1. THE OPINION REPORT

In most international business transactions involving parties from the United States and foreign countries, legal opinions are requested from counsel admitted in the country of the foreign party (foreign counsel). Through these legal opinions, the party in the United States seeks foreign counsel's professional opinion that the legal assumptions upon which it is basing its decision on whether or not to proceed with the transaction are correct. An unqualified favorable opinion constitutes a statement to the domestic party that foreign counsel has examined specific legal aspects of the transaction and has found them to be proper. To the extent foreign counsel is unable to give an unqualified favorable opinion, the recipient is put on notice that the contemplated transaction may involve certain legal risks which should be further evaluated.

Additional problems may arise by obtaining legal opinions of foreign counsel. Frequently, the foreign party does not see the purpose for these opinions. Furthermore, foreign counsel may object to certain legal conclusions reached in the domestic attorney's opinion draft. Long and often difficult discussions between domestic and foreign attorneys may ensue. Counsel in the United States may be unable to understand why foreign counsel disagrees with seemingly ordinary legal conclusions; foreign counsel may finally provide the opinion believing that "it does
not really matter" and that the entire procedure of obtaining legal opinions of foreign counsel is simply another idiosyncrasy of the United States legal system.

In these negotiations between United States and foreign counsel over the opinion language, it often appears that the domestic counsel does not have a very clear understanding of either the meaning of the opinions sought or the reasons for requesting the opinion. As these negotiations continue, the client often becomes both irritated about the time spent by the lawyers discussing "merely legal" issues and possibly upset if the "opinion negotiations" either lead to an impasse or endanger his transaction. These recurrent experiences led the Committee on Banking Law of the Section on Business Law of the International Bar Association to form, in 1984, a Subcommittee on Legal Opinions. In September 1987, the Subcommittee on Legal Opinions published its final report (the Report).

The Report states that it has two principal purposes. The first purpose of the Report is to improve communication between attorneys in the United States and those in foreign countries. In order to communicate rationally in their discussions over the wording of a legal opinion, attorneys in both countries must have a common understanding of the terminology used in the opinion. Ultimately, they must be able to agree on an opinion which (i) gives the domestic client adequate comfort with respect to his legal assumptions and (ii) reflects the unique aspects of the foreign legal system. The second principal purpose of the Report is to analyze the relationship between the opinions of foreign and domestic counsel. Where the laws of several countries apply to a transaction, both the foreign and domestic opinions must be constructed like pieces of a puzzle before the recipient of the opinion can be certain that all pertinent legal issues arising under every relevant legal system have been fully addressed.

The Report uses as its model a legal opinion requested by a major New York bank from counsel for the borrower, a foreign corporation, in connection with an unsecured loan agreement for United States dol-

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2 Id.

3 Id. at 7.

4 Id.

5 Id.

6 Id.

7 Id. at 8.
lar borrowings governed by New York law. The Report comments on each item or clause of the opinion. The first part of each comment sets forth the United States perspective on the portion of the opinion under discussion and either paraphrases or quotes from the “Tribar Report,” which reflects generally accepted views — at least as far as New York law is concerned — on legal opinions. The second part of each comment summarizes the related viewpoints of attorneys from Argentina, Austria, Canada, England, France, Germany, Italy, Japan, The Netherlands, and Switzerland. These foreign responses discuss both the validity of the opinion under a particular foreign legal system and whether or not modifications are advisable. These responses also address the extent of investigation necessary to enable a lawyer to render a valid opinion. Finally, where it was necessary to either explain certain concepts of the Tribar Report or comment on an item or clause of the opinion from a conflict-of-laws perspective, the authors of the Report added necessary explanations and comments under the heading “Reporters’ Annotations.”

This article identifies and briefly discusses some of the clauses contained in a legal opinion which are particularly relevant in international business transactions and which have not been sufficiently addressed and examined in the past.

2. The Legal Opinion Itself: Selected Issues

2.1. Corporate Status Opinion

In the United States, an opinion that a corporation has been “duly incorporated” and “duly organized” means that all steps necessary for

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8 New York County Lawyers’ Ass’n, A Report By the Special Comm. on Legal Opinions in Commercial Transactions (cooperative effort with the Corporation Law Comm. of the Ass’n of the Bar of the City of New York and the Corporation Law Comm. of Banking, Corporation and Business Law Section of the New York State Bar Ass’n), reprinted in Legal Opinions to Third Parties: An Easier Path, 34 Bus. Law. 1891 (1979) [hereinafter Tribar Report].
9 Pedro de Elizalde (Allende & Brea). See Report, supra note 1 at 1 n.1.
10 Michael Binder and Michael Kutschera (Binder, Grösswang & Partners). See id.
11 John W. Teolis (Blake, Cassels & Graydon). See id.
12 Martin Read (Slaughter & May). See id.
13 Francis Meyrier (Shearman & Sterling). See id.
14 Burkhardt Meister (Müller, Weitzel, Weisner). See id.
15 Marcello Gioscia (Ughi & Nunzianite). See id.
16 Yusako Ono (Hamada & Matsumoto). See id.
17 Peter Verloop (Nauta van Haersolte). See id.
18 Suzanne Wettenschwiler (Bär & Karrer). See id.
19 See id. at 19.
20 Id. at 32.
the creation of the corporation were properly taken under applicable state law as of the date of incorporation.\textsuperscript{21} Foreign responses reveal that any distinction between "duly incorporated" and "duly organized" is meaningless in most civil law countries.\textsuperscript{22} An opinion stating that a corporation is "validly existing" covers the incorporated status of a corporation at a time subsequent to organization.\textsuperscript{23} Typically, a corporation will cease to validly exist when, for example, it either voluntarily dissolves or its corporate term of existence expires.\textsuperscript{24}

Generally, corporations in a civil law country come into existence upon registration with a commercial register.\textsuperscript{25} The incorporation process is usually regulated in great detail by corporate law. Furthermore, a corporation will only be registered after a competent registration court has examined whether or not all steps required for incorporation, including its "due organization," have been taken.\textsuperscript{26} In many foreign jurisdictions, therefore, commercial registers must be both examined in order to give a proper corporate status opinion and added to the list of examined documents. In some countries, rendering an opinion regarding the due incorporation, due organization and valid existence of a corporation also requires an inspection of the commercial register files (which contain the submitted documents in full). In other countries, obtaining a so-called "excerpt" from the commercial register is sufficient to render a corporate status opinion. The detailed foreign reactions in the Report should make attorneys in the United States aware of both the scope of investigation required in each participating country and the extent to which reliance on the commercial register is protected by law.\textsuperscript{27}

The Report also points out that the existence of a corporation in many foreign countries does not depend on the payment of a franchise or taxes.\textsuperscript{28} Therefore, the opinion that a corporation is "in good standing" is meaningless in most civil law countries.\textsuperscript{29}

\textsuperscript{21} Id. at 32.
\textsuperscript{22} Id. at 33-38.
\textsuperscript{23} Id. at 39.
\textsuperscript{24} Id.
\textsuperscript{25} For a discussion of relevant German law, see A. BAUMBACH & A. HUECK, GMBH-GESE\textsuperscript{1}T, § 10, annot. 4 (14th ed. 1985).
\textsuperscript{26} Id. § 9(c), annot. 3.
\textsuperscript{27} Report, supra note 1, at 39-45.
\textsuperscript{28} Id. at 46.
\textsuperscript{29} Id.
2.2. *Corporate Action Opinion*\(^{30}\)

If used in connection with a United States corporation, the phrase "authorized by all necessary corporate action" typically refers to an act which is authorized by the board of directors or by the shareholders of the corporation.\(^{31}\) The foreign reactions in the Report suggest that there are legal systems in which the actions of certain corporate officers create legal, valid and binding obligations to third parties, without regard to authorization by either the entire board of directors or the shareholders of the corporation.\(^{32}\) In these legal systems, the power to represent and bind a corporation is vested in certain legally appointed officers as a matter of law and does not depend on any kind of separate authorization.\(^{33}\) In this context, the opinion that "the execution, delivery and performance by [party] of the Agreement have been duly authorized by all necessary corporate action" is inappropriate;\(^{34}\) the Report proposes the following opinion:

The . . . Agreement . . . ha[s] been duly executed and delivered for and on behalf of [party] by __________, . . . duly authorized for such purposes by [party]. No further authorization by any corporate action of [party] is required in connection with the execution, delivery and performance of the . . . Agreement . . . .\(^{35}\)

In the more complex situation where a person signed the agreement on the basis of a power of attorney, the opinion should also cover due authorization, execution and delivery of the power of attorney. In many civil law countries, the power of attorney, if executed and delivered by certain corporate officers, may similarly create legal, valid and binding obligations which require no separate corporate authorization.\(^{36}\)

2.3. *Execution and Delivery Opinion*\(^{37}\)

2.3.1. *Legal Authority*

The opinion that an agreement has been duly executed and delivered by a party assures its recipient that there was a manifestation of

\(^{30}\) Id.

\(^{31}\) Id. at 53.

\(^{32}\) Id.

\(^{33}\) Id. at 47.

\(^{34}\) Id. at 53.

\(^{35}\) Id. at 54.

\(^{36}\) Id. at 54, 58.

\(^{37}\) Id. at 56.
intent to create a legal, valid and binding agreement (which may be required by either applicable law or the agreement in question). In the case of a corporation, this intent can be exercised only by officers, persons holding a power of attorney or persons specifically authorized by the corporation to perform certain binding acts. Therefore, the due execution and delivery opinion must also address the authority of the person in question to act on behalf of and to bind the corporation with respect to third parties.

The legal authority of the person acting on behalf of a corporation in the execution and delivery of an agreement is usually determined by the law of the country of incorporation. It is less clear which law determines whether the required manifestation of intent to create a legal, valid and binding agreement was present. In making this determination, the conflict-of-laws rules of the foreign counsel's nation may look to either the law governing the agreement, the law of the place in which the agreement was signed, the law of the country where the corporation on whose behalf such person acted in the execution and delivery of the agreement was incorporated, or, possibly, some other nation's law. The Report suggests that, if the law which decides whether the required manifestation of intent was present cannot be determined with complete certainty, foreign and domestic counsel should both give opinions on due execution and delivery under the laws of their respective forums. Domestic attorneys would have to either assume or rely on foreign counsel's opinion that the persons executing and delivering the agreement are authorized both to act on behalf of the corporation and to bind it in its actions. Since the signing of the agreement and the closing of the transaction will most likely take place in either the country of foreign counsel or the state of domestic counsel, one of the two opinions will also cover the law of the place of signing.

The terms "execution" and "delivery" are terms of New York law; however, even under New York law, their meaning and relationship to each other are not entirely clear. The Report states that if

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these terms are used in foreign counsel’s opinion, they may not be cor-
rect expressions of that foreign law. Nevertheless, the Report suggests
that separate opinions on the due execution and delivery, which accord
with the legal terminology of a foreign country’s law, should not be
substituted for the traditional opinion. The international legal com-
2.3.2. Assumptions

If the foreign counsel is not present at either the signing of the
agreement or the closing of the transaction, an opinion on due execu-
tion and delivery cannot be provided. In that case, the foreign counsel’s
opinion would be limited to addressing the authority of certain officers
to execute and deliver the agreement. Furthermore, where an opinion
properly states that no authorization is required for a corporation to be
bound by its officers’ action, foreign counsel will also have to make
assumptions with respect to execution and delivery by certain corporate
officers. The Report proposes the following opinion:

Mr. , a [name of the office of
the person who will sign], [is] duly authorized by [party] to
execute and deliver the . . . Agreement . . . for and on be-
half of [party]. [Assuming the . . . Agreement . . . ha[s]
been duly executed and delivered for and on behalf of [party]
by Mr. , no further authorization by any corpo-
rate action of [party] is required in connection with the exe-
cution, delivery and performance of the Agreement] . . . .

This opinion only assumes the presence of a required manifesta-
tion of intent; it does not cover the authority of the person executing
and delivering the agreement to act on behalf of and to bind the party.
The recipient of the opinion will eventually insist that one lawyer state
an opinion concerning the validity of the due execution and delivery by
the person signing the agreement. This lawyer may have to either as-
sume that the person executing and delivering the agreement is author-
ized to act on behalf of the corporation or rely on another opinion re-
garding that authority.

47 Id.
48 Id.
49 Id. at 57-58.
50 Id. at 57.
2.4. Remedies Opinion

2.4.1. Expression of Purpose

Traditionally, New York lawyers seeking an opinion from foreign counsel on an agreement governed by New York law requested a statement that the agreement was "legal, valid, binding and enforceable in accordance with its terms." This statement is the heart of a customary legal opinion in the United States. The Report reaches the conclusion that a lawyer should not state in an opinion that an agreement, which is governed by a law other than his own, is legal, valid, binding and enforceable. The Report recommends a different formulation which more accurately reflects the scope of the Remedies Opinion.

The Tribar Report has pointed out that the "legal, valid, binding and enforceable" opinion assures its recipient that the court will provide some remedy to an aggrieved party if a suit is brought and certain other prerequisites are satisfied. In most cases, the lawyer predicts whether or not a court will uphold an agreement governed by the law of that court's jurisdiction. By contrast, in the context of international transactions, enforcement of an agreement may be sought in forums other than the country named in the governing-law clause.

If read together with the usual qualification that an opinion can only be rendered with respect to a familiar body of law, foreign counsel's opinion that a New York agreement is "legal, valid, binding and enforceable" only states that the governing-law clause in the agreement is valid and effective. In nations other than the country of the governing law, this is the only question which a court will determine under its own law; if the court finds that the governing-law clause is valid and effective under the conflict-of-laws rules of its forum, the court will then continue to apply the law of the stipulated nation. The Report proposes that attorneys use an opinion that clearly expresses what the opinion should say rather than continue drafting complicated opinions which far exceed their proper scope.

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52 For a more detailed discussion of the issues raised in the following text, see Gruson and Kutschera, Opinion of Counsel on Agreements Governed by Foreign Law, 19 Vand. J. Transnat'L L. 515 (1986); Report, supra note 1, at 62-73.
53 Report, supra note 1, at 59.
54 Id. at 64-65.
55 Id. at 65-72.
56 Id. at 62.
57 Id. at 64-65.
58 Id.
2.4.2. Conflict-of-Laws Basis

The principal purpose of foreign counsel's opinion is to address the issue of whether the courts in the foreign lawyer's country will both recognize the parties' stipulated choice of law and treat the agreement in a manner similar to a court within the jurisdiction of the governing law. A resolution of this issue depends on the validity of a party's choice of law under the conflict-of-laws rules which govern in foreign counsel's country. Because these rules differ with every nation, it can be assumed that the answer depends on which country's law is examined. The statements of foreign attorneys in the Report reveal, however, that most countries apply a two-step test in determining the validity of a contractual choice of law: first, they determine whether the choice of law in the agreement is generally recognized, and second, they determine whether there are limitations to the application of that chosen law. The Report suggests the following model for opinions on an agreement governed by a law other than that of foreign counsel:

(i) The governing-law clause[], subjecting the . . . Agreement . . . to New York law, [is] valid under the law of the [foreign lawyer's] country. 60
(ii) Under the law of the [foreign lawyer's] country, New York law will be applied to an agreement . . . such as the . . . Agreement . . . which under the law of the [foreign lawyer's] country has been validly subjected to New York law, except to the extent that any term of such Agreement or any provision of law applicable to such Agreement violates an important public policy of the [foreign lawyer's country]. 61
(iii) None of the terms of the . . . Agreement . . . violates an important public policy of the [foreign lawyer's] country. 62

Opinion (i) addresses the issue of whether a choice of law is generally valid under the laws of foreign counsel's country. 63 Opinion (ii)

60 Id. at 66-69.
61 Id. at 14.
62 Id.
63 Id.
looks to the scope and effect of the chosen law under the laws of foreign counsel’s country and reviews any limitations on the application of an otherwise validly chosen law. Opinion clause (ii) asks for a restatement of those laws which may limit the use of an otherwise validly chosen law in an agreement. Under New York law, for instance, application of a party’s chosen law is limited if either a term of the agreement or a provision of the stipulated law violates an “important public policy” of New York. Similarly, the conflict-of-laws rules of other states or countries may have different limitations and will, therefore, require appropriate variations in the opinion clause (ii). Opinion clause (iii) analyzes the extent to which a court in foreign counsel’s country will apply a rule mentioned in opinion clause (ii) to limit the application of the law governing the agreement. The content of opinion clause (iii), therefore, will be defined by the limitations on governing law imposed by opinion clause (ii). Opinion clause (iii), as drafted above, is based on the assumption that this limitation is not present. Of course, if this assumption is incorrect, opinion clause (iii) must be rephrased. If it is not possible to clearly state that a governing-law clause is limited by a law of foreign counsel’s country (it may be difficult to determine whether a term of the agreement violates a public policy or similar principle of foreign counsel’s country), foreign counsel may simply state that a provision in the agreement “may violate” a public policy or similar limitation of the law of foreign counsel’s nation. In most cases, however, foreign counsel will be able to provide a

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64 Report, supra note 1, at 14.
65 Id. at 63.
66 Id.
67 Id.
68 For example, under Austrian law, the application of an otherwise validly stipulated law to an agreement is limited if the application of a term of the agreement or a provision of the stipulated law is “irreconcilable with the basic principles of Austrian law.” Act of June 15, 1978, Bundesgesetzblatt [BGBI] (federal statute on conflict-of-laws rules) 304, § 6. See generally Report, supra note 1, at 66-69 (authors presenting views of several foreign lawyers on specific legal opinions).
69 Report, supra note 1, at 63.
70 Id. at 64. For example, if a New York lawyer is foreign counsel in connection with an agreement governed by foreign law which contains a provision for compound interest, the question arises whether he should take an exception to opinion (iii). New York courts have held that a provision for compound interest will not be enforced on the grounds that it is contrary to New York public policy. In re Am. Fuel & Power Co., 151 F.2d 470 (6th Cir. 1945); Young v. Hill, 67 N.Y. 162 (1876); Giventer v. Arnow, 44 A.D.2d 160, 354 N.Y.S.2d 162 (App. Div. 1974). It is not clear, however, whether a provision for compound interest violates an important public policy — the standard applied by the conflict-of-laws rules of New York. New York counsel rendering an opinion on an agreement which is governed by foreign law and contains a provision for compound interest may therefore want to limit opinion (iii) by adding the
definite answer. Public policy, as a general legal principle, may be an elusive concept under the law of some nations. Nevertheless, a lawyer should be able to determine whether a specific provision in a commercial agreement violates public policy. This result follows from the fact that, in most jurisdictions, there are only a few cases in which a court has held that certain terms of commercial agreements violated public policy. Although foreign counsel frequently may either hesitate in providing the public policy opinion or wish to qualify it by a “to the best of one’s knowledge” clause, the opinion recipient will insist on the insertion of this clause. It is crucial for domestic counsel to know whether or not certain terms of the agreement can be enforced in the courts of foreign counsel’s country. In addition, concepts such as “public policy” in a conflict-of-laws analysis are legal concepts and are, therefore, subject to legal analysis by a lawyer.

2.4.3. Three Unavoidable Gaps

The Report identifies certain gaps in the Remedies Opinion which cannot be closed.\(^7\) The formulations of opinions suggested by the Report, however, focus attention on those gaps and alert its reader to the limited scope of the opinion. If the traditional Remedies Opinion suggested by the Tribar Report were used for international transactions, the existence of these gaps would remain hidden and unclear.\(^2\)

Any choice of law incorporates portions of the chosen law into the agreement. At the same time, either an express term of the agreement or a provision of the chosen law may violate an important public policy or similar concept of the law of the foreign counsel’s nation. Foreign counsel, however, often does not fully understand the substantive law which may apply to an agreement by virtue of the governing-law clause. In order to confidently state that the chosen law does not violate a public policy of foreign counsel’s nation, knowledge of the laws of both foreign counsel’s nation and the country chosen in the governing-law clause would be required. Therefore, assuming that foreign counsel has no expertise in the governing law, any opinion which foreign counsel provides on the application of the governing law must be limited to the agreement’s stated terms and cannot refer to the substantive law incorporated into the agreement through the governing-law clause. The Report notes that, although the practical implications of this problem

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\(^7\) Report, supra note 1, at 64-65.
are small, this gap between the different laws does exist and cannot be closed.\footnote{Id.} The risk it creates must be assumed by the person who ultimately relies on the opinion of foreign counsel.

There is, moreover, a second gap. Because the applicable law both determines the meaning of the provisions of an agreement and is incorporated into an agreement by virtue of the governing-law clause, an agreement can only be fully understood if it is read with a knowledge of the law governing that agreement. Foreign counsel, however, is usually unfamiliar with this body of law. In the case of opinions rendered in interstate transactions within the United States, it has been suggested that counsel from one state should assume, for purposes of rendering an opinion, that the agreement in question is governed by the law of counsel's forum, rather than the law of the governing state. While this approach may not highlight violations of public policy within the state of the attorney rendering the opinion, it may nonetheless have some merit where the two states have substantially similar legal systems. By contrast, legal differences between nations make it ludicrous to suggest that a foreign lawyer read an agreement drafted under New York law as if it were governed by the law of foreign counsel's nation. With international legal opinions, all one can reasonably expect is that foreign counsel be both familiar with the English language and American legal terminology and experienced in international transactions similar to the transaction reflected in the agreement.

Finally, there is a third gap. Under the conflict-of-laws rules of certain countries, the effect of the governing-law clause may be limited by the law of a third country. Under German law, a governing-law clause will not be applied to an agreement if all elements of the transaction were connected to only one country and if there are mandatory provisions of the law of that country which apply to the transaction.\footnote{Id.} Under the law of The Netherlands, a law other than that which governs the agreement will be applied if the application of that law is of such fundamental importance that it should prevail over the law chosen by the parties.\footnote{Restatement (Second) of Conflict of Laws § 187(2)(b) (1971).} Foreign counsel should not be expected to know the laws of third countries and, therefore, cannot opine on whether or not those laws will override the chosen governing law. Thus, any opinion which foreign counsel gives on the application of the governing law does not necessarily ensure that the law of a third country will not prevail over the governing law under the choice-of-law rules of foreign counsel's country. The person relying on the opinion of foreign counsel

\footnote{Id.}
\footnote{Id.}
\footnote{Restatement (Second) of Conflict of Laws § 187(2)(b) (1971).}
https://scholarship.law.upenn.edu/jil/vol10/iss1/3
can, of course, lessen this risk by obtaining additional opinions from lawyers practicing in the other relevant third countries.

2.4.4. Remedy in Foreign Counsel's Country

An opinion of foreign counsel stating, to the extent possible, that the contractual choice of law will be recognized by the courts in foreign counsel’s country does not assure the recipient of the opinion that these courts will also enforce the agreement. An opinion recipient, however, generally expects an express statement by foreign counsel that the courts in foreign counsel's country will give "some remedy" in a suit based on a breach of the agreement.

The meaning and scope of the word “enforceable” is not entirely clear. Therefore, in order to avoid asking foreign counsel to give an opinion of questionable meaning, the Report spells out in greater detail both the assumptions underlying and the limitations inherent in that opinion. The Report suggests the following opinion:

(iv) Assuming that the . . . Agreement [is] legal, valid, binding, and enforceable under New York law, the . . . Agreement [is] enforceable in accordance with [its] terms, the civil procedure rules of the [foreign counsel’s country] and, subject to the opinions set forth in clauses . . . (i) through (iii) of the Opinion, the applicable provisions of the chosen law of . . . the Agreement [except that the enforceability of the . . . Agreement] may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally.

To the extent that other conditions affecting the enforcement of the agreement by a court in foreign counsel’s country (such as government approvals) may exist, foreign counsel must further qualify the opinion.

Foreign counsel does not have to qualify opinion (iv) with respect to equitable principles of fairness and good faith. The dichotomy between courts of equity and courts of law is unknown in most civil law systems and, therefore, the term “equity” is often translated literally and incorrectly. The Report points out that confusion is exacerbated by the fact that some civil law countries equate a translation of “equity” with concepts related to a duty of good faith. If equitable principles are embodied in procedural rules of a foreign law, they are covered by

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76 Report, supra note 1, at 14.
77 Id. at 69-70.
78 Id. at 14-15.
79 Id. at 71.
the language in opinion (iv). By contrast, if they constitute substantive
rules under the foreign law, a court in foreign counsel's country will
generally not apply them because the court will defer to the substantive
law chosen in the governing-law clause unless it is limited by a public
policy or similar concept in that country. As noted earlier, a limitation
on either a provision of the agreement or a rule of the governing law
should be noted in opinion (iii). 80

2.5. Jurisdiction Clause

In certain instances, a separate opinion on the availability of per-
sonal jurisdiction over a party may be appropriate. The Report identi-
fies three alternatives which should be considered: (1) that the agree-
ment provide for exclusive or non-exclusive jurisdiction in foreign
counsel's country; (2) that the agreement either have a no forum-selec-
tion clause or provide for the non-exclusive jurisdiction of a court other
than one in foreign counsel's country; or (3) that the agreement provide
for the exclusive jurisdiction of a court other than one in foreign coun-
sel's country. 81 With the first two alternatives, it would be appropri-
to obtain an opinion of foreign counsel as to the availability of personal
jurisdiction, based either on a contractual provision or on the laws of
foreign counsel's nation. 82 In the third alternative, the opinion of for-
eign counsel assures its recipient that the courts in the foreign country
would permit the exclusion ("ouster") of their jurisdiction by the agree-
ment between the parties. Furthermore, if jurisdiction of the foreign
courts were removed, the questions of which law would apply and
whether the agreement would be enforceable in the foreign courts is
relevant only in the most unusual circumstances such as those presented
in bankruptcy.

2.6. Pari Passu Opinion

The pari passu opinion was discussed at the London conference of
the International Bar Association in September 1987. 83 A typical pari

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80 See supra notes 63-70 and accompanying text.
81 Report, supra note 1, at 71-72.
82 Id. The opinion may have to be phrased differently and the legality, validity
and binding nature of the agreement under the governing law may have to be assumed
if, according to the conflict-of-laws rules of the foreign counsel's country, the governing
law and not the lex fori determines the validity of a forum-selection clause.
83 A paper on the pari passu clause was presented by Stephan Hutter at the 1987
London meeting of the Subcommittee on Legal Opinions of the Committee E on Bank-
ing Law of the Section on Business Law of the International Bar Association. S. Hut-
ter, The Pari Passu Clause (Feb. 23, 1988) (unpublished memorandum prepared in
connection with the Meeting on September 16, 1987, of the Subcommittee on Legal
passu clause might read as follows:

The obligations of [party] under the Agreement rank at least pari passu in priority of payment and in all other respects with all other [unsecured] obligations of [party]...

The pari passu opinion states that, subject to limited exceptions, certain specified obligations of a party rank equally with all of its other obligations. An exception that is almost always made is that the stated obligations of a party do not rank equally with its secured obligations, whether consensual or statutory. This exception arises from the fact that it is generally understood that a security interest gives its creditor priority over the rights of unsecured creditors in the same collateral. Furthermore, foreign reactions in the Report note that foreign laws frequently give certain groups of either creditors (e.g., depositors) or claims (e.g., those asserted by the government) preference without establishing a security interest in a technical sense. Priorities are also created among creditors in situations of insolvency and liquidation which do not involve the formal institution of either bankruptcy or reorganization proceedings. Two examples of this latter situation are customer claims under the Securities Investor Protection Act and the use of funds of the Securities Investor Protection Corporation. In this case, it cannot be said that general creditors are treated pari passu with these preferred unsecured creditors. Of course, it is impractical in most cases to list every preferred claim which is an exception to the pari passu opinion. In many cases, it is suggested that the opinion recipient recognize that preferred claims may exist and that a general exception should be read into the pari passu opinion. There are, of course, transactions in which it is very important for the opinion recipient to ascertain the exact character of any preferred claims. For instance, if a bank borrows money, the lender is interested in knowing whether bank de-

Opinions of the Committee E on Banking Laws of the Section on Business Law of the International Bar Association) (manuscript available upon request) [hereinafter Hutter].

Id. at 18.

Foreign reactions in the Report show that, although foreign counsel recognizes the problems of contractual or statutory preferences in connection with the pari passu clause, foreign counsel frequently thinks that these qualifications and limitations are implicitly included in the word "secured." Technically, this is not correct. It is important that opining counsel state the applicable qualifications and limitations to the pari passu clause expressly in order to alert the opinion recipient to the actual scope and limits of the opinion.


positors enjoy a statutory preference. In appropriate cases, therefore, the opinion should point out which creditors or claims are preferred by statute.

If an exception is taken for both secured and preferred claims, the remaining scope of the pari passu opinion is very limited. The opinion expresses two ideas: (i) neither the agreement in question nor any collateral agreement between the same parties contractually subordinates a party's claim covered by the opinion, and (ii) under the foreign law, no creditor can be given a preferred claim over another creditor without the subordinated creditor's consent. It is curious that the pari passu opinion is usually not qualified by a bankruptcy exception. By comparison, the Remedies Opinion is nearly always qualified by a statement that enforceability is subject to limitations of bankruptcy, insolvency or other laws affecting the general enforcement of the creditors' rights. 88 The Tribar Report indicates that a bankruptcy exception should be read into the pari passu opinion if it is not specifically mentioned. 89 Because the issue of ranking obligations becomes relevant only in enforcing them, the pari passu opinion is closely related to the enforceability opinion. Foreign reactions in the Report reveal that foreign counsel, in giving a pari passu opinion, do not think that they are also giving an opinion on bankruptcy preferences. Therefore, it is suggested that the pari passu opinion contain a general bankruptcy exception unless foreign counsel is specifically requested to render an opinion on the ranking of obligations in the event of bankruptcy. The following language is suggested:

The obligations of [party] under the Agreement rank at least pari passu in priority of payment and in all other respects with all other obligations of [party] which are not secured and which have not been accorded by law preferential rights, subject to the effect of applicable bankruptcy, insolvency, reorganization, moratorium, liquidation or similar laws relating to, or affecting generally the enforcement of creditors' rights and remedies against [party]. 90

3. OUTLOOK

The continuing efforts of the Subcommittee on Legal Opinions of

88 See Report, supra note 1, at 61.
89 Id. at 60-61. The Tribar Report states, however, that it is preferable to include a bankruptcy exception in the Remedies Opinion because, in general, opinions do not assume that the addressee is aware of federal or state laws.
90 Hutter, supra note 83, at 18.
the International Bar Association have been widely acclaimed by the legal profession. A supplement to the Report presently in preparation will contain additional foreign reactions from representatives of Australia, Brazil, Denmark, Finland, and Spain. It will also contain a summary of the topics presented at the 1987 London meeting. In particular, these topics will include the pari passu opinion and a further investigation of the public policy limitations to governing-law clauses. Finally, the supplement to the Report will contain new issues to be presented at the 1988 Buenos Aires meeting.

So far the Subcommittee has limited its efforts to legal opinions typically requested in international lending transactions. It plans, however, to expand its investigation to opinions requested in corporate acquisitions and securities transactions.

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91 Tony Browne (Arthur Robinson & Hedderwicks).
92 Ruben Fanseca e Silva (Noronha-Advogados).
93 Henrik Lind (Gorrissen and Partners).
94 Matti S. Kurkela (Obstbaum, Harju & Kurkela).
95 Javier Sans Roig (Bufete Roig Aran).