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Good Practice Principles for Cross-Border Closing Opinions

The Legal Opinion Committee of the Business Law Section of the American Bar Association

IBA Banking & Financial Law Committee

The International Bar Association (IBA), established in 1947, is the world's leading international organisation of legal practitioners, bar associations, law societies, law firms and in-house legal teams. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 lawyers, 190 bar associations and law societies and 200 group member law firms, spanning over 170 countries. The IBA is headquartered in London, with offices in São Paulo, Seoul, The Hague and Washington, DC.

About the IBA Legal Practice Division (LPD): The objectives of the Legal Practice Division are to promote an interchange of information and views among its members as to laws, practices and professional responsibilities relating to the practice of law throughout the world; to facilitate communication among its members; to provide the opportunity to all its members to be active in the division through its sections, committees, fora and other groupings; and to undertake such related projects as may be approved from time to time by the division's council.

About the American Bar Association: The ABA was founded in 1878 on a commitment to set the legal and ethical foundation for the American nation. Today, it exists as a membership organization and stands committed to its mission of defending liberty and pursuing justice.

Preface

In late 2018, the LPD leadership entrusted the IBA Banking & Financial Law Committee (**B&FLC**) with the mandate of representing the IBA on a joint task force with the Legal Opinions Committee of the Business Law Section of the American Bar Association (**ABA**) on cross-border closing opinion practices. Over the last few years, the B&FLC[1] and the ABA have agreed on a set of good practice principles aimed at making the negotiation and rendering of cross-border closing opinions less contentious, more time-efficient and more cost-effective, thereby increasing capital flow in cross-border transactions (the '**Good Practice Principles for Cross-Border Closing Opinions**').

The Good Practice Principles are the most recent milestone in the IBA's long history of dealing with legal opinions in international transactions. Forty years ago, the late Michael Gruson[2] initiated a series of events at the IBA's 20th Biennial Conference in Vienna in 1984. At that conference, the Subcommittee on Legal Opinions (**SLO**) of Committee E (Banking Law) (now known as the B&FLC) of the IBA Section on Business Law (**SBL**) (now known as the LPD) was established. The SLO produced an Exposure Draft for an Opinion Report that was discussed at the 7th Conference of the SBL in Singapore in 1985. The final Opinion Report of the SLO was presented by Michael Gruson, Michael Kutschera[3] and Stephan Hutter[4] at the IBA's 21st Biennial Conference in New York in 1986. The result was a Report of the SLO that was published later in four editions.[5] The series continued at the 8th Conference of the SBL in London in 1987, the 22nd Biennial Conference of the IBA in Buenos Aires in 1988, the 9th Conference of the SBL in Strasbourg in 1989 and finally at the 11th Conference of the SBL in New Orleans in 1993 where a panel consisting of representatives of the IBA and the ABA discussed the question 'Legal Opinions in International Transactions: Can the Gap between the IBA and the ABA be Bridged?'.

At the time, the predominant catalyst for addressing the issues involving the giving and receiving of legal opinions in international transactions was the increasing level of direct lending by banks in the United States of America (**US**), primarily New York banks, to non-US debtors. US lenders wanted assurances with respect to the validity and enforceability of their loan agreements, and this, in turn, raised many complex issues of private and public (eg, foreign exchange control) law.

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1 The B&FLC members of the Joint Task Force Working Group are: John Elias, Chair, IBA Derivatives Subcommittee (Fasken Martineau DuMoulin); Michael Kutschera, IBA Honorary Life Member of Council and Association (BINDER GRÖSSWANG Rechtsanwälte); Russell DaSilva, Member, IBA Banking & Financial Law Committee Advisory Board (Pillsbury Winthrop Shaw Pittman); Kok Chee Wai, Conference Quality Officer, IBA Banking & Financial Law Committee (Allen & Gledhill); Benedikt Maurenbrecher, Member, IBA Banking & Financial Law Committee Advisory Board (Homburger); and Caroline Phillips, Vice Chair, IBA Banking & Financial Law Committee (Slaughter and May). The Good Practice Principles for Cross-Border Closing Opinions were finally approved by the B&FLC officers at the Paris 2023 meeting.

2 At that time, a partner at Shearman & Sterling's New York office.

3 At that time, a foreign associate at Shearman & Sterling's New York office and now partner at BINDER GRÖSSWANG Rechtsanwälte, Vienna, Austria.

4 At that time, a foreign associate with Shearman & Sterling's New York office and now partner at Skadden Arps Meagher & Flom, Frankfurt, Germany.

5 Michael Gruson, Stephan Hutter, Michael Kutschera, *Legal Opinions in International Transactions Report of the Subcommittee on Legal Opinions of the Committee on Banking Law of the Section on Business Law of the International Bar Association*, 4th ed. Kluwer Law International.

The concept of a third party or closing legal opinion involving the giving of a legal opinion by counsel to one party to a financing agreement, primarily borrower's counsel in the context of loan agreements, to the other party, typically the lender, was at the time (and in some jurisdictions continues to be) not customary for many United Kingdom and other non-US lawyers (except in certain specific circumstances), and required considerable discussion and explanation.

Based on publications originating primarily from New York legal practitioners, in particular the Tri-Bar Report of 1979[6] as amended in 1981, the efforts of the IBA discussed above focused on familiarising non-US lawyers with the meaning of frequently used standardised opinion language in opinions rendered by New York qualified lawyers involving New York law governed loan agreements, including opinions on enforceability in New York courts. In certain circumstances, this position was not even settled within the US. For example, depending on the relevant US state, the opinion that an agreement was legal, valid, binding and enforceable in accordance with its terms (a '**remedies opinion**') meant that in some US states literally each and every provision would be enforced (provided the relevant facts could be proven), but in other states the prevailing view was that such language meant only that a contract had been formed and thus some form of remedy could be granted in principle but not necessarily in respect of each and every provision (for that matter, the practice in this regard often varied among law firms even within the same state). Now it seems as if the former view has become universally accepted in the US.

In other instances, certain US legal concepts required clarification for non-US lawyers because they could cause misunderstanding. For example, the opinion on the 'good standing' of a corporation, which in the US refers only to its continuing legal existence by reason of payment of franchise taxes and compliance with other technical requirements, could potentially be misunderstood by civil law qualified lawyers as an opinion on the economical viability of a corporation. Lawyers can, of course, confirm that a corporation was not involved in formal bankruptcy proceedings, but beyond that, lawyers would find this to be a factual matter, far beyond the normal expertise of any lawyer, and an unacceptable opinion request. It has now become consensus that, due to the absence of franchise taxes for corporations in civil law countries, such an opinion is not relevant in respect of a civil law corporation and should not be requested.

6 1979 Report By the Special Committee on Legal Opinions in Commercial Transactions of the New York Country Lawyers' Association, in Cooperation with the Corporation Law Committee of the Association of the Bar of the City of New York and the Corporation Law Committee of the Banking, Corporation and Business Law Section of the New York State Bar Association, *Legal Opinions to Third Parties: An Easier Path.*

Finally, and perhaps as a fitting climax of the endeavours discussed above, was the investigation into whether a non-US lawyer could give a remedies opinion, or some form of it, if the applicable agreement had a choice of law clause providing for New York law but a litigation relating to that agreement might take place in the jurisdiction of the opining foreign lawyer. Since a remedies opinion is a lawyer's best judgement as to whether the relevant agreement is capable of being enforced in that lawyer's jurisdiction, the opining foreign lawyer has to first determine what law the courts in the opining foreign lawyer's jurisdiction will apply to the agreement. This determination is usually made under the conflicts of laws rules of the opining foreign lawyer's jurisdiction. If the result is that the courts in that jurisdiction will apply the chosen New York law, it raises the question about what legal conclusions the opining foreign lawyer can reasonably draw about enforceability of an agreement governed by New York law, even assuming the agreement is legal, valid, binding and enforceable under New York law. By contrast, if the result is that the courts in the opining lawyer's jurisdiction would not apply the chosen New York law, but rather would apply that jurisdiction's own laws, can the lawyer fully opine as to the enforceability of an entire agreement if important legal concepts in New York differ from, or don't even exist in, the opining lawyer's jurisdiction? There is no universal consensus on the appropriate reach of what can be reasonably expected for an opining foreign lawyer to opine on in that context.

The traditional approach taken by the Report of the SLO is that the remedies opinion in an international setting as described above could be an opinion on the validity of the choice of law clause and the applicable law in certain respects only. For example, corporate power, authorisation and other corporate law matters will normally not be governed by a chosen law but rather by the law of the relevant company's jurisdiction of organisation, and matters relating to real estate rights will be governed by the jurisdiction in which the real estate in question is located. In addition, the remedies opinion might also include a statement that the terms of the agreement in question as understood on their face are not in conflict with the international public policy of the jurisdiction under the law on which the legal opinion is rendered. Another view is that the opining foreign lawyer should give the opinion recipient more comfort, for example, by stating that the courts in the foreign opining lawyer's jurisdiction will give some remedy in case of a proven breach of the agreement. Another approach that typically is not adopted is for the opining lawyer to give an opinion (subject, of course, to prudent assumptions and limitations) that, if the law of the opining lawyer's jurisdiction were to be applied, notwithstanding the parties' choice of New York law, it would constitute a legal, valid, binding and enforceable agreement.

The circumstances discussed above demonstrate there are limitations to the coverage of legal issues that may arise in international transactions. Accordingly, lawyers involved in the process of giving and receiving legal opinions in international transactions are well advised to deal cautiously with one another. Opinion requests that are overreaching should not be made to foreign opining lawyers and foreign opining lawyers should not unreasonably refuse to give some degree of comfort to the opinion recipient, even if it is clear that there cannot be all-encompassing legal coverage of certain matters and scenarios. Respect and creativity should prevail over temptations to engage in legal skirmishes or games of brinksmanship.

There are many other crucial issues that should be considered in connection with the giving and receiving of legal opinions in international transactions, including which law governs the responsibility and ultimately the liability of the opining foreign lawyer, and what the limitations to such liability are. Heated debates took place at several sessions at IBA conferences organised by the B&FLC and its predecessor Committee during the past decades on this and related issues. Critical questions include the following: in what scenarios are limitations to the liability of the opining foreign lawyer appropriate? To what extent does the legal market permit them, and how can they best be agreed upon? There's a question too as to the sense and nonsense of governing law clauses in legal opinions. And are so-called 10b-5 letters appropriate? A legal opinion certainly is not an insurance policy, but what exactly is the difference, and is this difference understood by opinion recipients (or, in the case of filed opinions, the public)? These sessions were always exceptionally well attended, which is not surprising because the potential personal liability or liability of law firms is an extremely sensitive issue, especially given the significant financial amounts typically involved in international financial transactions.

The Good Practice Principles for Cross-Border Closing Opinions are a starting point to further explore the above and other issues involved in the process of giving and receiving legal opinions in international transactions. Whether or not universal consensus can be achieved on relevant issues will remain to be seen. However, discussion of and clarity on the issues involved and on the various positions of participating lawyers will facilitate the process of giving and receiving legal opinions in international transactions. The Good Practice Principles for Cross-Border Closing Opinions are an excellent first step in that continuing dialogue.

Good Practice Principles for Cross-Border Closing Opinions

The Legal Opinion Committee of the Business Law Section of the American Bar Association (ABA) and the Banking & Financial Law Committee of the International Bar Association (IBA) have formed a joint task force on cross-border opinion practice (the 'Task Force'). The Task Force seeks to: (1) build upon work done under the auspices of the ABA, the IBA, the Union International des Avocats and the City of London Law Society; and (2) to collaborate with a number of other bar groups in various countries to improve the practices of lawyers throughout the world relating to the giving of, and advising recipients of, closing opinions in cross-border transactions. The ABA and the IBA have undertaken these efforts to help the legal profession remain a constructive contributor to global finance and commerce, and hopefully, to aid the flow of capital across borders, particularly to emerging economies. This document seeks to establish foundational principles on closing opinions in cross-border finance transactions.

I. The evolution of cross-border transactional practice has drawn on customs and practice from various countries over many decades. Today, standard closing procedures often include the delivery of opinion letters by lawyers ('**opining counsel**') covering selected legal issues under the law that the closing opinion identifies as being covered (the '**covered law**'). Those opinion letters may be addressed to opining counsel's client and thus be part of legal advice that counsel provides to its client in the transaction, or they may be addressed to another party at the request of opining counsel's client (a '**third-party opinion**'), usually to satisfy a condition precedent to closing a commercial or financial transaction. Whether a closing opinion is given to a client or a party who is not opining counsel's client depends principally on the customs and practice of the country whose law is covered by the closing opinion but, to some extent, may be influenced by the practice of the primary jurisdiction of the transaction. For example, in some countries, it is customary for a lender to receive a third-party opinion from the borrower's counsel, whereas in other countries, opinions from the lender's own counsel are the norm.

   This document uses the term '**closing opinion**' to refer to an opinion letter delivered by counsel at the closing of a transaction, whether delivered to opining counsel's own client or to a party that opining counsel does not represent. A closing opinion usually states opining counsel's conclusions on specific legal matters, typically broken into separate numbered paragraphs that are referred to in this document as specific '**opinions**'. Closing opinions typically include assumptions, qualifications, exceptions and/or limitations, both of a general nature and with respect to specific opinions. This document (including its footnotes) focuses exclusively on closing opinions in cross-border transactions because they present issues that differ from closing opinions in domestic transactions.[7]

7 Cross-border transactions implicate laws of multiple countries and make it imperative that lawyers with expertise in those laws understand each other's perspective, and address language barriers and differences in market expectations. Therefore, giving and receiving closing opinions in cross-border transactions often is more challenging than in domestic transactions.

When a closing opinion is delivered to opining counsel's own client, the terms of the overall engagement and the rules of professional conduct applicable to the attorney/client relationship govern the opinion process and opining counsel's responsibilities, as well as other aspects of such a relationship. When a closing opinion is delivered to a recipient who opining counsel is not representing in the transaction, opining counsel has no responsibility to explain to the recipient the scope and meaning of the opinions that are being rendered. Rather, the burden is on the opinion recipient to seek such advice from its own counsel. That advice may include the effect of the customs and practice of the country whose law is covered by the closing opinion.[8]

Local customs and practice, which may be more or less developed or formalised in any particular country, will dictate whether an opinion request is appropriate and, if so, whether the opinion should be requested from the recipient's own counsel. Local customs and practice, and the circumstances of the specific transaction also dictate the extent to which: (1) opinions can be varied by express statements mutually agreed upon between opining counsel and the recipient; (2) a closing opinion is governed by arrangements existing outside the closing opinion; (3) opinions are qualified by implied understandings not set forth in the closing opinion itself; and (4) opining counsel may use assumptions or exceptions and, if so, whether they can be implied or should be expressly stated. An important consideration with respect to the customs and practice that govern opining counsel's conduct is whether the form of government in the country of the covered law is a 'federal' system, where constituent states or political subdivisions have their own laws and regulations alongside those of federal authorities, as is the case, for example, in the United States and Canada.

Although there are important differences between closing opinions addressed to one's own client and third-party opinions, the fundamental principles discussed in this document are intended to assist both opining counsel and opinion recipients, whether or not the recipient is represented by opining counsel in the transaction. The principles are based on the following premises:

1. cross-border opinion practice can benefit from the application of common principles by providing a basis for mutually respectful interaction between lawyers in different countries because the typical coverage of closing opinions in cross-border transactions is substantially similar across markets;

2. the giving of a closing opinion is an exercise in professional judgement and should not be treated as a business negotiation in which the recipient seeks to obtain as much as possible and opining counsel seeks to give as little as possible;

8 In the United States, eg, an established body of 'customary practice' ('US Customary Practice') has developed to provide guidance on: (1) the practice of experienced lawyers in the giving of, and advising recipients with respect to the receipt of, third-party opinions, including the work opining counsel is expected to perform to be able to give specific opinions; (2) the way that certain words and phrases are commonly used and understood in closing opinions; and (3) other commonly understood aspects of opinion practice, including standard assumptions, qualifications, exceptions and/or limitations. Conversely, in other countries, eg, England and Wales, no generally understood practice exists on which lawyers can rely for the meaning and scope of their closing opinions, and, therefore, opinion letters ordinarily state explicitly matters that under US Customary Practice would be understood to apply whether or not stated expressly. Depending on whether customs and practice in the country whose law is covered are similar to US Customary Practice, the language in a closing opinion may be more or less expansive on various aspects of the opinions given, including assumptions, qualifications, exceptions and limitations, than the more streamlined language ordinarily used in opinion letters to which US Customary Practice applies.

3. opining counsel and the recipient, and/or recipient's counsel, should work together in good faith to achieve a balance in which the benefits to the recipient of receiving a specific opinion warrant the difficulty, time and expense required for opining counsel to give it;

4. unlike transaction agreements resulting from business negotiations, closing opinions are not a tool to allocate risk or bridge gaps when the law governing a particular issue is uncertain or unsettled. Early in the development of US Customary Practice, the concept of a 'Golden Rule' was developed to guide both givers and recipients of third-party closing opinions in US domestic practice by establishing the principles that: (i) opining counsel should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were opining counsel and had the requisite competence to give the opinion; and (ii) before declining to give an opinion that it is competent to give, opining counsel should consider whether another lawyer in similar circumstances would ordinarily give the requested opinion. The Golden Rule must be adapted for cross-border opinion practice because: (i) in some countries, closing opinions delivered to one's own client are common, whereas third-party opinions are not; (ii) in domestic practice, lawyers generally share common customs and practices, whereas this is not the case among lawyers from different countries; and (iii) the original Golden Rule was based on the fact that opining counsel and counsel advising the opinion recipient could well find themselves in similar but opposite positions in other transactions, whereas that often does not hold true in the cross-border context. Nevertheless, the Golden Rule as a guiding principle can be a valuable tool in cross-border opinion practice to help all participants in the process balance the needs of opinion recipients and opinion givers; and

5. in a cross-border closing opinion, the covered law is often not the law of the opinion recipient's country. A concept under the covered law may not have an analogous concept in the law of the recipient's country and seemingly analogous concepts may not be analogous because of subtle differences in law or practice. Moreover, legal analysis and conclusions expressed in a language (often English) different from the language of the covered law may have substantively different meanings or the translation may not accurately reflect concepts under the covered law. In addition, English may not be the native language of either opining counsel or the opinion recipient. These issues do not exist in opinion practice within the same country. A recipient should not expect a closing opinion in a cross-border transaction to explain the intricacies of legal terminology or differences in the way the covered law and the law with which the recipient is familiar deal with an issue. Even when opining counsel represents the recipient in the transaction, responsibility for such advice may require specialised expertise beyond the expertise in the covered law necessary to give specific opinions.[9]

9 Sometimes recipients request a third-party closing opinion because they do not wish to retain their own counsel in the country of the covered law. If the customs and practice of opining counsel's country make giving a third-party opinion appropriate, the recipient should be on notice that it is not the responsibility of opining counsel to advise the recipient, who is not its client, how the closing opinion should be interpreted, even though opining counsel knows that the recipient itself does not have, and is not represented by counsel with, expertise in the covered law. The customs and practice, terms of the engagement and professional rules may be different when a closing opinion is delivered to opining counsel's own client.

II. The following principles should apply when requesting and preparing a closing opinion in a cross-border transaction:

1. a closing opinion addresses only the law it states it covers. Even within that law, the law covered by specific opinions may be limited to particular statutes, rules and regulations (which may or may not include decisional law interpreting them) that lawyers with expertise in the covered law, exercising customary diligence, would reasonably be expected to recognise as being applicable under the circumstances to the transaction to which the closing opinion relates. The opinion does not cover any law other than the covered law, even when the transaction itself or specific legal obligations are governed by the law of a jurisdiction that the closing opinion does not cover;[10]

2. a closing opinion covers only those matters that it specifically addresses and not matters that might be thought to be implicit but are not expressly stated;

3. opinion requests should be limited to specific and determinable matters of law that: (i) involve the exercise of professional judgement under the covered law; and (ii) relate to the transaction on which, or the party on whom, opinions are being given, as well as legal obligations imposed on such a party by the transaction documents;

4. a closing opinion only expresses opining counsel's professional judgement under the covered law; it is not a guarantee that a court applying such law to a specific case will reach the conclusion expressed in the opinion;

5. opining counsel should not be asked to: (i) confirm matters of fact, even if the confirmation is limited by broadly worded disclaimers, including a limitation to the knowledge of such counsel; or (ii) state that it is not aware of any inaccuracy in representations and warranties contained in an agreement, because neither involves the exercise of professional judgement on matters of law.[11] With rare exceptions, therefore, factual confirmations are not a proper subject for a closing opinion. When an opinion depends on factual matters,

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10 When the laws of multiple countries, or multiple states or political subdivisions in a federal system, apply to a transaction, the parties and their counsel normally have to determine which issues are governed by the law of which jurisdiction. A legal conclusion under the law of one jurisdiction may depend on legal conclusions under the laws of one or more other jurisdictions. The application of the conflict of laws rules of multiple jurisdictions whose laws bear on a relevant issue often makes it difficult to determine with certainty which jurisdiction's law ultimately will be held to control. Consequently, opining counsel ordinarily is entitled to assume legal conclusions under the laws of all relevant jurisdictions other than the covered law, even when those conclusions may affect an opinion it is giving. As there is no single approach in the cross-border area to dealing with conflicts of law analysis in closing opinions, the opinion recipient may need to seek advice from counsel in the multiple jurisdictions involved in the transaction to confirm material aspects of the legal analysis.

11 In some cases, the substance of an opinion may mirror a representation or warranty in an agreement. However, the function of a representation or warranty is to allocate risk as a matter of contract between the parties as to the accuracy of the matters it covers, which often include both legal and factual matters. Conversely, the function of a closing opinion is to express opining counsel's professional judgement on the legal matters addressed by specific opinions. The same analysis applies to requests that counsel state in a closing opinion that nothing has come to counsel's attention that would suggest that statements made in transaction documents are incorrect or incomplete. Not only does this require counsel to make indirect statements of fact, but it also could put counsel in the position of potentially violating an applicable attorney–client privilege.

In rare circumstances, customs and practice in opining counsel's country may permit opinions that involve questions of mixed law and fact. In many countries, however, requesting mixed law and fact opinions is not appropriate and, under most circumstances, giving them is not warranted under a cost-benefit analysis because of the considerable time and expense involved in preparing them, and backup certifications and other due diligence necessary to give them. Such requests should be kept to a minimum or avoided altogether. Moreover, if such an opinion is given, it is advisable for opining counsel to segregate it from the true legal opinions given in the same transaction.

In some countries, lawyers provide a due diligence report on specific factual matters based on the results of a stated review process or specific procedures. Such a report is typically provided to the lawyer's own client, who may ask to share it with a third party, such as a lender, potential acquirer or underwriter. Due diligence reports are not closing opinions and are not covered by the principles set forth herein.

Matters not within the expertise of lawyers, such as financial controls, solvency and generally commercial aspects of a company's business, assets or operations, are never an appropriate subject for closing opinions. Matters of this type should be addressed by reports or advice from experts in the relevant subject matter, such as auditors, appraisers or financial advisers.

for example, the existence or authenticity of a document, opining counsel ordinarily is allowed to make assumptions with regard to such matters or rely on information provided by, or documentation received from, an appropriate source or on representations and warranties contained in the documents on which opinions are being given. Depending on the customs and practice of opining counsel's country, opining counsel may be permitted to rely on unstated assumptions;

6. a closing opinion should be prepared in accordance with, and can only be understood by reference to: (i) the customs and practice of the country whose law is covered by the closing opinion, including those based on applicable professional rules, market conventions, and guidance published by bar associations, law societies and recognised opinion authorities; and (ii) any applicable statutes and regulations of the country whose law is covered by the opinion, together with judicial decisions interpreting them;

7. as a general rule, opining counsel should not be expected to give an opinion in a cross-border transaction that lawyers practising in the country whose law is covered by the closing opinion would not be expected to give in a transaction that is limited to that country. The fact that the opinion recipient would normally expect counsel in its own country to give a particular opinion does not necessarily mean that opining counsel in a different country should be expected to give it;[12]

8. the fact that an opinion recipient has received a particular opinion in the past in a similar cross-border transaction does not mean that opining counsel should be expected to give it again;[13]

9. opining counsel should not give an opinion that, although technically correct, opining counsel recognises would be misleading to the opinion recipient with regard to the subject matter of the opinion. Whether an opinion would be misleading is to be determined under the customs and practice of the country whose law is covered by the opinion and opining counsel may assume, without so stating, that such customs and practice are known to the opinion recipient;

10. if opining counsel declines to give a requested opinion, the opinion recipient may ask whether such a decision is due to: (i) uncertainty regarding the covered law; (ii) the structure or documentation of the transaction; or (iii) the fact that the requested opinion ordinarily is not given in opining counsel's country. However, if opining counsel is giving a third-party closing opinion, applicable rules of professional conduct may require that opining counsel obtain instructions from, or the consent of, its client before providing an answer that could have adverse consequences for the client. If opining counsel declines to provide an answer, the opinion recipient should seek advice from its own counsel;

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12 This is one of the ways in which an adaptation of the Golden Rule discussed earlier can provide helpful guidance in cross-border opinion practice.

13 Parties to a transaction should be mindful that: (i) opinion practice evolves over time in every jurisdiction; (ii) such opinion practice can be interpreted and applied differently by lawyers, even in the same jurisdiction, depending on areas of practice, geographic regions and transaction-specific circumstances; (iii) transactions differ from one another, and even those that appear on their face to be similar can have important differences that merit a different approach to closing opinions given on them; and (iv) the backup work required to give specific opinions often depends on the particular facts and circumstances. The Golden Rule and cost-benefit analysis should play an especially important role in cross-border opinion practice in light of the absence of consistent customs and practice between different countries.

11. the covered law, customs and practice in opining counsel's country, and agreement between opining counsel and the recipient determines which assumptions, qualifications, exceptions and limitations in a closing opinion are appropriate and the extent to which they need to be expressed or can be implied.

III. Opining counsel is subject to the law and rules governing the professional conduct of lawyers in its country (or state or other political subdivision, in a federal system like the US). Those laws and rules, as well as local customs and practice, often will determine the following matters:

1. whether a specific issue is the proper subject of a closing opinion and, if so, whether the issue should be covered in an opinion from the recipient's own counsel or in a third-party opinion;[14]

2. the duties of opining counsel, including how it is expected to act in advising the recipient if the closing opinion is delivered to a recipient that is not its client and whether it can give an opinion to a non-client that may be detrimental to its client's interests;[15]

3. the standard of care that must be exercised by opining counsel (including the scope of work that opining counsel needs to perform to render a specific opinion) and the liability of opining counsel if an opinion proves to be incorrect; and

4. whether, and the extent to which, opining counsel and the opinion recipient can agree on terms and conditions for resolving future disputes relating to matters covered by a closing opinion, including choice of law, forum selection, arbitration and limitations on opining counsel's liability.

IV. The parties should recognise that the cost-benefit analysis with respect to opinions requested in a particular transaction may vary depending on the circumstances, even if the transaction is similar to other transactions with which the parties have dealt before.[16] Relevant circumstances include:

1. the size of the transaction;

2. the number of countries involved and their relative significance to the transaction;

3. special regulatory regimes applicable to the parties or the transaction;

4. the complexity of a particular issue, which may require special expertise or which may not lend itself to an unqualified opinion (eg, issues under tax laws, employee benefits laws, environmental laws, competition laws, economic sanctions, anti-terrorism, anti-money laundering and anti- corruption laws, or laws restricting foreign control of sensitive enterprises); and

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14 If a third-party closing opinion is appropriate, the customs and practice of opining counsel's country and applicable rules of professional conduct may require that a client consent to the giving of particular opinions, which may or may not be implied from a provision in an agreement signed by the client that makes the delivery of the closing opinion a condition to closing. If the opinion discloses information that opining counsel knows the client would not want to be disclosed that is otherwise subject to a duty of confidentiality, specific consent from the client may be required before the closing opinion can be delivered.

15 Eg, in an enforceability opinion on an agreement, opining counsel may need to take an exception for a particular provision, thereby alerting the recipient that it may be unable to enforce that provision.

16 Eg, if the transaction involves secured debt and the borrower has collateral of different types located in different countries and/or upstream or downstream guarantees by entities formed under the laws of different countries, giving opinions covering the creation and validity of security interests or the enforceability of guarantees, to the extent even possible, may not be cost-justified.

5. the degree to which the law being covered is or is not well developed as it relates to the issue addressed by the opinion.

The Task Force hopes that these principles will ease the giving and receipt of closing opinions in cross-border transactions, thereby benefitting trade, commerce and finance around the world.

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