



Over opinions, Een onderzoek naar de zorgplicht van de gever van een  
Nederlandsrechtelijk legal opinion

*J.M. van Dijk*

## Summary and conclusions

This book can be summarised as follows.

- Chapter 1 describes what an opinion is. In a general sense, an opinion is the opinion of an expert. This book, however, is about a certain type of opinions only. In this book, an opinion is (a) an opinion by an appropriately qualified legal expert, (b) on a certain legal situation or legal relationship, (c) whose substance, and oftentimes whose form, is customary in practice. Opinions in this sense are customary in the financial sector, in particular where financing is extended, whether in the form of bonds or shares or otherwise. The legal expert who gives the opinion is the opinion giver. He can be a lawyer (*advocaat*), a civil-law notary (*notaris*) or an in-house lawyer. If the legal expert is a lawyer or civil-law notary, his opinion is usually given in the name of the firm where he works; in that case, the firm is the opinion giver. The opinion is addressed to the financiers in question or, if the financing takes the form of bonds or shares, to the banks which are assisting the issue. Every addressee, and any other person whose reliance on the opinion is permitted by the opinion, is an opinion recipient. A Dutch law legal opinion typically relates to entry into a legal relationship by a legal person under private law provided for in Book 2 of the Civil Code (*Burgerlijk Wetboek*) or a general partnership (*vennootschap onder firma*, a "VOF") or a limited partnership (*commanditaire vennootschap*, a "CV"). The legal person or VOF or CV is the opinion company. The legal relationship which is the subject of the opinion is typically a contract, which would include a bond, or a security interest or a share. The addressees of the opinion request the opinion to gain an insight into the legal risks attaching to that legal relationship. The opinion giver provides that insight by applying the law covered by the opinion to the opinion company and that legal relationship. The opinion he derives from this is set out in the "opinion paragraphs". To the extent that the opinion is rooted in facts which were not established by the opinion giver personally, he assumes their existence in "assumptions". To the extent that the opinion is not unreservedly correct, he will include any necessary refinements in "qualifications".
- Chapter 2 highlights the duty of care of an opinion giver. (See also the description of Chapter 5 below in relation to Chapter 2.) Before asking what that duty of care is, it is necessary to determine which law applies to that duty of care. That law is not necessarily the law to which the opinion relates. However, the opinion given in the legal opinion will inevitably have the significance accorded to it under that law. The duty of care of an opinion giver who gives an opinion to a party other than his client – a third party opinion – is rooted in tort. Alternative approaches – the duty of care stems from (a) a third party clause in the contract between the opinion giver and his client, (b) a contract between opinion giver and opinion recipient, (c) benevolent intervention (*negotiorum gestio*) or (d) reasonableness and fairness – must be rejected. Which law is applicable to a tort is

determined by the Rome II Regulation.<sup>1</sup> The duty of care of an opinion giver who gives an opinion to his client – a client opinion – is rooted in the contract between the opinion giver and the client, and possibly in tort. Which law is applicable to that contract is determined by the Rome I Regulation.<sup>2</sup> In practice, a Dutch opinion giver will include in his opinion a choice of law, the object of which is that his liability, irrespective of whether it is rooted in contract or in tort, is governed by Dutch law. In accordance with the Rome I Regulation and the Rome II Regulation, the opinion recipient is bound by such a choice of law. In addition to the choice of law, an opinion giver will often include in his opinion a choice of forum for the Dutch courts. In most instances, the opinion recipient is also bound, in application of the Brussels I Regulation,<sup>3</sup> by such a choice of forum. Under Dutch law the duty of care of an opinion giver requires that he gives the opinion with the care of a reasonably proficient and reasonably acting colleague. That holds true irrespective of whether the opinion is a third party opinion or client opinion. The opinion giver gives his opinion pursuant to an agreement of instruction with his client (or, if the opinion giver is an in-house lawyer, usually in accordance with his employment contract with his employer). In the case of a client opinion, that agreement can imply that the opinion giver must exercise either less or more care towards the opinion recipient than he must exercise in the case of a third party opinion. An opinion giver who gives a third party opinion must ensure that in giving the opinion he does not violate the duty of care he continues to have to that client under the agreement. If the opinion giver is confronted with an irreconcilable conflict of interests, he may not give the third party opinion. As the instructing party, the client of the opinion giver has the authority to give directions which the opinion giver must observe when he gives his opinion – whether that be a client opinion or a third party opinion. That authority has little practical significance. The content of the opinion giver's duty of care is largely determined by customary opinion practice. Special circumstances may require divergence from customary opinion practice. The objective of an opinion is to give the opinion recipient an insight into the legal risks attaching to the legal relationship which is the subject of the opinion. These risks can be differentiated into (a) the risk that the legal relationship which is the subject of the opinion is not fully enforceable, (b) the risk that entering into or performing that legal relationship may have onerous legal consequences for the opinion company and (c) the risk that entering into or performing the legal relationship may have onerous legal consequences for the opinion recipient. Researching all of those risks would be costly. Identifying which risks to examine and what research this should entail requires deliberation, taking into account the circumstances of the case. That deliberation, including the choice of which circumstances must be considered and what weight they are given, can be based on three benchmarks: (a) the objective the opinion recipient aims to achieve with the opinion – in other words, the insight the opinion can give the opinion recipient into the legal risks

---

<sup>1</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II).

<sup>2</sup> Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>3</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

attaching to the legal relationship which is the subject of the opinion, (b) the work that the opinion must and can do to provide such insight, and (c) the costs associated with that work. The benchmarks do not replace the rule that the opinion giver's duty of care is determined by the circumstances of the case; they merely act to add granularity to that rule. The first two of these three benchmarks can be fleshed out. Pinpointing the particular insight the opinion recipient wishes to gain from the opinion – the first benchmark – requires the opinion giver to reflect on (a) what the probability is that the risk will manifest itself, (b) what the consequences will be if a risk manifests itself, (c) whether the risk can be avoided, (d) whether reassurance about a risk can be obtained from means other than an opinion, and (e) whether the opinion giver is already aware of the risk. In order to determine the work the opinion giver must and can do in order that the opinion achieves its objective – the second benchmark – the opinion giver must at least ascertain (a) the minimum work necessary to give the opinion content; this will create the foundation for his work, (b) what other work he can do to perform his duty of care, and (c) where the boundary lies for the work that can be requested of him as a legal adviser. For the customary opinions, these deliberations have culminated in customary opinion practice. The deliberations focus on an "informed opinion recipient": an opinion recipient who has broad experience in the practice of opinions or who is assisted by an experienced legal adviser. What constitutes an informed opinion recipient can vary, depending on whether the opinion recipient is Dutch or foreign. Because the research done by the opinion giver determines what opinions he can give in his opinion, customary opinion practice plays a role in determining how standard elements of an opinion must be interpreted. Interpreted thus, the opinion must (a) give the opinion recipient a proper insight into significant legal risks attached to the legal relationship which is the subject of the opinion, and (b) offer a sound basis for minimising the chances of those risks occurring. With that in mind, the opinion must be (a) understandable – clear and in plain language, (b) relevant – free of risks that are of no significant importance, and (c) precise – but not necessarily exhaustive. The opinion may not suggest an opinion that the opinion giver does not actually hold, may not suggest research that the opinion giver did not conduct and may not suggest that facts are other than the opinion giver knows or ought to know. In all cases, customary opinion practice requires that an opinion is given with a high level of care. But the height at which the bar is set does not alter the fact that an opinion is not a guarantee or insurance. An opinion, even if given with the required level of care, can nonetheless be incorrect. If an incorrect opinion is not given with the required level of care, the opinion giver is liable for the resulting damage suffered by the opinion recipient, in accordance with normal liability rules. If the opinion giver is a firm, the liability of the lawyer or civil-law notary who signed the opinion cannot be ruled out. However, that is not the preferred approach.

- Chapter 3 discusses the opinion-giving process. Who gives the opinion – the legal adviser of the opinion company or the legal adviser of the opinion recipient, sometimes both or sometimes each providing a part – varies from country to country. The practice in the Netherlands is flexible. Often two opinions are needed: one opinion on the law

governing the opinion company and one opinion on the law governing the legal relationship the opinion company enters into. In complex cases involving several countries, several opinions may be necessary. The opinion giver must consult with the opinion recipient to determine the scope and precise content of each opinion. Those consultations must be conducted with professional goodwill. The opinion giver ought not to refuse to give an opinion which he would have requested had he been acting as the legal adviser for the opinion recipient. The opinion recipient ought not to request opinions which his legal adviser would not have given had he been the opinion giver. Most firms which give opinions base them on their own opinion templates. The opinion recipient should respect this. In practice, the opinion is given at the "signing" or "closing" of the legal relationship which is the subject of the opinion (or at both). It can be desirable, for practical reasons, that the opinion be provided "in escrow", prior to the signing or closing. The opinion is then deemed to have been issued as soon as the opinion giver has confirmed it to be the case.

- In Chapter 4, the framework of the opinion is discussed. In practice the opinion takes the form of a letter, addressed to the opinion recipient/addressee. The date of the letter is the date on which the opinions given in the opinion must be correct. The framework provides the context within which the opinion giver gives his opinion. It indicates for whom he is acting – the opinion company or the opinion recipient – and the opinion company and legal relationship to which the opinion relates, and contains the customary choice of law and choice of forum. The "reliance paragraph" included in the framework determines (a) who, in addition to the opinion recipient/addressee, may rely on the opinion, and (b) to which persons, in addition to the opinion recipients, the opinion may be disclosed without their being permitted to rely on it. In practice, this circle of persons has expanded considerably. The opinion is signed by the opinion giver, sometimes simply using the name of the firm.
- Chapter 5 examines the heart of the opinion in general: the description of the fact-finding research performed by the opinion giver, the assumptions, the opinion paragraphs and the qualifications. These four elements together form a collective whole. The fact-finding research includes legal research. This is not commonly described in an opinion. The legal and fact-finding research is discussed in Chapter 2. The fact-finding research is considered in further detail in Chapter 5. The legal research must cover all rules of Dutch national law, including directly effective European and international law, which at the outset are not unlikely to be relevant for the purpose of the opinion. Competition law is disregarded. Rules of law which are no longer in force must be included in the research, insofar as they have a bearing on the opinions given in the opinion. Generally speaking, future rules of law need only be researched if they have been announced in the Bulletin of Acts and Decrees (*Staatsblad*) or the Dutch Government Gazette (*Staatscourant*). The fact-finding research which the opinion giver must perform is limited. He must set out what the "requested facts" are: the facts as they should be, if the opinion is to be correct. The requested facts comprise all "beneficial" facts: facts that are necessary to give rise to

a legal consequence which is covered by the opinion. The opinion giver need only consider "adverse" facts – facts which stand in the way of achieving a legal consequence or which reverse that legal consequence – to the extent that a good opinion giver would recognise their potential importance for the opinion. The opinion giver need only determine what the actual facts are, to the extent that such determination requires legal expertise. In practice, the fact-finding research by the opinion giver is typically limited to (a) studying documents, in particular the legal relationship which is the subject of the opinion, and the Articles of Association (or comparable arrangement) and internal resolutions adopted by the opinion company, (b) consulting the Trade Register, the Insolvency Register and the European terrorist lists, and (c) in some cases consulting the register under the Financial Markets Supervision Act (*Wet op het financieel toezicht*) or a shareholders' register. The opinion giver must interpret the documents he studies by their semantic meaning. He can forego research of foreign law that is relevant for the interpretation of a document. The opinion giver may rely on statements from the opinion company or a person within the opinion company only if he is satisfied that the signatory of the statement understands what the statement says and can know that it is correct. In the assumptions, the opinion giver assumes the requested facts whose existence he has not personally established. Facts which require a legal opinion, including such facts relating to the opinion company's opposite party, can sometimes also be assumed. In the qualifications, the opinion giver includes the exceptions to the opinions given in the opinion paragraphs. There is no clear dividing line between assumptions and qualifications. Assuming a fact (or the absence thereof) in an assumption can render a qualification redundant, and vice versa. Finally, Chapter 5 discusses a single customary assumption and two customary qualifications: (a) the "authenticity" assumption, in which the opinion giver assumes that he has not been deceived (which the opinion giver may in any event take as a given), (b) the "bankruptcy" qualification, which states that the opinions set out in the opinion paragraphs are limited by rules of insolvency law and other rules that are applicable where there is a collision of creditors' rights, and (c) the "no opinion" qualification, in which the opinion giver indicates which subjects remain beyond the scope of his opinion.

- Chapters 6-12 are difficult to summarise. The value of those chapters lies not in main points that can be enumerated in a summary, but in the details discussed in the chapters. Chapters 6-12 contain a discussion of customary opinion paragraphs. Each discussion starts by explaining the meaning of the opinion paragraph in question. This is followed by an explanation of the rules of law which are important for the purpose of the opinion paragraph. Rooted in that explanation is an answer to the question of which fact-finding and legal research the opinion giver must perform in order that the opinion given is sound, and what assumptions and qualifications he must or can include. Where the question of research requires deliberation on the part of the opinion giver, that deliberation has been made on the basis of the benchmarks and further refinement contained in Chapter 2 on the one hand and customary opinion practice on the other. Generally speaking, customary opinion practice can stand up to assessment against the

three benchmarks and the refinement. Where customary opinion practice appears to be lacking or in the occasional event of derogation from customary opinion practice, the actual practice is examined critically. Chapter 6 relates to the customary "capacity opinions": the opinion paragraphs which relate to the opinion company and to its validly entering into the legal relationship which is the subject of the opinion. This concerns (a) the "incorporation opinion" (for a legal person) and the "formation opinion" (for a VOF or CV), each of which state that the opinion company has been incorporated and exists, (b) the "corporate power" opinion, which states that the opinion company has the authority to enter into the legal relationship to which the legal opinion relates, (c) the "corporate action" opinion, which states that the opinion company has adopted the internal resolutions and taken the other internal steps necessary to enter into that legal relationship, and (d) the "validly signed" opinion, which states that the opinion company has validly entered into the legal relationship. Chapters 7-10 relates to customary enforceability opinions: the opinion paragraphs relating to enforceability against the opinion company of the legal relationship which is the subject of the opinion. This concerns (a) the "remedies" opinion, which typically states that the legal relationship, or the choice of law contained in it, is enforceable against the opinion company, (b) the "pari passu" opinion, which states that the payment obligations of the opinion company arising from the legal relationship have at least the same ranking as its other obligations (both Chapter 7), (c) the "valid security" opinion which, if the object of the legal relationship is to establish a pledge (*pandrecht*) or mortgage (*hypotheek*), states that the pledge or mortgage in question is enforceable (Chapter 8), (d) the "validly issued" opinion which, if the legal relationship is a share, states that the share in question has been validly issued and is fully paid up (Chapter 9), (e) the "jurisdiction" opinion, which states that a choice of forum contained in the legal relationship is enforceable against the opinion company, (f) the "enforcement of judgments" opinion which, if the chosen forum in the legal relationship is a foreign court, states the extent to which a decision by the chosen court is enforceable in the Netherlands, (g) the "arbitration and enforcement of arbitral awards" opinion, which states that a choice for arbitration in the legal relationship is enforceable against the opinion company and that a decision by the chosen arbitral tribunal can be enforced in the Netherlands, and (h) the "no immunity" opinion, which states that the opinion company and its property do not enjoy immunity under international law (all Chapter 10). Chapter 11 concerns customary "diligence opinions": the opinion paragraphs which relate to the potential onerous consequences of the legal relationship which is the subject of the opinion for the opinion company or another party. This concerns (a) the "no violation of law" opinion, which states that entering into that legal relationship is not contrary to the law or the Articles of Association (or a comparable arrangement) of the opinion company, (b) the "no licences" opinion, which states that entering into the legal relationship does not require the opinion company to obtain any government consents, (c) the "no registration" opinion, which states that entering into the legal relationship does not require any registration or filing with any governmental body, (d) the "no adverse consequences" opinion, which states that entering into the legal relationship by the opposite party to the opinion company is not impeded by Dutch law,

and (e) the "prospectus" opinion, which, if a prospectus is published when entering into the legal relationship, states that descriptions in that prospectus of Dutch law or the Articles of Association of the opinion company are correct. Chapter 12 discusses two tax opinions: (a) the "stamp duty opinion", which states that the legal relationship which is the subject of the opinion will not lead to chargeability of Dutch documentary taxes, and (b) the "withholding tax" opinion, which states that payments by the opinion company under that legal relationship are not subject to Dutch withholding tax. Other tax opinions, given by tax advisers, are beyond the scope of this book. Chapter 13 indicates four points on which, owing to requirements imposed by the United States Securities and Exchange Commission (SEC), opinions given when securities are registered with the SEC tend to derogate from the opinions typically given on securities.

Chapter 2 in particular lends itself to drawing a number of general conclusions.

- A first conclusion is that the work of an opinion giver is not fundamentally different from the work done by a lawyer – or civil-law notary or in-house lawyer. An opinion is a legal opinion and no more than that. At most, what is exceptional about giving an opinion is that an opinion giver must do his work with a high level of care. However, a lawyer's other work can also require a similarly high level of care. In accordance with the general rule that the duty of care of a legal adviser is determined by the circumstances of the case, the circumstances can require such a high level of care. Consider the work that a civil-notary must do in preparing a notarial deed.
- A second conclusion is that for customary opinions, customary opinion practice is the guiding principle for the care with which the opinion giver must do his work. Customary opinion practice is the culmination of many years of experience of seasoned lawyers in customary opinion practice. Customary opinion practice has enabled opinions to be standardised to a large degree. That standardisation has reduced the costs of opinions. If the guideline of customary opinion practice is abandoned, an opinion giver will constantly have to ask himself whether he should be exercising greater care than customary opinion practice demands of him. Answering that question, and the work that is required if the answer is affirmative, would push up costs. Nobody would gain from that. A consequence of the prevailing role of customary opinion practice is that an opinion recipient who would have been alerted to a limited risk if a higher level of care had been exercised, will bear the risk if that risk coincidentally manifests itself. The consequences of that risk can be considerable and run into hundreds of millions of euros. However, it is fairer if those consequences are for the opinion recipient, who will be party to the legal relationship which is the subject of the opinion, and will therefore also have the potential profit, than if they are for the opinion giver who gives his opinion for a limited fee – several thousands of euros.
- A third conclusion is that as a basic premise, client opinions and third party opinions must be treated equally. The duty of care of an opinion giver who gives a third party opinion is

restricted to giving his opinion, having regard to the care of a good opinion giver. The opinion giver who gives the client opinion can have a broader duty of care. He may have to advise the opinion recipient-client on questions connected to the opinion, in particular on the scope which the opinion must have and on the meaning of the opinion. However, in most cases, the circumstances in which client opinions and third party opinions are given are comparable. In particular, the opinion recipient is typically an "informed opinion recipient": an opinion recipient who has broad experience in customary opinion practice or who is assisted by an experienced legal adviser. In practice those comparable circumstances imply that in accordance with customary opinion practice, opinion givers exercise the same duty of care when giving client opinions as that exercised when giving third party opinions. And that is permitted. If an opinion giver who gives a client opinion must exercise more care, he can be held liable for any lack of care on that point outside the opinion.

- A fourth conclusion is that the importance of an opinion is overestimated. In practice, the giving of opinions is held in a certain awe. There is no reason for that. An opinion does nothing more than set out a number of legal risks which attach to the legal relationship which is the subject of the opinion. However, an opinion recipient who is properly advised is alerted to those risks in any event – by the opinion giver in the case of a client opinion or by his own legal adviser in the case of a third party opinion. The opinion merely offers him a clear framework within which the risks are enumerated, possibly with a little more care, because an opinion must be given with a high level of care.
- A fifth conclusion is that an opinion could be a lot shorter. The average opinion, even in a simple case, covers many pages, containing lengthy enumerations of examined documents and assumptions and qualifications. That is not necessary. Where the duty of care of an opinion giver is determined predominantly by customary opinion practice and the opinion recipient (or in any event an "informed opinion recipient") is familiar with that practice, the usefulness of including such enumerations is at the very least questionable. That is the case, in any event, if the opinion recipient is Dutch. If the opinion recipient is foreign and consequently unfamiliar or less familiar with Dutch customary opinion practice, it may be wise to draft a rather more detailed opinion. However, more detail is not necessary where, as is the case on many points, Dutch customary opinion practice follows international practice.