if the beneficiary qualifies for a J visa.

5.2.11F visa (Student Visa)

A person who wishes to study in the United States has a higher probability of obtaining an F visa. The basic condition to obtain such a visa is that the applicant must be admitted to an American educational program as a full-time student. Further, the applicant must demonstrate that he or she masters English at a level sufficient to comprehend what is being taught. Further, the applicant must demonstrate that he or she has sufficient financial support to finance the studies and the living expenses in the United States.

A student visa is issued for the time period expected to complete the studies and the visa remains in force as long as the student continues the studies on a full-time basis. Following a rather simple application procedure the educational institution issues a so-called visa petition provided that the institution finds that the student qualifies for a visa. After issuance of the petition, the fiscal visa is then issued by the American embassy in the country of which the student is a citizen.

A person who has obtained a student visa may with a few exceptions not work in the United States as long as the studies are in progress. However, the student may to a limited extent work on campus. Following completion of the studies the F visa holder may work in the United States for any employer for a time period of up until 12 months.

Children of F visa holders are automatically granted the right to complete the basic education in the United States (up until and including the high school level) without needing the issuance of an F visa. If the children wish to attend college or to pursue higher education studies, it is necessary to obtain an F visa issued which will normally not give rise to any problems.

5.2.12Other visa categories

The visa categories described above are the most commonly used in connection with business immigration to the United States. However, a large number of other visas pertaining to special education are available, e.g. special visas for nurses, journalists, priests and for other specialist business groups. Also, a special visa has been introduced for persons within the artistic fields, such as authors, painters and sculptors. Practice in regard to this visa category (the so-called O visa) has developed so that persons who can demonstrate that they have been recognized as being particularly creative have the possibility of obtaining an O visa even though their business field is not within the classical art disciplines. For example skilled developers of software programs may obtain an O visa if they can demonstrate extraordinary abilities which have been internationally recognized.

5.2.13Conclusion

One main conclusion of the aforementioned is that the permission to work in the United States under one of the visa categories as described above always requires that the applicant has obtained a job offer from an American employer prior to the time where the application is submitted to the appropriate authority. Also, the general rule is that the visa application must be submitted by the prospective employer in the employer's capacity as sponsor for this company's prospective foreign employee.

Further, a general conclusion is that spouses who accompany the visa holder to the United States are not automatically granted the right to work there. If the primary visa holder has obtained an E visa or an L visa, the spouse may work in the United States following a simple application for employment authorization. In order for spouses of visa holders under other visa categories to work legally in the United States, it is necessary that he or she obtains a separate work visa of a relevant category.

Further, it is the case that none of the visa forms described above makes it possible for the foreigner to establish his or her own business in the United States or to work for another employer than the employer who acted as sponsor (the only exception is the E-2 Treaty Investor Visa). In consequence, the conclusion just referred to requires that a visa holder who desires to change jobs in the United States must have his or her new prospective employer file a new visa application pertaining to the new job. Clearly, in order to obtain a visa the new employer acting as sponsor must observe that all relevant requirements for the visa type in question are met.

The restrictions just referred to often makes it desirable for a visa holder to apply for permanent residentship (Green Card) in the United States. This is due to the fact that a person, who has obtained permanent residentship may work for any employer in the United States and also establish his or her own business. Further, the spouse of a person who has been granted permanent residentship obtains such residentship at the same time meaning that the spouse is also given the opportunity to work for any employer in the United States or to work as self-employed. Regulations on how to apply for permanent residentship are described in chapter 5.3 below.

5.3 Permanent Residentship ("Greencard") to the United States

5.3.1 Introductory remarks

All the visas in the foregoing chapter are so-called Non-immigrant Visas. Non-immigrant Visas all have one common feature, namely that the visa holder is viewed as residing temporarily in the United States. A person, who has the desire to reside permanently in the United States, and thus view the United States as his primary place of domicile, may apply for a Permanent Residentship. A person, who obtains Permanent Residentship to the United States, is issued a so-called Green Card as identification of his or her status.

A person, who has obtained a Green Card is no longer bound to work for one specific employer in the United States. Thus, that person may seek employment without limitation, and the person may start his or her own business. Further, when a person obtains a Green Card, Green Cards are simultaneously issued to his or her spouse and his or her children under the age of 21.

Permanent Residentship can be obtained via four different routes, namely

- on the basis of employment with an American employer and the applicant's qualifications
- on the basis of family
- on the basis of substantial investment in the United States
- on the basis of "winning" in the Diversity Immigration Program (often referred to as the Green Card Lottery)

The first route mentioned is far the most common for persons, who have been stationed in the United States. Thus, the following text of this chapter will largely focus on obtaining Permanent Residentship on the basis of employment in the United States

5.3.2 Permanent Residentship Based on Employment in the United States

The current regulations in regard to Permanent Residentship are found in a complex set of rules, which is part of the Immigration and Nationality Act of 1990. The rules distinguish between three preference groups.

The first preference group consists of persons that can demonstrate extraordinary abilities such as for example persons who are internationally renowned within their field. This may be professors and researchers or persons, who have been involved with management at a very high level.

Second preference group consists of persons, who have an educational background that is at least equivalent to an American bachelor degree.

Third preference group consists of persons, who have some education (less than a bachelor degree). This group also consists of skilled and unskilled workers.

As it will be described in the following the possibility of obtaining Permanent Residentship is very much dependent upon in which preference group the applicant is placed.

In most situations the application procedure falls in two basis steps. The first authority to be involved in the procedure is the Department of Labor. That authority handles the so- called Labor Certification Process. A Labor Certificate is a document issued by the Department of Labor and stating that the applicant's job has been publicly announced and that is has shown that there are no qualified American applicants to the job. Obtaining a Labor Certificate is very time consuming, complex and costly. The process does

normally take around 2 years, somewhat dependant on the local authorities. During the time period, where the application for a Labor Certificate is pending, the applicant must remain employed with his current employer. If the applicant (via a new visa application) obtains an alternative job in the United States, the application for a Labor Certification cannot be carried through. Thus, in this situation the applicant may start an entirely new Labor Certification procedure based on his employment with the "new" employer.

Once the Labor Certificate is issued the application for Permanent Residentship is then filed with the Immigration Authorities. The processing time with the Immigration Authorities varies from service center to service center, but an average processing time of 2 years should be expected.

Persons within preference group 1 do not need to apply for a Labor Certificate. Thus, for these persons the processing time is drastically simplified since the only authority involved in the process is the Immigration Authorities. Thus, the processing time is reduced from around 4 years to around 2 years. Also, persons who hold a L1-A visa may apply for Permanent Residentship without first having obtained a Labor Certificate. Thus, when stationing a person in the United States under the L1 visa group it should always be considered to apply for a L1-A visa, if the employee's position is managerial in nature.

There is a yearly quota for the number of Permanent Residentships to be issued. Historically, the quota has not given rise to delays for applicants within preference group 1 and 2. Within preference group 3 delays have occurred for unskilled laborers. The delay varies from year to year, but has generally caused a processing time of 6 to 7 years.

The conclusion of all the foregoing is that applicants, who are stationed in the United States under the visa categories E-1, L-1B and H-1B shall expect a total processing time with the authorities of around 4 years. The processing time for persons, who can demonstrate extraordinary abilities (preference group 1) and many persons who have been stationed under the L1-A visa category, may obtain Permanent Resident status after a processing time of approximately 2 years. The reduction in processing time is due to the fact that such persons need not go through the Labor Certification process. It is worth to note that an applicant's background is scrutinized by the authorities during the process. Therefore, before initiating an application for Permanent Residentship it is always advisable that the applicant does in advance take professional advice to determine to which extend there may be incidents in the applicant's background that will hinder a successful application. Such incidents may be criminal charges filed against the applicant or situations where the applicant has stayed illegally in the United States. It falls beyond the scope of this publication to give a detailed description of instances that may hinder a successful application.

5.3.3 Permanent Residentship Based on Investment in the United States

A person, who invests at least 1 million dollars in the United States and thereby creates at least 10 full-time employment positions for American

employees may obtain a so-called Investor Visa. Such Investor Visa gives the applicant the right to Permanent Residentship in the United States. The investment in question must be a genuine active business investment, and the applicant must actively take part in the investment project. The Investor Visa is initially issued for a time period of 2 years. If the business in which the investment were made is still intact after 2 years, the Investor Visa is granted without time limitation. Investor Visas are rarely applied for. Thus, the yearly quota of 3,000 visas has never been filled.

5.3.4 The Green Card Lottery

A person who has the desire to obtain a Permanent Residentship to the United States should participate in the so-called Green Card Lottery. Applications may be filed each year prior to a specific date in the month of October, and the winners are notified the following spring, either in the month of April or May. It is a prerequisite to participate in the lottery that the participant has an education at least at the same level as an American high school degree or equivalent practical training. Each person may file only one application, but both spouses may file a separate application. A person, who wins in the lottery, obtains Permanent Residentship not only for himself or herself but also for his or her spouse and possible unmarried children under the age of 21.

The procedure for participating in the Green Card lottery is very detailed, and the procedure varies from year to year. Information in regard to the procedure may be found on the US Embassies' homepages.

5.3.5 Maintaining Permanent Residentship Status

A person, who has been granted Permanent Resident Status to the United States may loose that status for 2 reasons.

First, the status is lost if the Green Card holder is found guilty of a serious crime, typically crimes involving elements of moral turpitude. In such situations the Immigration Authorities are notified by the police. Provided that the Immigration Authorities find that the criminal act should lead to deportation, a court procedure is enacted with the aim of giving the person in question the possibility to defend himself against the deportation.

Second, a condition for Permanent Residentship to the United States is always that the applicant has a desire to reside permanently in the United States. Thus, if the Green Card holder leaves the United States with the purpose of residing permanently outside the United States, there is a risk that the Permanent Resident Status will be lost. Stays outside the United States of less than 1 year's duration do not give rise to loss of Permanent Residentship. However, in a situation where a person has to stay outside the United States for more than one year and still desires to maintain his or her Permanent Residentship, an application for a so-called Re-entry Permit should be applied for. In order to obtain a Re-entry Permit the applicant must

demonstrate that he or she does not have the intent to permanently leave the United States. Thus, the applicant should demonstrate that strong ties are kept to the United States. Such ties are – among other things – ownership of real property, maintaining bank accounts in the United States, and filing taxes with the United States authorities.

5.4 American citizenship

Persons who have obtained permanent residentship in the United States and who have stayed in the United States for no less than 5 years as permanent residents may apply for American citizenship. Obtaining citizenship results in a series of privileges, such as, but not limited to, the following:

A citizen obtains the right to vote in the United States. This is the privilege not normally granted to persons who stay in the United States as permanent residents. Further, a citizen also avoids the risk of being deported from the United States should that person be found guilty of a serious criminal offence.

A person who obtains American citizenship through an application may lose his or her citizenship to the country of which the person was originally a citizen. Thus, it is often a difficult decision for Nordic citizens to decide whether they want to obtain American citizenship or not. The state legislation in regard to dual citizenship vary among the Nordic countries. Thus, each individual matter should be individually examined.

Finally, it is noteworthy that obtaining American citizenship has widespread tax consequences. A person who is an American citizen is tax liable to the American Federal Tax Authorities regardless of where he or she lives. Thus, if an American citizen leaves the United States to live in another country this person remains tax liable to the United States in regard to federal income taxes and other applicable federal taxes. However, the American citizen who does not live in the United States is granted a tax deduction so that no tax shall be paid on incomes not exceeding approximately $70,000 per annum. For the tax reasons just mentioned and for other reasons not dealt with in this publication, it is advisable that persons who consider obtaining American citizenship always obtain professional assistance before a decision on citizenship is taken.

6. Topics to consider when stationing an employee in the United States

6.1 Employment agreements

6.1.1 Introductory remarks

Stationing an employee in the United States give rise to a number of considerations regarding the contents of the Employment Agreement and possible issues that may arise if it proves necessary to terminate the employee from his or her position. Also, the employment conditions should be tailored so that they meet the specific requirements within the visa category under which the employee is expected to be stationed in the United States.

In general, legislation on employee protection is far less developed in the United States than in the Nordic countries. For example, there is no general legislation on the right to vacation, the right to certain termination periods, the right to sick leave with pay etc. The American system is often viewed as a system that gives the employer the right to hire and lay of "at will", meaning that the employee is left with no protection. This notion is far from the truth. Indeed, detailed federal and state legislation has been enacted to protect the employee. Generally spoken though, this protective legislation pertains only to situations where an employee is being laid off or otherwise deprived of his rights for discriminatory reasons, such as race, religion or gender. These anti-discriminatory provisions become of utmost importance in situations where becomes necessary to lay off or demote an employee in the United States.

Also, when employing persons in the United States it is always important for the employer to protect itself against claims from the employees based on acts or omissions that take place at the workplace. The general mechanism to protect the employer is to establish elaborate manuals describing in detail acceptable and unacceptable conduct at the workplace as well as prescribing procedures for handling claims from employees.

6.1.2 The content of employment agreements

Due to the fact that the American legislation to a large degree lacks regulation of areas that are highly regulated in the Nordic countries, an Employment Agreement with an American employer is usually much more detailed than is the case in the Nordic countries. It is for example necessary to include detailed descriptions of minimum termination periods, the right to vacation and the right to paid sick leave. Also, the fact that the person to be employed comes from a foreign country gives rise to specific considerations, such as payment of transportation to and from the United States, payment of housing, payment of insurances etc. The most common issues to be included in the Employment Agreement are as follows:

- **Employment contingent on issuance of visa.** The employment shall be contingent upon obtaining a work visa to the United States. Such provision is normally combined with a provision that releases the parties from their obligations under the Employment Agreement if the visa is not obtained within a specified period of time.
- **Possible right to re-employment.** In situations where the employee is already employed with the American employer's affiliated Nordic company, it should be considered whether the employee has the right to reemployment in the relevant Nordic company once the employment in the United States comes to an end. Thus, in such situations the Employment Agreement is drafted as a three-party contract in that it contains rights and obligations of the current Nordic employer, of the future American employer and of the employee.
- **Termination.** In the United States, there is no general legislation which covers termination. Thus, the parties are free to agree on termination periods.
- **Employee's title and work duties.** Seen from the employer's point of view it is recommended that the definition of work duties be as flexible as possible. This is particularly advisable where the operation in the United States is either newly established or a small operation. Also, it is important to specify the work duties as the employee may have other expectations to the job than the employer.
- **Employee's salary.** In this context, it should be considered whether the salary is to be fixed in dollars or whether it is to be subject to the exchange rate between the relevant Nordic currency and the US dollar. For visa purposes, it is necessary that the salary is paid by the American employer. Thus, even in situations where the salary is funded by the Nordic business entity, it is necessary to establish a system where funds are transferred from such Nordic entity to the American employer company.
- **Incentives**, such as employee profit sharing programs, the right to stock options or warrants.
- **Work hours.** Specification of the employee's work hours and possible right to overtime pay. There is no general legislation in this regard so the parties have wide latitude to set the conditions.
- **Right to vacation.** There is no general American legislation that covers the right to vacation. The norm is that vacation time is much shorter than what is statutory in the Nordic countries. Also, there is no legislation that obligates the employer to pay salary during the employee's vacation time.
- **Right to paid sick leave.** No statutory legislation regulates the right to paid sick leave. Depending on the employee's position and seniority, it is the norm is that an employee is granted paid sick leave during a specified number of days ranging from 5 to 20 days per annum.
- **Maternity leave.** When employing female employees, the agreement should contain provisions pertaining to maternity leave, including the duration of such leave and possible payment of salary during the leave. The norm is that maternity leave is granted for much shorter periods of time than is the case in the Nordic countries.
- **Right to paid holidays.** The holidays in the United States do not follow those of the Nordic countries which are mainly Christian holidays. The

norm is that an employee is granted 8 to 11 American holidays which usually consist of at least the following: New Year's Day, President's Day, Memorial Day, 4th of July (Independence Day), Labor Day, Veterans Day, Thanksgiving Day and the day after Thanksgiving and the 1st day of Christmas. It is usually specified in the agreement that the employee does not have the right to Nordic holidays that do not fall on an American holiday (typically, certain Christian holidays, such as Good Friday, the day after Pentecost and the 2nd day of Christmas). Of course, nothing hinders the employer from granting the employees such holidays. The employer should, though, be aware that giving special rights to foreign employees may give rise to criticism and possible suits by the American employees. This is an important point which does not only pertain to holidays but to all parts of the employment conditions that favor a foreign employee.

- **Non-competition clause.** If the employee holds a high position in the company, it is often in the employer's interest to include a non-competition clause in the Employment Agreement. Non-competition clauses are regulated via the various states' court practices. The general norm is that a non-competition clause (also called a "covenant not to compete") is enforceable only if the employee is compensated during the non-competition period. Practice varies from state to state, but the standard minimum requirement for compensation is 50% of the employee's base salary. Also, the various states' practices set standards as to the maximum geographical limitations and business limitations of the non-competition clause. Close attention should always be paid to the relevant states' legislation and advice should only be taken from competent local counsel.
- **Confidentiality clause.** It is often in the interest of the employer to include a Confidentiality Clause in the Employment Agreement. Court practice in the United States recognizes that employees may legally be bound to not disclose the employer's business secrets to third parties.
- **Travel expenses.** Coverage of travel expenses for the employee, for his or her family members and specifying what type of service will be used (e.g. coach, tourist, first class etc.).
- **Business expenses.** Company car and/or company telephone.
- **Housing expenses.** Free housing, specifying maximum amount and what type of housing costs are covered (rent, utility costs, insurance etc.).
- **Moving expenses.** Possible coverage of moving costs to and from the United States.
- **Insurance.** Payment of insurance costs (health insurance, travel insurance, insurance of the employee's belongings etc.).
- **Representation costs.** Should include definition of maximum amounts and requirements to documentation.
- **Taxes.** In conjunction with all the above, the tax consequences for the employee and the employer must be considered.
- **Law governing the agreement.** Most states have enacted legislation that makes it illegal to bind an employee to the laws of another state or to the laws of a foreign country. Thus, even in situations where the parties have agreed that the agreement shall be governed by the laws of one of the Nordic countries, such provision will not be enforceable. Clearly, in many instances the employee will not object to the provision, and it is often seen that the parties agree to the application of the laws of the

employee's home country. The choice of law clause contains a long series of very important legal questions. It falls beyond the scope of this publication to discuss these questions in detail. However, the author strongly recommends that qualified legal advice be obtained in order to make sure that the choice of law clause is worded so that it will not give rise to unexpected and detrimental consequences.

- **A clause pertaining to resolution of disputes.** Most of the states have enacted legislation that makes it unlawful to deprive the employee of his/her right to have a possible dispute resolved via the courts in the state where the employee is employed. Due to the fact that lawsuits in the United States involve substantial legal fees and costs[17] it is often in the interest of both parties to agree on an alternative dispute resolution mechanism, such as arbitration or legal proceedings in a court in the employee's home country. As just mentioned, the employer should be aware that such clause may not be enforceable. Drafting of choice of law clauses gives rise to a number of complex legal issues. Again, the author strongly recommends that qualified legal advice be obtained in order to make sure that the choice of law clause is worded so that it will not give rise to unexpected and detrimental consequences.

6.1.3 Severance agreements

If a situation occurs where it becomes necessary to terminate an employee in the United States it is always advisable to draft a so-called "Severance Agreement" to regulate the parties and obligations in connection with the termination. In addition to stipulating the employee's right to salary during the termination period, right to paid home transport etc., the Severance Agreement should always contain a detailed clause according to which the employee waives his or her rights under federal and state discrimination laws. In order to make such waiver legally binding for the employee, the employer will need to offer some amount (called "severance payment") to the employee in most states. Each of the states in the United States has enacted detailed legislation pertaining to Severance Agreements and local counsel should always be consulted in order to make sure that the Severance Agreement is properly drafted and thus enforceable.

[17] See the description in chapter 7 of this publication.

6.2 Practical aspects of the stationing in the United States

6.2.1 Introductory remarks

This chapter will focus on the common issues that persons who are stationed temporarily in the United States will be met with following their initial entry. In general, a person or a family who enter the United States should expect to encounter a number of hurdles before they are settled in. The general advice is to reserve at least one week following the initial entry for taking care of practical matters. It can be very stressful for a person to start his or her employment immediately following entry and then at the same time having to deal with a number of practical things. The complexity of settling in of course depends largely on the assistance offered to the employee and the employee's family by the American employer. Naturally, if the employer has arranged for housing, transportation, insurance etc., the number of tasks left to the employee and his or her family is reduced. However, despite all efforts carried out by the employer there will always be many practical tasks left to the employee and his or her family.

6.2.2 Obtaining a social security number

All persons who come to the United States to work must obtain a social security number. This number is used as a means of identification in relation to all public authorities and in many other connections. A social security number cannot be obtained prior to entry into the United States. Consequently, following entry into the United States, the person who has entered the United States on a visa must go to the local social security office in person and submit the appropriate application form. The form can be downloaded from the following website: http://www.ssa.gov/online/ss-5.pdf.

Once the application has been submitted, the social security authorities contact the immigration authorities in order to verify that the applicant has indeed been issued a valid work visa. Following the verification procedure, which will usually take approximately three weeks, the social security card is mailed to the applicant.

Only persons who have obtained a valid work visa or an employment authorization are entitled to obtain a social security number. Accordingly, the spouse and children of the person who has been issued a valid work visa cannot obtain a social security number. Provided the visa issued is either an L visa or an E visa, the spouse is entitled to apply for employment authorization. Once such authorization has been issued, the spouse can apply for a social security number. Due to the important function of the social security number, it is often advisable that the spouse of an L or E visa holder applies for a social security number even though the spouse may not wish to work in the United States.

6.2.3 Establishment of a bank account

It is always necessary to establish at least one bank account. This is due to the fact that wages are always transferred to an American bank account held by the employee. The bank will, as a matter of routine, request that the account holder has obtained a social security number. However, no state or federal regulation requires applicants to provide the bank with a social security number. Accordingly, it is indeed possible to establish a bank account even prior to having obtained a social security number. It is also our experience that applicants are successful in doing so if they are persistent.

The general account to be established is a checking account. Checks are much more widely used in the United States than in the Nordic countries, and it would simply be very impractical not to have a checking account in that many payments have to be made by check and not by direct deposit as it is the norm in the Nordic countries.

When choosing which bank to use, it is important to make sure that the bank has good international connections. Many local banks will have difficulties in dealing with international transactions, such as money transfers. On the other hand, most of the larger banks have established an excellent network making it possible to make money transfers between the United States in only one day.

6.2.4 Routine for payment of wages

In all situations where a person is employed with an American employer, it is necessary to establish a routine ensuring that all relevant tax deductions are carried out in the correct fashion. The employer itself may carry out such administrative routines. However, these functions may be outsourced to a so-called "payroll service". This service makes sure that all mandatory tax deductions are carried out and paid for. Further, the payroll service provides the employee and the employer with reports detailing deductions and payments.

In order to make use of the payroll service, it is necessary for the employer to establish a US bank account from which salaries and taxes are transferred to the payroll service. The cost of using the payroll service is rather low, normally less than $100 per month per employee.

6.2.5 Obtaining a driver's license

The rules pertaining to obtaining a driver's license vary from state to state. Thus, the following description is general in nature.

In all states the driver's license is widely used as a means of identification. This means of identification is so important that many states have indeed enacted rules according to which persons who are not able to drive a car can still obtain a drivers license, but with no right to drive.

In many states it is a prerequisite for obtaining a driver's license that the applicant has obtained a social security number. This brings about the odd situation that spouses or children of persons who have obtained a work visa will be denied to apply for a driver's license. It is our experience that such persons - if they argue persistently - will be allowed to apply for a driver's license even though they do not have a social security number.

In most states the practical procedure for obtaining a driver's license is to pass a simple theory test (written) and to pass a practical driving test. Compared to the requirements in The Nordic countries, most people find it easy to pass these tests.

6.2.6 Obtaining adequate insurance

When employing personnel in the United States, it is in all instances a legal requirement that the employees are covered by the so-called "Worker's Compensation Insurance". This insurance coverage is meant to cover physical damages suffered by the employees during their employment. The Worker's Compensation Insurance must be established with an American insurance carrier. The premiums vary drastically from type of business to type of business and it is the author's experience that the various insurance carriers are not always consistent in their practice when determining the insurance premium. Thus, it is the author's general recommendation that offers are solicited from more than one prospective insurance carrier.

When foreign employees are stationed to work for a Nordic parent company's subsidiary in the United States, it is necessary to obtain health insurance coverage for the employee and his or her family. Such coverage can either be established by taking out travel insurance coverage (typically with a Nordic insurer) or by establishing coverage via a local insurance company. In order to assure health insurance coverage from the time when the employee and his or her family arrive in the United States, it is often a practical solution to establish such coverage in the form of a travel insurance taken out in advance. Provided that the employee intends to stay in the United States for a longer period of time, it will normally be more feasible to replace the travel insurance with local health insurance coverage. A large number of private hospitals offer health insurance in the United States and the employee or the employer should carry out a close study of the local market to determine which carrier offers the best coverage.

It will be necessary for the employee to establish other types of insurance as it is the norm in the Nordic countries, such as automobile insurance, liability insurance for family members and their pets, fire and water damage insurance for personal belongings etc. Such coverage is generally obtained without difficulty via a local insurance agency. Specifically, in regard to automobile insurance it is advisable for the employee to provide documentation for his or her record with the previous European insurance carrier. Provided that no such favorable documentation is supplied, it will not be easy for the employee to negotiate a favorable premium.

6.2.7 Obtaining loans and credit cards

Contrary to the easiness of establishing a checking account in the United States, it is very difficult – if not impossible - for the newcomer to obtain a bank loan or a credit card. This is due to the fact that the financial institutions in the United States heavily rely on the applicant's credit history in the United States and not on the applicant's financial abilities. For the reason just mentioned, it is important for the newcomers to maintain their Nordic credit cards. Not having a credit card will cause problems, e.g. in connection with a car lease and payment of hotel bills.

In order to be eligible for obtaining a credit card and/or a credit line with a bank, it is advisable that the newcomer immediately starts building a credit history. Such credit history can be built in various ways, e.g. via obtaining a small loan in a bank against a cash deposit in that bank. Another method is to obtain purchase cards from department stores allowing purchases within very limited credit lines. All such actions are recorded by the credit evaluation agency. All lenders rely on such agencies, and reported activities to the agencies will normally form the basis for obtaining a credit card and/or a credit line with a bank within approximately one year.

6.2.8 Lease or purchase of cars

For the reasons described above with regard to obtaining loans, it is always difficult – if not impossible – for a newcomer to lease a car or to obtain a car loan. Thus, most newcomers will have to purchase a car and pay cash. Consequently, it is often beneficial to have the employer provide one or two cars as part of the remuneration package.

In most states it is not possible to obtain car insurance for persons who have not been issued an American driver's license. For the reasons described above in regard to obtaining a social security number and a driver's license, it will usually take at least four to six weeks from the initial entry into the United States until a driver's license can be issued. Therefore, if a company car is not provided it will in many instances be necessary for the newcomer to rent a car during the first weeks of the stay in the United States.

It is often difficult to obtain car insurance due to the fact that the applicant does not have a proven driving record in the United States. It is always advisable to bring a statement from a Nordic car insurance company stating how many years the person has been insured in the Nordic country in question and, if positive, a record of the accident history. Even though it may be difficult to obtain car insurance, it is our experience that persistent applicants always succeed in obtaining car insurance. The initial premium may be high and the premium should always be negotiated after a few months of driving. The experience is that premiums vary radically from insurance company to insurance company. Accordingly, substantial sums may be saved by canvassing the market.

6.2.9 Lease or purchase of housing

For the reasons described above with regard to obtaining loans, it is not possible for the newcomer to finance the purchase of a home. As a result, the newcomer's only choice would normally be to lease a house or an apartment. It is often difficult to assess the location of the home "at a distance", i.e. prior to having entered the United States. It is e.g. difficult "at a distance" to assess whether the neighborhood is safe, whether the schools are good, whether the traffic conditions are suitable, whether there are intolerable noise levels etc. For these, and many other reasons, it is advisable to spend some time after the entry into the United States to search for a neighborhood that meets the individual criteria. Alternatively, this search may be done during an initial and temporary visit to the United States prior to the actual entry.

Due to the tenant's lack of credit history and perhaps lack of social security number, the landlord will often argue that it is not possible to establish a lease agreement. However, it is our experience that these factors will not be obstacles in relation to entering into a lease agreement, if the perspective tenant is persistent. Lease agreements are usually very detailed, and the perspective tenant should always read the entire agreement very carefully. Home leases normally require a deposit of one to three months' lease payment, and leases are usually entered into on conditions that allow both parties to terminate the lease at a short notice. By offering the landlord a long-term lease, it will often be possible to reduce the lease payments. This of course has the flip side that the tenant will give up his or her ability to get out of the lease without cost if the lease is not to the tenant's satisfaction.

Following one or two years in the United States, the necessary credit history will often be established to obtain a home loan and thus to purchase a home. Despite the necessary credit history, it will often be difficult for a person to obtain a home loan if the person lives in the United States on a work visa. Most lenders require that the loan applicant has obtained permanent resident status (Green Card), and the loan conditions will under all circumstances be less favorable for persons without such status. Accordingly, those who wish to purchase a house in the United States should at an early stage initiate the application procedure for permanent resident status.

6.2.10 Various business insurance types to be established

As it is the situation in the Nordic countries, the business will have to establish adequate insurance coverage for its assets, such as automobiles, office equipment, real property etc. Further, if the company enters into an office lease the landlord will regularly require that the company takes out a liability insurance to cover damages caused by the company's employees to property or persons on the premises. Insurance types of the general nature just referred to are normally established with a local insurance carrier.

7. Dispute resolution in the United States

7.1 Introductory remarks

Dispute resolution in the United States is one of the legal fields that differ most from the systems established in the Nordic countries. In the United States, the courts are used far more frequently than in the Nordic countries as a forum for resolution of disputes. If a dispute arises, it is customary that a lawsuit is initiated even prior to the time where the parties have seriously tried to settle their dispute. This is radically different from the tradition in the Nordic countries where suit is normally not brought until it is evident that serious settlement negotiations have not lead to a result acceptable to both parties. Despite the fact that many lawsuits are initiated, it is worth noting that approximately 90% of all civil lawsuits in the United States are settled prior to trial.

There are many reasons for the high frequency of lawsuits in the United States. One reason is that the losing party will usually not have to pay the winning party's legal fees and costs. Thus, the plaintiff is rarely at risk of ending up paying for the defendant's attorneys' fees and costs.[18] Another reason for the many lawsuits is that it only costs a nominal fee to initiate a lawsuit. Also, this fee is usually not dependant upon the size of the claim. This leads to the often unfortunate result that claims are brought for astronomical sums that have little or no bearing on reality. Further, it is not uncommon in the United States that attorneys accept to represent a plaintiff against receiving a percentage of the reward. Such fee structure, named "contingency fees", is particularly common in product liability cases and other cases involving personal injury. Obviously, the contingency fee is appealing to a plaintiff in that the plaintiff thereby is virtually free of risk even in the situation where he or she may not win the case.[19]

In all situations where the contingency fee system is not being used, the attorneys normally bill for their services according to time spent. Generally, the legal fees charged in connection with lawsuits are much higher than in the Nordic countries, often 2 to 3 times higher. This is mainly due to the fact that the procedural system in the United States is vastly more complicated than in the Nordic countries. Thus, more time will have to be spent on the matters.

In conclusion, all of the above factors lead to the situation that the plaintiff and his legal advisor have no strong reason to analyze the case critically prior to the time where the lawsuit is initiated. This leads to the result referred to above, namely that the number of lawsuits per capita in the United States is much higher than in the Nordic countries. Also, as mentioned above, approximately 90% of all commercial suits are settled

[18] In the Nordic countries it is the main rule that the losing party has to pay part of the winning party's attorneys' fees and costs.

[19] It should be noted that contingency fees are rarely used in commercial lawsuits. In such suits, the norm is that the attorney calculates his or her fees based on the time spent.

prior to trial. The reason for this result is partially that the defendant will have to pay its own legal fees and costs even if the plaintiff does not win the case. Therefore, in order to avoid large legal fees to defend itself, the defendant has an interest in settling the matter even in situations where the defendant has a strong case.[20]

All of the above leads to two important conclusions: First, that the risk of being sued in the United States is much higher than in the Nordic countries, and second, that the legal fees to defend oneself in the United States are normally much higher than in the Nordic countries. These conclusions lead to the general advice that business activities and commercial contracts should always be structured in such a fashion that the risk of being sued in the United States is minimized. This very important issue will be described in more detail in chapter 7.4.

The structure of the remaining part of this chapter 7 is as follows: Chapter 7.2 gives an overview of the court system structure in the United States. Chapter 7.3 contains a description of the procedures normally followed in a civil lawsuit in the United States. Chapter 7.4 describes alternatives to lawsuits in the United States and advice is given regarding how agreements can be formulated so that lawsuits in the United States may be avoided. Finally, chapter 7.5 focuses on a defendant's considerations when suit is brought in the United States.

7.2 The structure of the court system in the United States

The legal system in the United States is bifurcated. Certain areas are regulated at the federal level. All federal regulation is uniform throughout the states of the United States. The scope of federal regulation is found via interpretation of the federal constitution. Generally, federal regulation pertains to legal areas that are of common interest for all the states. Such areas include security exchange regulation, immigration law, patent and trademark laws, laws related to transportation, federal tax legislation and bankruptcy law etc.[21] Areas that are not regulated at the federal level are regulated via state legislation. Further, the states may enact legislation within federally regulated areas as long as the regulation does not conflict with federal laws.

Legal topics that are not preempted via state or federal regulation are regulated by court decisions. Such regulations are referred to as common law. The United States is commonly referred to as a common law country which leads to the notion that a vast part of the legal regulation is determined by the courts. This is historically correct. The current reality is, however, that no country in the world has so many legal regulations as the United States. The federal laws which are compiled in one huge code takes

[20] Lawsuits of such nature are often referred to as cases that have "settlement value". This means that the plaintiff will probably be able to receive some award even though he, seen from a legal point of view, does not have a case against the defendant.
[21] In addition to the federal and state legislation, certain topics are regulated by the counties or by the cities. Such regulation pertains to topics of local interest such as roads, schools and planning.

up more than one hundred big book volumes. Each of the codes is supplemented by so-called regulations which are often very detailed leaving very little leeway to interpretation by the courts. Also, the state regulations are very detailed. Many state laws take up more than one hundred big book volumes.

When dealing with a specific legal topic, it is common that the topic is regulated in three ways, namely by federal regulation, state legislation, and by common law which fills in the gaps and interprets the legislation. This interplay between the three systems involves great complexity. Accordingly, topics that would be simple to describe and resolve under the Nordic legal systems often prove to be very complex and therefore time-consuming to resolve in the United States. Consequently, costs for legal advice are usually much higher in the United States than in the Nordic countries.

As a consequence of the bifurcated legal regulation (the federal regulation and the state regulation), two sets of courts have been established, namely federal courts and state courts. The federal courts of course have jurisdiction in all cases that pertain to federal law. Further, the federal courts have jurisdiction in cases involving parties that are not domiciled in the same state if the dispute in question concerns more than $50,000 and if one of the parties requests federal jurisdiction.[22] An example of this is the following: Suit is brought in the State of New York against a Nordic business entity. The claim pertains to New York law, and the claim is for more than $50,000. If suit is brought in a New York state court, the Nordic business entity has the option of having the case moved to the federal court in the Federal Court District which covers the State of New York. If the matter is moved to the federal court, New York substantive law and federal procedural law will be applied.

As in the Nordic countries, the court systems contain an appeal system. First instance courts in the federal system are referred to as “circuit courts”. The appeal courts in the federal system are referred to as “appellant courts”. Finally, there is one federal Supreme Court situated in Washington, D.C.

State courts are named differently in the various states, but all states have established a three-tier system with the highest court instance being the state Supreme Court. The right to appeal is somewhat different from what is the case in the Nordic countries. Generally, the parties have the right to appeal from the first instance court to the second instance court. Contrarily, there is rarely access to automatic appeal to the Supreme Court.

In order to have a case tried before the Supreme Court (both state Supreme Courts and the federal Supreme Court), a special request for such appeal must be filed with the court following which the court will decide whether to try the case or not.[23]

[22] Jurisdiction in matters as just described is referred to as “diversity jurisdiction”.
[23] If the State Supreme Court accepts to try a case it is said that the court “grants certiorari”.

In addition to the general civil court systems described above, a series of special courts exist. These special courts resolve cases pertaining to patent matters, insolvency matters, family law matters, and matters of minor financial value.

7.3 Standard procedures in a civil lawsuit

As already mentioned above, the procedural system pertaining to civil lawsuits in the United States is very complex. The following general description of the procedures to be followed in a civil lawsuit will substantiate this fact.

As in the Nordic countries, a civil lawsuit is initiated by serving the defendant with the plaintiff's claim. If the defendant is domiciled in the United States, service of process is carried out via the local rules pertaining service of process. If the defendant is domiciled in one of the Nordic countries, service will normally be carried out in accordance with the special rules found in the Hague Convention on the Service of Process.

An American Complaint contains a brief description of the factual situation, the arguments to support the claim and the nature and size of the claim. Normally, none or very few attachments are served with the Complaint.

Following the time when the Complaint has been served on the defendant, the defendant is given a rather short time to answer in the matter. The defendant is normally granted three weeks, but extensions are usually granted. In matters of international character, it is the rule rather than the exception that the defendant initially brings forward defenses of procedural nature, such as the matter not having been served correctly or the court where the suit is brought not being the competent court. Provided such procedural arguments are brought forward, the substance of the matter will not be dealt with until the procedural matters are resolved. Thus, it is common that long periods of time (often more than a year) pass until the case is either dismissed from the court or continues.

Once the defendant has answered in regard to the substance of the matter, the case continues with the so-called "discovery phase". This phase of the procedure is not known outside of the United States and differs radically from anything that is seen in the Nordic procedural systems. As the discovery phase often results in surprises for foreign defendants, this phase is described in detail below.

The purpose of the discovery phase is to allow each of the parties to obtain evidence from the other party. The core of the procedure is that each party has an almost unlimited access to request information from the other party. The idealistic point of view behind this rule is to establish the best possible factual background for each of the parties to evaluate the matter. Thus, theoretically the system is ideal. However, seen from a more practical point of view, the system has been criticized for being time-consuming and very costly. The author agrees with this point of criticism.

The court is usually not involved in the discovery phase. The court's involvement is limited to situations where a dispute arises, typically in regard to a party's unwillingness to fulfill the discovery requests. The information obtained during the discovery phase falls in the following four stages:

Requests for production of documents pertain to situations where one party asks the other party to produce written documentation. Such requests may not only pertain to facts that are directly relevant for the matter but also to circumstantial matters. If, for example, a matter pertains to a defective product, the party who claims that the product was defective may rightfully ask the other party to produce documentation pertaining to all other claims that the party has been met with regarding defective products. Such broad requests are often referred to as "fishing expeditions", meaning that the requests are made in the hope that some of the documents produced may contain information that can support the requesting party's case. It is common that thousands of pages of documentation will have to be produced, which makes the procedure very time-consuming and costly.

Each of the parties may also forward written questions to the other party. Such requests, named "written interrogatories", usually pertain to issues that cannot be answered by way of production of documents.

Each of the parties may also forward requests for admissions to the other party. Such requests for admissions are used to determine which facts are in dispute and which facts the parties can agree on.

"Depositions" is the American term for the parties' or witnesses' testimony under oath. Such testimony is given without involvement of the court. The testimony is given to a court reporter who may administer the oath and who types out a report containing word-by-word reference of all questions and answers.[24] As with the request for production of documents, questions posed during depositions need not be directly relevant for the matter. This means that depositions are often very time-consuming, sometimes lasting several days.

All information produced during the discovery phase is used by the parties to determine which evidence shall be brought before the court. Thus, the court is not made aware of the discovery material unless this is subsequently being brought before the court as evidence.

Following the discovery phase, the court will set a trial date. The purpose of the trial is to have the case presented before the court. The court is presided over by a judge who has a legal degree. Each of the parties may request a jury trial. This means that the court will be supplemented by 6, 9 or 12 lay judges. These lay judges, named the "jury", decide on the fact of the matter, for example the size of damages. The jury members are elected via a complicated procedure under which each of the parties' legal representatives may exclude a number of potential jury members. The jury

[24] The oath given has the following wording: "I swear to tell the truth, the whole truth and nothing but the truth, so help me God." The consequence of the oath is that false testimony under oath can result in severe criminal sanctions.

makes its decision based on the evidence presented during the trial and based on detailed instructions that are complied with by the parties' legal representatives and approved by the legal judge.

The use of juries in civil cases is unknown in the Nordic countries where juries are only found in severe criminal cases. The use of juries in civil matters has two consequences. First, the outcome of the matter becomes less predictable than in matters decided by a trained legal judge. This is due to the fact that the jury members may be more subjective in their evaluation of the matter than a legal judge would be. The other consequence is that the duration of the trial is extended which will increase the trial costs. This is due to the lengthy jury selection procedure and the extensive amount of time that it takes to instruct the jury members in a way that is easily understood by lay persons. In this context, it is often necessary to have expert witnesses give detailed information to the jury in regard to complex technical or financial questions.

Once the jury members have been selected and sworn in, the plaintiff's attorney will give an opening statement. The purpose of this statement is to provide the jury members with an objective description of the issues in dispute. Following the opening statement, each of the parties will present its evidence with the plaintiff presenting its side first. Evidence is presently partly in the form of documents and partly in the form of testimonies from witnesses and the parties. The American procedural laws contain a very complex set of rules regulating which documents may be presented as evidence. This means that any trial will partly consist of formal procedures pertaining to which documents may be presented. This part of the trial is very time-consuming. Testimony from witnesses and parties are given in open court. The questioning is usually very eloquent in that the questions posed have already been asked and answered during the discovery stage when the witness or the party gave his or her deposition. In conjunction with the testimony, the opposing party will often object to the questions asked. Such objections are founded in a very complex set of rules which pertains to what oral information may be taken into evidence. Possibly, the most well known rule is the so-called "Rule Against Hearsay". The contents of this rule are that no witness may testify as to what this witness has heard from another person if the purpose of the testimony is to prove the truth of what was said. The judge decides all objections immediately. If a witness has answered a question and the answer is denied, the judge will explain to the jury that they may not take such answer into consideration when they decide on the matter.

In addition to testimony given by the parties or witnesses, it is common also to take testimony from expert witnesses. It is common that each of the parties bring in expert witnesses. Thus, the expert witnesses are to be viewed as party representatives, and it is common that a witness will go far - but staying within the limits of the truth – to answer the questions in favor of the party who has appointed the witness.

Once all evidence has been brought before the court, the legal judge then instructs the jury as to how they shall evaluate the evidence. After these instructions, each of the parties' legal representatives is given the

opportunity to present the legal points of view to the jury. The purpose of this presentation is to persuade the jury to rule in the respective party's favor, and the presentation is often very emotional.

The above leads to one important observation, namely that the procedure to be followed in an American civil lawsuit is far more complicated than in the Nordic countries. The complexity stems mainly from the discovery process and the lengthy trial. The complexity also results in an escalation of the legal fees. A recent survey pertaining to product liability cases has shown that the defendant's average cost in such a case is around 70% of the amount claimed by the plaintiff. In other words, if a business is being sued in a product liability case for a claim in the size of $100,000, the average legal fees will amount to $70,000. Legal fees cover attorneys' fees and fees to expert witnesses.

In cases where a foreign party is being sued in the United States, the fees will be even higher. This is because it is usually necessary to hire two law firms in the matter, namely an American law firm and a local law firm. Further, additional costs will usually be incurred in connection with having parties or witnesses travel to the United States to give depositions and participate in the trial.

Based on the above, the overall conclusion is that lawsuits in the United States are very complicated and very costly. Thus, business activities in the United States should always be tailored so that the risk of being sued in the United States is minimized.

7.4 Alternatives to lawsuits in the United States

It is widely accepted under American law that parties to a commercial contract may enter into an agreement regarding how possible disputes shall be resolved and which country's law shall be applied. Therefore, in situations where a Nordic party enters into an agreement with an American party, such agreement should always contain a clause stipulating the dispute regulation mechanism and stipulating which country's law shall apply. Provided such clause is not included in the agreement, the Nordic party is at risk of being sued in the United States. It should be noted that the risk of being sued in the United States might not be limited by virtue of an agreement in situations where the plaintiff is a non-contracting party. This is specifically relevant in cases pertaining to product liability where the plaintiff has rarely entered into a contract with the defendant.[25]

The alternatives to resolving a dispute in an American court are basically the following:

- To agree that suit is to be brought in the competent court in the relevant Nordic country; or
- that disputes are to be resolved by arbitration in the relevant Nordic country; or

[25] In regard to product liability cases, reference is made to chapter 8 of this publication.

- that disputes are to be resolved by arbitration in the United States.

It is the author's experience that it is rarely possible to persuade the American party that disputes should be solved via the court system in a Nordic country. The American party has a strong argument not to accept such solution, namely the fact that the language of the procedures will not be English. It is more realistic to establish an agreement according to which disputes are to be solved via arbitration. The Nordic party's argument will of course be that arbitration should take place in his or her home country, and the American party will argue that arbitration should take place in the United States. The outcome of these negotiations will depend on the parties' negotiation strength.

It is the author's experience that arbitration is an efficient tool to resolve commercial disputes. Arbitration has several advantages over court procedures. The most important are the following: Correctly tailored, the cost of arbitration procedures is not as high as that of American court cases. Arbitration procedures can usually not be appealed. Arbitration tribunals consist of persons who have professional knowledge of the dispute in question. Arbitration panels do not include lay judges (juries). The arbitration procedures are not public.

The arbitration clause in the agreement should always be tailored to the specific situation, and the clause needs to be rather detailed in order to avoid future conflicts in regard to the arbitration procedures. An arbitration clause should, as a minimum, contain the following provisions:

- How the arbitration procedure should be initiated
- Which arbitration institution shall resolve the matter
- The place of the arbitration
- The language in which the arbitration shall be conducted
- Which country's law shall govern the arbitration procedures
- Whether or not the arbitration panel shall be competent to award legal fees and costs to the winning party
- The number of arbitrators to be appointed.

If it is agreed that the arbitration procedures shall take place in the United States, the Nordics party should make an attempt to include in the arbitration clause that discovery shall be excluded or alternatively limited to a degree specified in the agreement. Such limitations may for example state that depositions are excluded and/or discovery requests are to be limited to documents that directly pertain to the dispute.

All Nordic countries and the United States have ratified the so-called "New York Convention on the Enforcement of International Arbitration Awards". This means that arbitration awards from an American Arbitration Institute will be enforceable in the Nordic countries and visa versa.

It is the author's experience that most lawsuits filed by American parties against foreign contracting parties appear in situations where the parties did not establish a written agreement or where the parties established an

ambiguous or poorly drafted agreement. Therefore, the importance of establishing detailed and operative agreements when entering into business contracts with American parties cannot be overestimated. The cost of establishing such agreement is nominal compared to the cost triggered by being dragged into a lawsuit or even an arbitration procedure. It is the author's experience that Nordic business entities pay a lot of attention to the product liability risk in the United States but only little attention to the risks triggered by the lack of sufficient written agreements. It is the author's point of view that focus should be shifted so that the two risk groups, namely the product liability risk and the risk of being met with a contract claim, are treated as being equally dangerous.

7.5 Procedural considerations if suit is brought

In situations where a Nordic party is being sued in the United States, an aggressive and competent case handling from the outset will often limit the adverse effects of such lawsuit.[26] The possible actions to be taken by the defendant should be taken shortly after the Complaint is served on the defendant and always prior to launching an answer pertaining to the substantive parts of the lawsuit. If an answer pertaining to the substantive parts of the lawsuit is filed with the court, such answer constitutes an acceptance that the court is competent to handle the matter, and the defendant can at no later point in time contest the court's competence.

One major issue to consider when suit is brought is whether the American court has jurisdiction over the defendant. All the American states have enacted legislation describing which extent the courts have jurisdiction over a foreign defendant. Such codes are named "long-arm statutes". Generally, an American court has jurisdiction over a foreign defendant if the defendant has established a certain minimum contact with the state in question. The threshold for minimum contact is very low. Thus, for example, if the actions which gave rise to the lawsuit took place in the United States, the prerequisite minimum contact will be established. Also, in situations where the defendant has visited the plaintiff in the United States for purposes relating to the dispute, minimum contact will normally have been established. Even though court practice shows that the court in all likelihood has jurisdiction over the defendant, it is often advisable to argue that the court has no jurisdiction. Such arguments must be presented in an answer that constitutes a so-called "special appearance". As mentioned above, an answer that pertains also to the substantive parts of the matter will constitute an acceptance that the court has jurisdiction. The purpose of filing objections against the establishment of jurisdiction even in situations where the arguments are rather weak is to increase the plaintiff's legal fees and costs which in turn form a better platform for initiating settlement negotiations.

[26] Lawsuits of this nature occur in various situations. First, it may be the case that the plaintiff is a non-contracting party with whom the defendant could not have entered into a dispute resolution agreement. Second, the plaintiff may be a contracting party with whom no dispute resolution mechanism was agreed.

It should also always be considered whether service of process was carried out in accordance with the rules set forth in the Hague Convention on the Service of Process. If it appears that service of process was faulty, that fact - as with objections to jurisdiction – should be presented to the court by way of a special appearance.

Also, it should be considered which country's laws shall apply in connection with the lawsuit. If valid arguments can be produced that the laws of one of the Nordic countries shall apply in the matter, procedures in regard to these arguments should be initiated. Such procedures will complicate the matter for the American plaintiff and thus form a good platform for initiating settlement negotiations.

Further, a strong argument for initiating settlement negotiations at an early stage is that it will prove difficult for the American party to obtain evidence in the matter. This is due to the fact that taking evidence will be regulated by the so-called "Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters". This Convention will always apply in that both the United States and the Nordic countries have ratified the Convention. An important feature of the Convention is that it does not allow discovery requests.[27] This limitation will often stipulate that the American party must agree to enter into settlement negotiations. Further, the taking of any type of evidence by way of the rules set forth in the Convention is very time-consuming and often unfamiliar for the American party's legal representative. This further entices a desire for settlement negotiations.

In addition to the above considerations, the defendant should always evaluate the strength of the substantive matter from the outset. In this context, the defendant should be realistic and take into account the substantial fees and costs it will have to pay to defend itself. Once the potential financial risk has been assessed, steps should be taken towards settlement negotiations. It is foreign to most American parties to enter into settlement negotiations at an early stage in the matter. However, it is the author's experience that settlement negotiations may often be initiated and concluded at an early stage if the defendant and his legal advisors are persistent. Due to the very high fees and costs that will be triggered by a court case, it is often advisable to accept a settlement of a higher amount than that of a court case. In this context, it needs to be taken into consideration that a court case not only triggers legal fees and costs but also substantial internal costs and resources.

If it is not possible to conclude the case by way of an early settlement, the parties will normally be given an opportunity to make settlement attempts via the so-called "mediation system". Most courts have enacted procedures according to which the parties must participate in a mediation procedure. The mediation procedures are presided over by a mediator (typically a retired judge). The mediator's role is to facilitate settlement negotiations, but the mediator cannot mandate any settlement. It is the author's experience that mediation procedures is an effective tool which facilitates

[27] See chapter 7.3 above.

settlements, specifically if a defendant presents his arguments carefully during the mediation procedures.

8. Product liability in the United States

8.1 Introductory remarks

Product liability in the United States is generally defined as the liability which producers and sellers of chattels risk being met with from third parties with whom the seller or the producer does not have any contractual relationship.[28] In other words, product liability covers the type of liability which the producer or the seller risks being met with as a result of claims made by a user of the goods sold. It is worth noting that product liability theories only apply to the sale of goods. This means that the sale of real property, shares, bank instruments etc. are not included in these theories.

The following is a basic example of the use of the product liability theories in the United States: A user of a ladder sustains bodily injuries when he falls from the ladder which collapses under him. For this person, the theories of product liability open up a possibility for him to claim his losses from the retailer, the wholesaler, the producer and possibly the party who delivered parts to the producer for the production of the ladder. The claims made in connection with a product liability suit almost always contain a claim for financial compensation for the losses sustained by the use of the product in question. It is sometimes seen that the claims go beyond a claim for physical damages and is extended to a claim for damages on property. As it will be described in chapter 8.5, claims for compensation of bodily injury are the most far-reaching and therefore the most important. The legal rules that form the basis of product liability in the United States are almost without exception found in rules developed via the court system. Only a few special areas have been subject to legislation. In other words, the United States does not have a general code which regulates product liability.[29] Not only is there no general federal legislation on product liability, also only very few states have enacted legislation which regulates product liability.[30]

What has just been mentioned in regard to the lack of legislation on product liability results in each case having to be decided on the basis of prior judgments in similar cases. This inevitably leads to there being no clear-cut rules on which to form a good basis for the foreseeability of product liability cases. This becomes even more apparent due to the various states following different theories in their formulation of the principles surrounding product

[28] Prosser on Torts, Fourth Edition, page 641 defines product liability as follows: "...The name currently given to the area of case law involving the liability of seller of chattels to third person with whom they are not in privity of contract."

[29] Within the past decades, attempts have been made to introduce a general federal legislation regarding product liability. In 1979, the United States Department of Commerce lodged the so-called "Model Uniform Product Liability Act". The purpose of this act was to form the basis for the various states' legislation on product liability. It appears to the author that none of the 50 states yet have enacted legislation based on the rules set forth in the Model Uniform Product Liability Act.

[30] An area that has been the basis of regulation in many states concerns the so-called "punitive damages". For a more detailed description hereof, see chapter 8.5.4.

liability. This leads to a very important conclusion, "The rules of product liability in the United States vary from state to state and from case type to case type." The description of product liability in the United States in the following chapters is therefore a general description of main principles. These principles must, in each and every case, be tailored to the specific theories enforced in the state in question and to the specific type of case.

Within certain product sectors, a general federal legislation has been enacted. Provided such legislation has been enacted, this legislation will be used uniformly in all of the fifty states.[31] The purpose of this legislation is generally to ensure that consumers obtain reliable information on products that are deemed to be potentially dangerous to use. The legislation is generally referred to as "Consumer Product Safety Acts". The legislation covers, among other things, textiles used in the apparel and furniture industry, medicine, poison, toys, certain food products and certain household machines. Generally spoken, the legislation enacts uniform standards for safety and sets standards for warnings and user manuals. Also, in certain situations, the legislation requires that information regarding the products be reported to the Consumer Product Safety Commission. Before goods are exported to the United States it should always be examined in detail to which extent the product to be exported is among the products covered by the Consumer Products Safety Acts. Provided this is the case, it is very important that export is not initiated unless the product meets all such standards.[32]

In addition to the Consumer Product Safety Acts, certain states have enacted legislation to supplement the federal legislation. It is not possible within the scope of this publication to describe the contents of such state legislation. However, the legislation of the state or states where the product in question is expected to be sold should always be examined prior to export.[33]

All of the above could give to the impression that the legal rules pertaining to product liability in the United States are completely unpredictable. However, such a point of view is not entirely correct. The legal development in the various states contains many similar elements leading to a general trend in most of the states' rules on product liability. The following chapters will deal with these rules. When appropriate, reference will be made to rules in other legal systems, specifically the rules set forth in the European Union's Convention on product liability.[34]

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[31]This is due to the fact that federal legislation supersedes state legislation when such federal legislation is found to be preemptive.

[32]If a product is sold in violation of the Consumer Product Safety Acts or other legislation, this mere fact will, in itself, lead to liability for the producer and the seller. For a more detailed description of this important rule, see chapter 8.4.1.

[33]For a further discussion of this precaution, reference is made to chapter 8.7.

[34]The European Union Directive no. 374, 1985 on Product Liability.

8.2 Statistical information

A way to get a good overview of the product liability climate in the United States is to take a look at recent statistical information. The information referred to below comes from various sources. However, most of the information is taken from a thesis written by Randall L. Goodden[35]. The statistics referred to are arranged in three different groups, namely information pertaining to the number of court cases, information on costs and information on the reasons behind the product liability cases.

The number of court cases:

Approximately 90,000 cases pertaining to product liability are initiated each year in the United States. This corresponds to 16 cases per year in a city of approximately 50,000 inhabitants. Of all cases initiated, more than 95% are settled or dismissed prior to trial. This means that less than 500 cases per year are actually finalized via the court system. The number is not entirely certain because many of the state courts do not provide statistical information as to the type of civil cases initiated.

The statistics show that the plaintiff wins the case in approximately 40% of the cases where the plaintiff is a consumer. In cases where the plaintiff is a non-consumer (typically cases pertaining to labor injuries), the plaintiff wins in approximately 60% of the cases.

The average size of the awards has been reduced drastically over the past decade. In 1986, the average award was $18,000 and this average has decreased to approximately $5,000 in 1996. This trend is mainly the result of asbestos related cases now being an almost closed chapter.

Awards exceeding $100,000 in first instance cases are found in less than 2% of all cases. If such cases are appealed, the award is normally reduced. The average reduction is approximately 30% of the first instance award.

Costs related to litigation:

Legal fees in the United States are astronomical compared to what is common practice in most other countries. In the mid-1980's, the defendant's costs to attorneys and expert witnesses in product liability cases averaged 54% of the sum awarded to the plaintiff. In the mid-1990's, this percentage had increased to almost 70%. In other words, for each $1,000 awarded to the plaintiff, the defendant, on average, has to pay $700 in attorneys' fees and fees to expert witnesses.

The plaintiffs' attorneys' fees are usually between 30% and 40% of the amount awarded to the plaintiff. Such fees are usually based on a

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[35] Randal L. Goodden: Preventing and Handling Product Liability, New York 1996.

contingency fee agreement under which the attorney receives a certain percentage of a possible award. In addition to the attorneys' fees, the plaintiff will have to pay all costs, such as court fees, fees to expert witnesses etc.

The main rule is that each of the parties covers its own costs. Thus, it can be expensive for a defendant to win the case. This is due to the fact that the attorneys and the expert witnesses usually are paid based on time spent on the matter regardless of the outcome of the case.

The types of defects behind the court cases pertaining to product liability:

Approximately 9% of the cases are initiated due to alleged manufacturing defects (non-fulfillment of the manufacturer's own standards).

Approximately 21% of the cases are initiated due to alleged design defects (non-fulfillment of normal standards pertaining to safety).

Approximately 26% of the cases are initiated based on alleged insufficient safeguards (such cases are almost entirely limited to cases where workers have been injured when operating machinery).

Approximately 44% of the cases are initiated based on alleged warning and instruction defects.

8.3 Legal theories behind liability in product liability cases

8.3.1 Introductory remarks

Litigation pertaining to product liability in the United States is almost always founded on many different legal theories. The following subchapters describe the most important of these theories and the legal development within the past decade.

8.3.2 Liability based on negligence

The traditional basis for liability is found in matters involving errors or omissions by the producer. Such liability will only be found if the plaintiff can prove that the producer did not act in a fashion that lives up to the standards that can reasonably be expected of a prudent producer of similar products. In the United States, this liability theory is defined as "negligence." As already indicated, product liability based on negligence will only be found in situations where the producer (and more rarely the seller), in the production or handling of the goods has not lived up to the standards that are generally found and accepted within the business sector in question. Also, negligence will be found where the producer has not complied with current legislation or other public regulations.[36]

In all of the 50 states, product liability based on negligence is accepted. However, the number of cases ruling against the defendant based on a negligence theory is very limited. This is due to the fact that such liability can only be found when the defendant (producer or seller) is proven not to have met the generally accepted standards within the industry or the standards set by the defendant himself.

8.3.3. Liability based on warranty theories

Product liability based on warranty theories falls into two groups:

Firstly, the producer will be found liable if the damage caused is found in the fact that the product did not live up to the standards that were expressly guaranteed. The following example will illustrate this situation: A container to be used for cooking purposes is delivered with an express written guarantee that the container can withstand boiling water. It subsequently proves that the container could not withstand boiling water with the unfortunate result that the user had boiling water pouring over her. In this situation, the producer will be found liable for breach of warranty even if the plaintiff has produced no evidence showing that the producer acted negligently either in the production of the container or in formulating the warranty.

Secondly, and more importantly, a producer may be liable for breach of implied warranty. This means that breach of warranty can be found even if there was not issued any express, oral or written guarantee as to how the product would function. All of the fifty states have accepted theories relating to such implied warranty. A few states have enacted legislation in product liability cases regarding implied liability in the relation between the retailer and the user. The implied warranty relation between producers and whole sellers on one side, and the users on the other side has not been the basis of legislation, but the theories are founded in case law.[37]

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[36]The threshold for negligence is set by comparing the defendant's conduct to the conduct of a prudent person in the same profession and situation. Such comparison to a so-called "bonus pater" or "prudent person" is of course theoretical in nature, as the "bonus pater" is purely a creature of law. It is important to note, however, that the use of the bonus pater standard leads to the result that this standard develops in accordance with the development in the relevant business sector.

[37]The most important standards for implied warranty are found in the Uniform Commercial Code (UCC). The UCC has, in varied forms, been incorporated in almost all the states' legislation. It is the general rule that a product is sold with an implied warranty that the product is not dangerous provided it is used for its ordinary purpose. Section 2-314 of the Uniform Commercial Code states the following on implied warranty: "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind...." Goods, to be merchantable must be at least such as "[A]re fit for the ordinary purpose for which such goods are used....".

With reference to the example stated above, the purchaser of the container could base her claim on theories of implied warranty against the producer and the retailer even if the container was sold without any express guarantee that it could withstand boiling water and even if the producer and the seller had not acted negligently. This is due to the fact that a container to be used for cooking purposes is ordinarily expected to withstand boiling water unless otherwise expressly indicated. This shows that the purchaser has a much stronger tool against the producer and the seller under the theory of implied warranty than under the negligence theory. This is because the theory of implied warranty does not require the plaintiff to prove any sort of negligent conduct on the part of the producer or the seller.

The warranty theories have developed differently in the various states. Some of the states only allow the use of these theories in cases where there is a direct contractual relationship between the plaintiff and the defendant, typically in cases between the buyer and the retail seller. Contrary to this, other states (also) allow the use of the theories in cases where there is no contractual relationship between the plaintiff and the defendant. Such extended use of warranty theories contrasts the classic point of view that warranty theories can only be used where the parties are in privity of contract. The varied use of warranty theories in the various states makes it necessary always to examine the state laws of warranty theories in product liability cases in order to determine the possible outcome of a lawsuit that is wholly or partly based on warranty theories.

8.3.4. Strict liability in tort

Up until the mid-1960's, most of the litigation pertaining to product liability was founded on the two theories described above.[38] However, seen from the plaintiff's point of view, often none of the theories were adequate. The theory of negligence had the clear weakness that damage could only be awarded in cases where the plaintiff could prove that the defendant had acted in a negligent fashion. As a result, the plaintiff was left with the theories of warranty. As already stated, the warranty theories could in many situations not form a basis for liability, specifically because many states limited the use of these theories to situations where the plaintiff and the defendant (producer or seller) were contracting parties. This in turn leads to the conclusion that the producer could not successfully be sued under theories of product liability by the ultimate purchaser of the product. The warranty theories could only form a basis for a successful lawsuit against the end users' contract party - the retail seller. In the frequent situations, where the person who had suffered injuries was not the purchaser of the product, this person was often in a situation where no legal theories could form the basis for compensation because this person was not in privity of contract with any of the entities that produced or sold the product. However during the late

[38] Liability in product liability cases has in rare instances been based on fraud or misrepresentation theories or even based on the allegation that the defendant acted willfully. These and other rarely used foundations for liability will not be described in this publication.

1950's and the early 1960's, the theory of strict liability in tort was accepted by certain courts and is now accepted by the courts in almost all of the 50 states.

Under the theory of strict product liability in tort, the producer, the wholesaler and the retailer are at risk of being found liable for damages caused a user of the produced and sold product, provided the product was commercially brought into the market with a knowledge that the product would be sold to consumers who would not carry out any inspection of the product prior to using it. Liability according to the theory in question is found if the plaintiff can prove that the product was defective or would potentially cause damage when the product was brought on the market, and if the plaintiff can prove that the defectiveness has caused the alleged damage.

The main thrust of strict product liability in tort is that under this theory it is not a condition for finding liability that the producer, the wholesaler or the retailer has acted in a negligent fashion or that the plaintiff is in privity of contract with either the producer, the wholesaler or the retailer. The theory of strict product liability in tort hereby combines the early theory of product liability based on negligence and the early theory that was based on warranty points of view. The result of this is that the plaintiff escapes the difficulties of proving the basis for liability that is described in the previous chapters. As already mentioned, the line of thinking behind the theory of strict product liability in tort was to ease the plaintiff's burden of proof in such cases in order to make it more likely that entities which commercially brought defective goods into the marketplace became ultimately responsible for damages caused by such products.

The conclusion of the above is that the plaintiff in the vast part of suits pertaining to product liability in the United States will primarily seek to establish a basis for claiming damages on the theory of strict product liability in tort. From a practical point of view, the warranty theories will only be argued in cases between the buyer and the retailer where privity of contract is established. The liability theory based on negligence will be argued only in the small fraction of court cases where the plaintiff can reasonably prove that the damages are caused by negligent or willful conduct by the producer or the seller.

8.4 Further conditions for finding product liability

The previous chapters dealt with the legal requirements for establishing a foundation for liability. In addition to the establishment of such basis for liability, there are always certain additional legal elements that the plaintiff must prove in order to obtain compensation for the injuries caused. These conditions are briefly presented in this chapter.

8.4.1 The product must be "defective"

In product liability lawsuits the plaintiff must always prove that the product that has caused the injuries was defective. Defectiveness comes in three

different forms, namely "manufacturing defects", "design defects," and "warning and instruction defects".[39]

Manufacturing defects are found in the situation where the product sold is not produced in accordance with the producer's own standards. The following example illustrates a manufacturing defect: A lawnmower is produced and sold without a guard to ensure that particles are not being flung from the lawnmower when it is used. A user of the lawnmower is injured by a stone that is flung from the lawnmower. The plaintiff proves that the producer's own specifications called for the mounting of a safety guard, but that such guard was nevertheless not mounted. In the situation just described, the lawnmower will be viewed as being defective already due to the fact that the lawnmower was not produced in accordance with the producer's own descriptions which caused the lawnmower to be unsafe to use.

Design defects are more complex to characterize because they are not found via any objective standard. Design defects are, in the majority of the states, found when a product is more dangerous to use than what the user could reasonably expect. Some of the states' legal systems instead focus on whether the producer has exercised reasonable care when producing the product in order to make the product safe to use. The result of the two points of view normally becomes the same. This is because a decent producer should only produce products that are not more dangerous to use than what a user should generally expect. The lawnmower example referred to above can again be used as an illustration: If the producer's own specification did not call for mounting of a guard, the determination of whether the lawnmower was defective or not would depend on whether the average user reasonably would expect that the risk of stones being flung from the lawnmower was eliminated or whether the decent producer would eliminate such risk. Both tests will without any doubt lead to the same result, namely that the lawnmower, without the guard must be viewed as defective. An additional point of view in determining whether a design defect exists or not is always a comparison of the alleged defective product to similar products that are brought on the market. This latter point of view leads to the result that the safety standards are being developed continuously as more and more safety features are added to the products.[40]

W*arning and instruction defects* are found if the product was sold without adequate warnings and descriptions pertaining to the correct and safe use of the product. This type of defect is distinct from the other types of defects in

[39]See chapter 8.2 regarding the statistical occurrence of the various types of defects.

[40]The market development hereby becomes a very important factor in determining whether a design defect exists or not. Therefore, it is not enough for a producer to see that safety standards stipulated in laws or regulations are fulfilled. Even if such standards are fulfilled, a design defect may be found if products of the kind in question are generally produced according to more strict standards than the public safety standards. Contrarily, non-fulfillment of public safety standards will, from a practical point of view, always lead to the result that the product will be viewed as having a design defect.

that it does not pertain to the defectiveness of the product but to the defectiveness of warnings or instructions. Accordingly, product liability based on warning and instruction defects can be found even if the product was produced in accordance with the producer's specifications and with a design similar to compatible products in the market and according to all public safety standards. In order to determine whether a warning and instruction defect exists or not, a comparison should be made with instructions and warnings normally used for similar products. In other words, the market standards will normally set the threshold for warning and instruction defects.[41]

Warning and instruction defects set the most subjective standards for defects. It is therefore often difficult to determine what the standards are. The best advice that can be given to importers is to collect samples of instructions and warnings used in connection with sale of competitive products. Once such samples have been collected, the importer should formulate its own warnings and instructions in a form and with a wording that is at least as far-reaching as the wording used on the competitor's products. In addition to this, the importer must always make sure that the warnings and instructions are worded in compliance with public regulations relating to labeling of the product in question.

Regarding all types of defects, the plaintiff must bring evidence not only that the product was defective when the damage occurred, but also that the product was defective at the time when it was brought into the stream of commerce. In determining the standard of the defect, it is the time when the product was brought into the stream of commerce that is determinative. This fundamental point of view is found in the logic that no producer and seller should be held liable for non-fulfillment of standards that were not established when the product was brought into the market. The extended risk of using such "outdated products" can only be placed with the user.

8.4.2 Causation and foreseeability

In addition to the plaintiff's production of evidence that the product was defective, the plaintiff must also prove that the injuries sustained were caused by the defective product and that the injuries are of a kind that would foreseeably be caused. Determination of whether causation exists is normally found via the so-called "but for" test, meaning that causation is only established if the injuries would not have been sustained had the product not been defective. This test normally does not give rise to difficulties. The standard of foreseeability is a much more difficult standard to work with. Whether the sort of injuries sustained were foreseeable is judged on a case-by-case basis where the injuries proven in the present case are compared to an artificial set of "standard injuries" that would normally be expected in similar cases. Understandably, such comparison will always be theoretical

[41] If the legislation or other public regulation has set standards for instructions or warnings, such standards must - as a minimum - always be met to make the product non-defective.

in nature, and due to the great varieties in fact patterns, no standards can be established.[42]

8.5 Which types of losses can be compensated for?

8.5.1 Introductory remarks

The starting point when the compensation has to be determined is simple: The victim claims compensation for the losses he or she sustained as a foreseeable consequence of the damages caused by the defective product. This doctrine which is well known in most legal systems will however in the United States often lead to a valid claim for types of compensation that are not known in most other countries. In addition to this, the size of the compensation in the United States often turns out to be of a much larger amount than what is known in most other countries. In brief, the most significant difference between US product liability and product liability in most other countries is found in the rules surrounding the compensation. Not surprisingly, it is indeed these differences that have given rise to most interest among lawyers and in the news media. Most readers will remember stories in the news media pertaining to court cases where damages in the size of millions of dollars had been claimed. The following description will shed light on the differences via examples from court cases. The conclusion is that the picture often drawn in the news media regarding the astronomical damages awarded in the United States is far from the reality. In the real world, the damages that are awarded are indeed of larger amounts than in most other countries. However, these damages are not out of proportion when the only scarcely developed social compensation system in the United States is taken into account. The very large monetary damages often referred to in the press are rarely found and only awarded in cases where the producer or seller has acted in a fashion that is strongly disdainful. Therefore, the product liability laws of the United States should not in itself form a hindrance for export to this market.

What most significantly distinguishes the United States' rules on damages from the rules in most other countries is the widespread possibility in the United States to obtain compensation for the so-called non-financial losses. Compensation for non-financial losses fall in two groups, namely compensation for bodily injuries in the form of pain and suffering, mental problems, anger, anguish and the like, and the so-called punitive damages that have a more penal than compensatory function.[43] The following coverage is naturally split in three subchapters, namely one on compensation for financial losses, one on compensation for non-financial

[42]The majority of legal systems in the world contain similar requirements to the plaintiff's proof of causation and foreseeability. It should be pointed out that in most cases the two standards do not give rise to difficulties. Focus is usually on determination of whether the product was defective or not.

[43]Punitive damages are described in detail in chapter 8.5.4. As it will appear from this chapter, the risk of being met with a valid claim for payment of punitive damages is limited to situations where the defendant has acted grossly negligent, wantonly or willfully.

losses and one on punitive damages. The coverage includes examples taken from first instance jury decisions.

8.5.2 Compensation for financial losses

The types of losses where the monetary value can be determined via invoices or via simple calculations are naturally the most simple to handle. These types of losses typically cover things such as hospital bills, medicine, compensation for damaged clothing, and compensation for damages caused to assets belonging to the injured person. Provided the plaintiff can prove that losses of the kind just mentioned have occurred as a foreseeable consequence of the use of the defective product, such damages can rightfully be claimed. The legal rules within this area follow norms that are accepted in most other legal systems such as for example the EU convention on product liability.

Compensation for financial losses also includes compensation for lost future earnings. In cases where the injured person has sustained such injuries that he is unable to work for a long period of time, the damages are bifurcated, namely in one fork covering the time period up to the judgment and one fork covering future losses. The financial value of the latter fork must of course be determined based on an estimate of the injured person's expected future income. In almost all cases, this compensation exceeds what is usually found in almost all other countries. This is due to the fact that the compensation is estimated at the expected factual earnings which the injured person would have had without any reduction for taxes that would have been paid. In cases where the injured is deceased as a consequence of the accident, the deceased's heirs are allowed to "step into the shoes of the deceased" and claim damages to compensate the income of which the deceased would have contributed to the heirs had the accident not happened.[44] In calculating this compensation, most states' legal systems contain rules under which the deceased's expected income will be reduced by the fraction he or she would have used on his or her own matters. Insurance schemes entered into by the injured person, the deceased person or the heirs are irrelevant when determining the size of the damages. In other words, if for example an injured person has established an insurance scheme under which he will be paid his wages for a certain period of time during which he is unable to work, this person will often find himself in a situation where he benefits financially from the accident in that he will receive both his insurance compensation and damages covering the lost wages.

[44]Such court case initiated by the heirs is called a "wrongful death action."

8.5.3 Compensation for non-financial losses

8.5.3.1 Pain and suffering

In many countries, compensation for pain and suffering is either unknown or calculated according to fixed standards and constitute small amounts. In the United States, the picture is totally different. Compensation for pain and suffering in the United States is normally fixed based on an expert witness' testimony regarding the sufferings the injured person has experienced and/or possibly will experience in the future. Also, if the injured person died as a consequence of the accident, compensation for pain and suffering will be determined based on the pain the deceased suffered from the time of the accident and until death occurred.

Due to the fact that the compensation is based on subjective criteria and not on the basis of a mathematical formula, the size of the compensation varies radically from case to case. It is indeed not possible to see any general trend. In addition to this, the compensation for pain and suffering is often combined with compensation for other types of losses, and accordingly it is even more difficult to see what part of the compensation covers pain and suffering. Certain states have enacted legislation setting maximum amounts for compensation for pain and suffering.

8.5.3.2 Other types of non-financial losses

In cases pertaining to product liability, it is often seen that the injured persons' relatives forward separate claims for loss of consortium or loss of parenthood during the time period when the injured person was ill. In cases where the personal injury was so serious that the injured person died, it also happens from time to time that the relatives of the deceased forward separate claims for compensation for loss of society and companionship. Especially, the first type of claims are rather common, and from time to time, substantial compensation is given.

8.5.4 Punitive damages

8.5.4.1 Introductory remarks

Punitive damages, which are penal in nature, are the type of damages which have attracted most discussion and the type of damages that have lead to great hesitation among importers to the United States when determining the risk of product liability in the United States. Punitive damages can – seen from a simplistic viewpoint - be defined as compensation which money-wise

exceeds compensation to cover the plaintiff's direct and indirect financial losses.

Punitive damages are imposed only on a defendant who is proven to have acted in an aggravated and grossly unreasonable fashion.[45] In other words, punitive damages are not a compensation for a financial loss but rather a punishment. The punitive element in the compensation has developed based on a theory that such punishment shall set an example for others. In other words, punitive damages are based on a point of view of prevention. This commingling of tort law and criminal law is unknown in most other countries. For example in the European Union, the phenomenon is only known in Ireland.

Many legends are told about punitive damages. However, a closer analysis shows that many of these stories or myths have very little similarity to the legal reality. The following subchapters contain an objective description of the use of punitive damages in court cases relating to product liability in the United States. The conclusion is that the risk to be found liable for payment of punitive damages is very limited, and that only exporters who have acted wantonly will be found liable for this type of damages. The very substantial amounts of damages that are often referred to in the news media are almost without exception reduced under appeal or the matters are settled afterwards for amounts much lower than those first awarded. [46]

8.5.4.2 Legislation in the United States pertaining to punitive damages

The debate pertaining to punitive damages and especially the warnings against the risk of being found liable for such damages, have resulted in many of the American states having implemented legislation that regulates the courts' use of punitive damages. A few states have imposed a total ban on the use of punitive damages. Approximately half of the states have enacted legislation that expressly limits the use of punitive damages to situations where the plaintiff can prove on an elaborate scale that the basis

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[45]Punitive damages are sometimes called "exemplary damages", "vindictive damages" or "punitory damages." Black's Law Dictionary, 6th Edition, 1990, describes punitive damages in the following fashion: "...Damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him..."

[46]In the news media, reference is often made to court cases where the plaintiff is awarded millions in punitive damages. Many persons will probably still remember the "Ford Pinto cases" from 1973 where Ford Motor Company was the defendant. In this matter, a plaintiff was awarded punitive damages in the amount of $125 million for damages caused by a defective gas tank installed in Ford's model Pinto. However, what is little known is that this substantial award was reduced to a much more meager amount of $3.5 million in the continued litigation after the first instance award.

for awarding punitive damages is established. The typical standard in these states is that the plaintiff shall produce clear and convincing evidence that the defendant via his conduct sets aside generally accepted standards for business conduct. The legislation in an increasing number of states sets limitations for the size of punitive damages varying from $250,000 to $5 million. A few of these states have furthermore enacted legislation that limits the size of the punitive damages to either two or three times the actual suffered financial losses. The legislation of eight states contains rules assuring that part of the punitive damages will be paid, not to the plaintiff but to public purposes. This type of legislation clearly shows the penal element in the use of punitive damages. Currently, initiatives are being taken in many states to further curtail the use of punitive damages. The trend in the legislation clearly shows an aim to limit the use of punitive damages.

8.5.4.3 The use of punitive damages in the United States

A milestone thesis published in the fall of 1992[47] should bring an end to the myth and anecdotes surrounding punitive damages. The results of the thesis are found by researching all published judgments pertaining to product liability since 1965. The results referred to above are all cited from the thesis which is the first of its kind to be published.[48] The conclusion of the thesis is presented as answers to a series of the points of views that within the most recent decade have been published pertaining to punitive damages.

- Point of view: The number of court cases where punitive damages are awarded is growing.
  Result: The number of such cases, absent from the asbestos litigation cases, have been reduced every year since the mid-1980's.
  Result: The number of court cases awarding punitive damages has decreased over the past decades.

During the time period 1965 up until and including 1990, punitive damages were awarded in 355 published court cases pertaining to product liability. 95 of these were asbestos cases. Aside from the asbestos cases, which are now a closed chapter in US legal history, the result is that 260 defendants in product liability cases were found liable for punitive damages over a period of 25 years. In the time period 1986-1990, punitive damages were awarded in 78 cases, corresponding to approximately 16 cases per year. The number

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[47]Michael Rustad, In Defense of Punitive Damages In Products Liability: Testing Tort Anecdotes Via Empirical Data. Iowa Law Review, October 1992, pages 1-88.

[48]Prior to 1992, a series of theses, albeit not so thorough as Rustad's, have been published showing the same results. See, Michael Sakx, Do We Really Know Anything About The Behavior Of The Tort Litigation System - And Why Not?, 140 U.PA.L.Rev. 1147 (1992) and David G. Owen, Punitive Damages In Products Liability Litigation, 74 Mich.L.Rev.1257 (1976) and United States Gen. Acct. Office, Report to the Chairman; Products Liability, Verdicts and Case Resolution in Five States. GAO/HRD - 89 -99 (September 1989).

of cases just referred to constitutes only a very small fraction of the thousands of cases pertaining to product liability that are decided every year.[49]

- Point of view: The size of punitive damages amounts to astronomical amounts.
  Result: The size of punitive damages is rather modest.

One of the thesis' results is that the size of punitive damages on an average scale is slightly larger than the damages given to compensation of direct and indirect financial losses. Another observation is that the (few) court cases, often referred to in the news media, where substantial punitive damages are awarded (amounts over $10 million) consist of less than 8% of the total number of cases where punitive damages are awarded. In addition, it is noted that such cases almost without exception are decided in first instance courts. In these cases, the amount of punitive damages is almost without exception reduced dramatically under a subsequent appeal or by the judge exercising his or her right to set aside the jury's decision when it is not in reasonable accordance with legal praxis. Reduction of the size of punitive damages takes place in more than 90% of all cases, and the final compensation is on average reduced to around 10% of the amount awarded in the first instance.[50]

Such decisions where the amount of punitive damages is reduced are usually not referred to in the news media. Furthermore, practice is that the size of punitive damages is determined partly based on the defendant's ability to pay. Thus, the situation where large damages are awarded is typically found in cases against multi-million dollar defendants (historically typically car producers) that have acted in a wanton or wicked fashion.[51]

- Point of view: Punitive damages are often awarded in matters where the harm to the plaintiff was minimal.
  Result: The plaintiff in matters where punitive damages are awarded has always suffered very serious harm or they died as a consequence of the harm caused.

One of the thesis' results is that the plaintiffs in 27% of all matters where punitive damages were awarded died as a consequence of the harm caused. 33% of the victims were totally disabled for life, 36% were partly disabled for life and 4% were temporarily disabled.

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[49]Rustad, page 38 and following.

[50]See Rustad, pages 54-58.

[51]Rustad, page 77, makes reference to the size of the largest punitive damages awards against car producers compared to the economical value of these car producers. The largest punitive damages award given is the award amounting to $3.5 million in the Ford Pinto case described above in footnote 19. The $3.5 million corresponded to 0.016% of the value of Ford Motor Company.

- Point of view: Producers and sellers of products are innocent victims in cases where punitive damages are awarded.
  Result: The reality is totally opposite. The plaintiffs are victims of producers and sellers that have acted in a wanton or wicked fashion.

The part of the thesis that has lead to the result just referred to is concentrated on the defendant's subjective standards. In other words, to which degree of negligence the defendants' had exposed themselves. The first very important result is that punitive damages are never awarded in matters where the plaintiff has not produced evidence showing that the defendant acted negligently. Furthermore, the results show that in all cases where punitive damages were awarded, the defendant's conduct was of a nature corresponding to at least gross negligence. The most common situation was that evidence was produced showing that the defendant knew that the products were dangerous, and that the defendant, despite this knowledge, had chosen not to change the product's design or to issue adequate warnings.[52] In many cases it furthermore appeared that the defendant had not followed safety standards imposed by the legislation. In other cases (typically within the medicine industry), it appeared that the producer had introduced the damaging product into the marketplace knowing that the product was not sufficiently tested.[53]

The conclusion of the thesis is that a defendant is - almost without exception - only found liable for punitive damages if the plaintiff can prove that the defendant had knowledge of the product's defect and did not take steps to issue adequate warnings or the defendant had such knowledge without changing the product's design so that it was safer to use.[54]

8.5.4.4 Conclusion on punitive damages

In the majority of the American states, punitive damages may under certain circumstances be awarded. Such damages, however, are only awarded in

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[52]Such evidence, typically in the form of internal reports or correspondence, is in the United States often referred to as "smoking guns."

[53]One example pertaining to such "race to the market" of a product is found in the cases regarding the so-called Dalkon Shield, a birth control device used by over 2.2 million American females in the early 1970's. It proved afterwards that the producer who had marketed the product as "modern, superior and safe" knew that one component of the product was designed in such a fashion that it allowed bacteria to enter the body of the user of the product. Despite this knowledge, the producer marketed the product without further testing. Many females suffered serious illness due to infections. 52 court cases were launched against the producers, and in approximately one fourth of these cases (all where the plaintiff had suffered very serious consequences of the infection), punitive damages were awarded. As an example, see Tetuan v. A.H. Robins, 738 P 2nd 1210 (1987).

[54]Rustad, page 73.

cases where the plaintiff has produced clear and convincing evidence that the defendant acted wantonly, typically that the defendant had direct knowledge of the dangers of the use of the product without changing the product or issuing adequate warnings. Thus, punitive damages are very rarely awarded in cases where the defendant has followed generally accepted business standards. Furthermore, punitive damages are from a practical point of view never awarded in cases where the basis of liability is strict liability in tort. The number of cases where punitive damages are awarded is extremely small compared to the total number of cases pertaining to product liability. The amount of punitive damages awarded in these cases is almost without exception of approximately the same size or smaller than the damages awarded for direct and indirect financial losses. Cases involving punitive damages in the million-dollar size are very rare. Such large damages are sometimes awarded in first instance in jury cases. However in such situations, the size of the damages is almost without exception radically reduced in the following appeal or settlement. The few cases where million-dollar awards are given are all cases where the defendant has acted in a wanton or wicked fashion, and where the defendant is a multi-million dollar business.

8.6 General liability insurance, including product liability insurance

In all situations where the activities in the United States involve the sale of goods or services it is imperative that adequate general liability insurance, including product liability insurance, if applicable, is established from the time when the products or services are being sold in the United States. The situation is often that the insurance coverage established by the Nordic parent company covers the company's affiliated entities outside of the Nordic country. However, it is often the case that the Nordic insurance policy excludes coverage in the United States. Thus, it becomes a crucial question to which extent the Nordic insurance carrier will accept to include the American subsidiary or branch under the parent company's "umbrella coverage".

It is the author's experience that many European insurance companies for many years have been willing to include the U.S. activities under the general liability coverage. However, the notion has recently occurred among some insurance companies that it is illegal for these insurance companies to cover activities in the United States via an "umbrella coverage" under the policy established with the Nordic parent company. Such notion is not accurate: The American Federal Supreme Court has for decades reiterated that it is legal for a foreign insurance company to insure activities in the United States provided that the insurance policy is established with an entity not domiciled in the United States. In other words: In most situations where a Nordic parent company has established general liability insurance, including product liability insurance, it is legal for the European insurance company to expand its coverage to cover the activities carried out in the United States via a branch or a subsidiary of the Nordic parent company.

An alternative to obtain "umbrella insurance coverage" is of course to have the American subsidiary or branch obtain insurance directly through an

American insurance company. It is the author's experience that it is often cumbersome to obtain such coverage in that it will often be difficult for the American subsidiary to show any historic facts in regard to its activities in the United States. Thus, it will normally require substantial internal resources to obtain such general liability insurance and the premium will often be higher than that of regular market rates. Thus, it is the author's general recommendation to attempt to obtain coverage through the Nordic parent company's insurance carrier.

There seems to be little conformity in the different insurance companies' determination of the insurance premium. It is the author's belief that this is a consequence of different notions among the insurance companies in regard to the risk of being met with a product liability claim in the United States. In order to negotiate the best possible premium, it is the general advice that the company demonstrates proof to the insurance carrier that reasonable precautions are taken to minimize the risk of being met with a product liability claim. Such precautions should – among other things – include a thorough preparation of warnings and instruction manuals, the establishment of a quality control program, the establishment of routines to handle claims brought against the company, and production of statistical material showing which claims have historically been brought against the company regarding defective products and other types of liability.

8.7 How to minimize the risk of product liability

As it was seen from the statistical information referred to in chapter 8.2 above, the type of defects that trigger product liability mainly concern alleged design defects and alleged warning and instruction defects. The following pages contain some advice on how the defect standards are met. Provided such standards are met, there are no grounds for a product liability claim. Thus, by always striving to meet the standards, the risk of being successfully sued on theories based on product liability is minimized.

8.7.1 Manufacturing defects

Based on the statistical fact that less than 10% of all cases pertain to alleged manufacturing defects, it appears that sufficient precautions are normally taken in regard to these types of defects. According to the author, this is particularly true for products produced by exporting producers. Consequently, it is the author's point of view that this group of defects is of little interest.

8.7.2 Design defects

Design defects are not based on any objective standard. On the contrary, the standard "a design defect" is based on legal theories that a product should never be more dangerous to use than what the user could reasonably expect.

For certain product groups, the standards have been set. Such standards must of course be followed, but this is not always enough to escape liability. The standards are set by the market itself. This means that the standards set by legislation only form the "lowest standard" for the product. The market and "court practice" may have set higher standards. Also, standards are formed based on approvals by non-governmental institutions such as approval by underwriter laboratories. Such standards do not bind the courts. The courts, however, have a strong tendency to follow such standards.

The producer should always take the following precautions:

- Compare the product with competitive products on the market and make sure that the product is at least as safe to use as the competitors' products. Such comparison should always be done prior to the time when the product is brought into the stream of commerce.

- Conduct thorough research with regard to safety standards. Remember to research both possible federal regulations and state regulations in the states where the product is expected to be sold. Such research should be conducted prior to the time when the product is brought into the stream of commerce.

- Conduct design reviews regularly, for example two times per year.

- Appoint one or more persons in the organization to be in charge of the design control. Make sure that such persons have established a good way of communicating with representatives for the departments of development, production, sales and marketing. It is of little help that the design control people find a design defect if such defect is not being remedied.

- Always make sure to maintain written documentation of the design control.

- Remember that, in addition to the reduced risk for product liability, it is always more economical to make a correction to a product prior to the time when the product is launched into the market than to make such changes after the product is on the shelves.

8.7.3 Lack of safeguards

This group of cases is indeed a subgroup pertaining to design errors. The group is specifically targeted against industrial machinery. Regarding precautions to be taken, reference is made to chapter 8.2 above.

8.7.4 Warning and instruction defects

According to the theories of strict liability in tort, the producer has an obligation to warn the user of risk of bodily injury which can be a consequence of the intended use of the product and the foreseeable misuse of the product.

The producer should always take the following precautions:

- Compare the warning and instruction labels of the product with warning and instruction labels used on the competitors' products. Make sure that the instructions and warnings are just as detailed and thorough as what is found on the competitors' labels. Such comparison should always be made prior to the time when the product is brought into the stream of commerce.

- Conduct thorough research with regard to possible rules for warnings and instructions pertaining to the type of product in question. Remember to research both possible federal regulations and state regulations in the states where the product is expected to be sold. Such research should be conducted prior to the time when the product is brought into the stream of commerce.

- Make sure that the warnings fulfill the standards set by the American National Standard Institute (ANSI), and other applicable standards.

Appoint a person or persons to be responsible for the instruction and warning labels. Such persons should represent the departments of development, production, sales and marketing.

- Make sure that all instructions and warnings are written in 100% correct American English. Make the language simple and easy to understand. Also, consider whether the labels should be printed in other languages other than the American language. Certain product groups are often used by persons who read little or no American English. This is for example the case with gardening tools and fertilizers which are often used by Mexican farm or garden workers.

- Make sure that the instructions particularly describe the correct use of the product and also emphasize what the product should not be used for. In other words, describe and warn against foreseeable misuse.

- Conduct reviews within certain intervals, for example two times per year.

- Always make sure to maintain written documentation of the instruction and warning control.

8.8 Precautions when a claim has been brought

Even the most prudent producer is at risk of being met with a claim pertaining to product liability. If such a claim case is launched, the case may be brought to an end quickly, or the award may be minimized by efficient and serious handling of the claim. The following actions have proven efficient:

- Make sure always to have established a procedure ensuring that claims (both written and via the telephone) are directed to a special department that has experience in handling such matters. It can be disastrous if the "wrong" person answers the phone and states "Oh yes, we have often had claims of this type".

- Make sure that the department handling claims is instructed to draft claim reports in such a form that the contents of the reports cannot be used against the producer in a subsequent court case. In other words, avoid "smoking guns" in the internal reports. Such "smoking guns" can for example be in the form of admissions pertaining to defects or references to prior complaints.

- Make sure that the complaint is given immediate attention. The complaint should be communicated to the persons responsible for design development and for warnings and instructions. Communicate back to the complainant as soon as possible. A telephone call or a letter from the president of the company will often impress the complainant and lead to a better settlement. Again, as mentioned above, avoid the "smoking guns".

- Provided that the case is not settled immediately, make sure that the case is reported to the insurance company.

- Stay actively involved in the insurance company's handling of the case. No other person than the producer is in a better position to judge the case. Specifically, the producer is in the very best position to judge the information received regarding the damage and the contents of reports prepared by the complainant's experts.

- Arrange an initial meeting with the complainant and/or the complainant's attorney. In the course of such a meeting, important information can be gathered. This in turn forms the basis for a possible early settlement, and substantial costs can be avoided.

- When hiring an attorney to handle the matter, make sure to set up an initial meeting with the attorney. Have the attorney provide documentation that he or she is experienced in handling product liability

matters. Make sure that a fee agreement is established and make sure that the attorney will constantly and loyally provide information about the matter.

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