Cross-Border Closing Opinions of U.S. Counsel

By the Legal Opinions Committee,
ABA Business Law Section

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FOREWORD

This Report addresses a subject that has never before been the sole focus of a bar association report: third party opinions given by U.S. lawyers in cross-border transactions. It embodies years of work by lawyers experienced in the field.

As international transactions have become more common, requests to U.S. lawyers for cross-border opinions have increased. These opinions raise issues that are markedly different than those that are present in purely domestic transactions, particularly when the agreement chooses the law of a country other than the United States as its governing law. These issues and other factors, such as language barriers, different legal systems and customs and different expectations, often make the cross-border opinion process difficult and expensive. The purpose of this Report is to promote a better understanding of opinion practice between U.S. and foreign lawyers and to facilitate the giving of cross-border opinions.

The recipients of cross-border opinions often are located in countries whose opinion practices are very different from those followed by U.S. lawyers. The linchpin of this Report is that the customary practice of the country whose law is covered by an opinion letter should govern which opinions can be given, their meaning and coverage, and the work required to support them.

This Report points out that some opinions that are routine in the United States can present challenges when given in a cross-border setting, discusses those challenges and suggests practical ways to address them. This Report also analyzes opinions that normally are given by U.S. lawyers only in cross-border transactions, suggesting how they should be worded and the issues they may raise. This Report points out that in some cases areas of legal uncertainty will exist that the opinion itself cannot eliminate, and thus the parties will need to deal with those matters in other ways.

We hope that U.S. lawyers who give cross-border opinions and lawyers, U.S. and non-U.S., who advise the recipients of those opinions will find this Report equally helpful.

Tim Hoxie, Chair, ABA Business Law Section, Legal Opinions Committee
Etore Santucci, Reporter
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In a financial transaction between U.S. parties, as a condition to closing legal counsel for one party often delivers to the other party a letter expressing such counsel’s professional judgment on various legal issues relating to its client and the transaction. That letter is commonly referred to as a “third-party closing opinion” or simply a “closing opinion.” With increasing frequency U.S. lawyers are asked to deliver closing opinions on matters of U.S. law to non-U.S. parties in financial transactions involving both U.S. and non-U.S. parties (“cross-border transactions”). Those closing opinions, which this Report refers to as “outbound opinions” because they are given by U.S. lawyers to non-U.S. recipients, are the subject of this Report.

I. INTRODUCTION

In the U.S. opinion givers and opinion recipients share a common framework for preparing and interpreting closing opinions. U.S. customary practice is well established with regard to many standard opinions, and guidance on what specific opinions mean, and the work required to support them, is provided in bar association reports and other materials. For outbound opinions, however, the application of this guidance is not always clearly understood by non-U.S. opinion recipients and their counsel. In some cases the guidance requires some adjustments to be workable for U.S. opinion preparers in the cross-border context. On a number of cross-border opinion issues little, if any, guidance is available.

The absence of well-established opinion practice in cross-border transactions, coupled with lack of the same shared conceptual framework between U.S. opinion givers, on the one hand, and non-U.S. opinion recipients and their counsel, on the other, that ordinarily exists in domestic U.S. transactions can give rise to misunderstandings over: (1) what opinions are appropriate to request; (2) the meaning of opinions that are given; and (3) the work the opinion preparers are expected to perform to support the opinions they give. Those misunderstandings can be compounded by differences in legal systems, legal education and practice, language barriers (even when documents are in English or are translated into English), limited experience in many non-U.S. jurisdictions in giving and receiving U.S.-style third party closing opinions, and lack of familiarity with the

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The practice of asking counsel . . . for legal opinions originated in the United States. It is not a common practice in purely domestic transactions in other countries. . . . Legal opinions, however, are gaining increasing acceptance in international transactions, including transactions involving only non-U.S. parties.

form U.S. opinion letters typically take. The risk of misunderstandings also has grown as the number and type of participants in, and the complexity of, cross-border transactions has increased.

The goals of this Report are: (1) to describe what the parties in a cross-border transaction should consider when deciding whether a closing opinion should be delivered by U.S. counsel generally or which particular opinions given; (2) to clarify the application of U.S. customary practice to outbound opinions; (3) to provide guidance on the special considerations that apply to opinions commonly given in domestic U.S. transactions when they are requested or given in cross-border transactions; (4) to explain why some opinion requests are inappropriate in cross-border transactions; (5) to provide guidance on both the meaning of, and the work expected to be performed to support, opinions frequently given in cross-border transactions that are not normally given in domestic U.S. transactions; and (6) to help establish some basic rules of engagement between U.S. opinion givers and counsel for non-U.S. opinion recipients to facilitate cross-border opinion practice and make it less confrontational.

II. APPLICATION OF GENERAL PRINCIPLES OF U.S. OPINION PRACTICE IN CROSS-BORDER TRANSACTIONS

II-1 THE THRESHOLD QUESTION.

As stated in Section 1.2 of the ABA Guidelines for the Preparation of Closing Opinions, opinions to third parties “should be limited to reasonably specific and determinable matters” and the benefit of an opinion to the third-party recipient “should warrant the time and expense required to prepare [it].” The opinions expressed in a closing opinion are not guarantees, but rather expressions of professional judgment, and the costs of preparing them can be substantial. At the outset of a transaction the opinion giver and the opinion recipient and its legal counsel should work together to: (1) weigh carefully the benefit the recipient seeks from each opinion the recipient proposes to request; and (2) compare it to the difficulty and expense of preparing it and understanding the matters it covers and does not cover. In domestic U.S. transactions that comparison

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4 See GUIDE TO THE QUESTIONS TO BE ADDRESSED WHEN PROVIDING OPINION LETTERS ON ENGLISH LAW IN FINANCIAL TRANSACTIONS, (November 17, 2011) (a project of a working party of the City of London Law Society Financial Law Committee) available at http://citysolicitors.org.uk [hereinafter CLLS OPINION GUIDE], ¶11 at 3 (“the approach to giving opinion letters may vary from jurisdiction to jurisdiction, because legal practitioners in each jurisdiction are bound by their own separate professional rules and because the practice of giving opinion letters may have developed differently. In particular, there is significant difference of practice as between the USA and England”). In some non-U.S. jurisdictions, lawyers give written opinions primarily to their own clients, sometimes permitting third parties to rely on them. Ordinarily, however, those opinions are reasoned and are not analogous to third party closing opinions typically given by U.S. lawyers. See IBA REPORT, supra note 2, at 8–9.

5 Comm. on Legal Ops., ABA Section of Bus. Law, Guidelines for the Preparation of Closing Opinions, 57 BUS. L. AW. 875, 876 (2002) [hereinafter ABA GUIDELINES].

6 Regarding the cost-effectiveness of a third-party legal opinion on the enforceability of the agreement, see BUS. LAW SECTION, STATE BAR OF CAL., REPORT ON THIRD-PARTY REMEDIES OPINION: 2007 UPDATE, app. 4 at 15 (2007), available through the Legal Opinion Resource Center of the Comm. on
has led to a reduction in the number and a narrowing of the opinions requested. Indeed, in some types of transactions in which closing opinions were once routinely requested, today they are requested infrequently, if at all. In the cross-border setting a cost/benefit analysis is at least equally, if not more, important.

Many of the opinions requested from U.S. lawyers in cross-border transactions appear on the surface to be the same as in domestic U.S. transactions. Appearances, however, can be deceiving. For the reasons discussed in this Report, opinions commonly given in domestic U.S. transactions can be more difficult and expensive to give in a cross-border setting. In a number of cases giving them in cross-border transactions requires special assumptions or qualifications and some opinions cannot be given at all.

Opinions given by U.S. lawyers also can be problematic from the standpoint of non-U.S. recipients. This is because U.S. opinions often cannot be understood without reference to U.S. customary practice, and for a non-U.S. recipient understanding what particular opinions do and do not cover under U.S. customary practice can be burdensome and costly.

In light of the difficulties inherent in both preparing and interpreting outbound opinions, and of the potential for their being misunderstood by non-U.S. recipients, this Committee recommends that early in a cross-border transaction the U.S. opinion preparers and the non-U.S. recipient (and its counsel) discuss candidly: (1) the cost of preparing each of the opinions the recipient is considering requesting; (2) the benefit the recipient is seeking from each opinion and whether, if given, the opinion would provide

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Legal Ops., ABA Section of Bus. Law (http://apps.americanbar.org/buslaw/tribar/home.shtml):

In the absence of special factors, the benefit to be obtained by an opinion recipient from a third-party remedies opinion can often be realized in a more cost-efficient and informative manner through advice provided by the opinion recipient’s own counsel, especially as it relates to documents regularly prepared by counsel to the opinion recipient for the opinion recipient. In general, it would seem inappropriate for a third-party remedies opinion to be requested or given in that circumstance.

This Report assumes, however, that the current practice of requesting and giving third-party closing opinions in domestic U.S. transactions on a range of legal issues will continue, and that it will extend to comparable cross-border transactions.

See ABA GUIDELINES §2.1, supra note 5, at 877:

Early in the negotiation of the transaction documents, counsel for the opinion recipient should specify the opinions the opinion recipient wishes to receive. The opinion giver should respond promptly with any concerns or proposed exceptions, providing, to the extent practicable, the form of its proposed opinions.

Timely commencement of the opinion process is even more critical in cross-border transactions because non-U.S. lawyers requesting outbound opinions of U.S. counsel may not appreciate fully the time and work required to give them and the opinion preparers may have to assess the impact of non-U.S. law applicable to the transaction on their analysis of issues of U.S. law. Early discussions also may highlight the need for the opinion preparers to consult with non-U.S. counsel or for the opinion recipient to consult with U.S. counsel. These issues can be particularly challenging if the opinion preparers have not been actively involved in the transaction because, for example, their client has been represented primarily by non-U.S. counsel.
that benefit; and (3) if the recipient is not familiar with U.S. customary practice, the additional cost to it in time and resources (possibly including the cost of retaining U.S. counsel) of understanding what each opinion means.

Closing opinions seldom are given in transactions that have no U.S. nexus. When U.S. lawyers are involved in a cross-border transaction, however, they sometimes are asked for closing opinions even though the non-U.S. law firms involved are not. Frequently, no good basis exists for treating U.S. and non-U.S. lawyers differently with respect to delivering closing opinions in a given transaction. Accordingly, in cross-border transactions, instead of automatically expecting U.S. lawyers to give opinions, the parties and their counsel should pause to consider whether non-U.S. opinion recipients can obtain the benefit they are seeking from a closing opinion in other or better ways (for example, by obtaining the advice of their own counsel).

II-2 U.S. CUSTOMARY PRACTICE.

U.S. customary practice amplifies the meaning of words and phrases commonly used in closing opinions, supplies customarily understood limitations, and permits the opinion preparers to rely on many assumptions, exceptions and qualifications without stating them expressly in the opinion letter. U.S. customary practice also establishes the scope and nature of the work U.S. lawyers are expected to perform in preparing particular opinions. Important sources of guidance on U.S. customary practice can be accessed through the Legal Opinion Resource Center of the ABA Legal Opinions Committee.

U.S. customary practice governs the preparation and interpretation of all third-party closing opinions of U.S. lawyers, including opinion letters delivered in cross-border transactions. U.S. lawyers give closing opinions covering matters of U.S. law. When they do so in the cross-border context it is not reasonable to expect them to ascertain the legal opinion practices of non-U.S. jurisdictions in which the opinion preparers do not practice or to tailor an opinion letter to non-U.S. customs for the benefit of a non-U.S. recipient. The opinion preparers also cannot be expected to know how a non-U.S.

8 If non-U.S. lawyers are also delivering closing opinions, and in that connection they are limiting their liability to the recipient, consideration should be given to whether U.S. lawyers similarly should be permitted to limit their liability to the recipient of an outbound opinion in the same transaction.

9 See generally Statement on Customary Practice, supra note 3.

10 See generally id. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §51(2)(g) (2000) (lawyer owes duty of care to non-client when lawyer or client “invites the non-client to rely on the lawyer’s opinion . . .”). Section 95, comment c, of the Restatement states that the standard of care a lawyer giving a third party closing opinion owes the recipient is to exercise “the competence and diligence normally exercised by lawyers in similar circumstances.” Id. at § 95 cmt. c. For a general discussion of the duty of care of opinion givers and the relevance of U.S. customary practice, see D. GLAZER, S. FITZGIBBON AND S. WEISE, GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING, AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS § 1.6.1 (3d ed. 2008) [hereinafter GLAZER TREATISE].

11 http://apps.americanbar.org/buslaw/tribar/home.shtml. Most of the reports of state bar associations and other U.S. bar groups on opinions in domestic U.S. transactions are also reproduced as appendices to the Glazer Treatise. See GLAZER TREATISE, supra note 10.
recipient or its legal counsel might interpret an outbound opinion, which will depend on the latter’s experience and expertise.\textsuperscript{12}

When U.S. lawyers deliver closing opinions in cross-border transactions, they necessarily rely on U.S. customary practice to establish the meaning of the opinions they give and the work they are expected to perform to support each opinion, just as they do when giving opinions in domestic U.S. transactions.\textsuperscript{13} Among other things, if that were not the case, outbound opinions could not take the same abbreviated form as domestic U.S. closing opinions and instead would need to attempt to spell out—in what is likely to be impossible detail—the assumptions, exceptions, limitations, and qualifications that as a matter of U.S. customary practice are understood to be implicit.\textsuperscript{14}

When a non-U.S. opinion recipient is not represented by U.S. counsel and neither the recipient nor its legal counsel is familiar with U.S. customary practice, the recipient runs a serious risk of misunderstanding an outbound opinion that is based on U.S. customary practice.\textsuperscript{15} That risk increases if opinions use standard U.S. terminology while the opinion request, as originally prepared by the recipient’s non-U.S counsel, used terms not commonly used by U.S. opinion givers.

This Committee recommends, as a way to alert non-U.S. recipients to the application of U.S. customary practice and to help reduce the risk of misunderstandings, that U.S. opinion givers expressly state in their outbound opinion letters that the interpretation of each opinion they are giving and the work they are expected to perform to support it are governed by U.S. customary practice.\textsuperscript{16} That statement would: (1) alert

\begin{footnotes}
\item[12] See, e.g., CLLS OPINION GUIDE, supra note 4, ¶63 and 64 at 13 (terms of opinion should be complete and self-reliant, because there is no English law on whether it is possible to rely on “customary practice” being implied; good practice to use language which is easily intelligible and for the letter to be clearly laid out, or the reader may fail to detect true message or draw correct conclusion).
\item[13] This approach is referenced in the CLLS Opinion Guide’s advice to English lawyers regarding opinions given by U.S. lawyers in cross-border transactions. See CLLS OPINION GUIDE, supra note 4, ¶60 at 12.
\item[14] The ABA Legal Opinion Accord, a document of almost 70 pages, illustrates the magnitude of the task of trying to spell out many of the assumptions, exceptions, limitations and qualifications applicable to the meaning of third-party closing opinions. See generally Comm. on Legal Ops., ABA Section of Bus. Law, Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association, 47 Bus. Law. 167, 179 (1991)
\item[15] The same concerns apply to a U.S. recipient of an inbound opinion of non-U.S. counsel if the recipient is not familiar with the non-U.S. opinion practice under which the opinion was prepared. That recipient runs a serious risk of misunderstanding the opinion it receives and ordinarily should not assume that the opinion can be interpreted in accordance with U.S. customary practice or that it can rely on the apparent meaning of the words as they appear on the face of the opinion. See generally GLAZER TREATISE, supra note 10, at § 5.3; IBA REPORT, supra note 2, at 19.
\item[16] The language could read as follows:

This opinion letter shall be interpreted in accordance with the customary practice of United States lawyers who regularly give opinions in transactions of this type and United States lawyers who regularly advise opinion recipients regarding such opinions.

An alternative is to incorporate the ABA PRINCIPLES expressly in the opinion letter, which is
\end{footnotes}
non-U.S. recipients to the need for them to obtain informed advice regarding the meaning of the opinions they receive; and (2) make clear to a non-U.S. court, if a suit later is brought against the U.S. opinion giver outside the U.S., that the opinions that were given are meant to be read in accordance with U.S. customary practice.

Whether or not, however, such a statement is included in an outbound opinion, U.S. customary practice necessarily governs the preparation and interpretation of closing opinions delivered in cross-border transactions, just as it does for those delivered in domestic U.S. transactions. Not including an express statement to that effect (or including it in a draft, but omitting it from the final opinion letter) should not be taken to imply that U.S. customary practice does not apply. An opinion giver has no responsibility to advise an opinion recipient that U.S. customary practice applies or of its significance for relying on an outbound opinion, nor to confirm that a non-U.S. recipient understands the meaning and limitations of the opinions being given. Non-U.S. opinion recipients are responsible for deciding what they need to do to understand the opinions they receive, including, to the extent they deem appropriate, consulting their own counsel on the role of U.S. customary practice in the preparation and interpretation of closing opinions.  

II-3 OMNIBUS CROSS-BORDER ASSUMPTION.

This Report primarily addresses opinions given by U.S. lawyers on transactions in which the agreement between the parties chooses the law of a jurisdiction other than the U.S. as its governing law (the “Chosen Law”). Those opinions cover the law of a specified U.S. state (or states) and may cover U.S. federal law (the “Covered Law”). They, however, do not cover the Chosen Law. Therefore, these opinions are given on the basis of an assumption that each provision of the agreement (including the governing law clause) is valid, binding and enforceable under the Chosen Law, taking into account not only substantive provisions of the law of the non-U.S. jurisdiction of the Chosen Law (the “Chosen Law Country”),

becoming increasingly common in domestic U.S. closing opinions, using, for example, the following language:

*The opinions contained in this opinion letter shall be interpreted in accordance with the Legal Opinion Principles issued by the Committee on Legal Opinions of the American Bar Association’s Business Law Section as published in 53 Bus. Law. 831 (1998).*

See, e.g., D. Glazer & S. Keller, A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles, 61 Bus. Law. 389, 393 (2005) [hereinafter *Boston Bar Streamlined Form*]. If the latter, alternative formulation is used, to facilitate a non-U.S. recipient’s access to the ABA PRINCIPLES, some opinion givers attach them to the opinion letter. See ABA PRINCIPLES, supra note 3.

Nevertheless, if the opinion preparers are aware of a significant issue affecting an opinion to be given, they should consider whether the opinion would be misleading to the recipient unless it is also aware of the issue. Section 1.5 of the ABA GUIDELINES, supra note 5, states that an opinion giver should not give an opinion that the opinion giver recognizes will mislead the recipient with regard to matters addressed by that opinion. The opinion giver, however, does not have a duty to advise or counsel the opinion recipient.

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but also the conflict-of-laws principles of the Chosen Law. This Report refers to the foregoing assumption as the “Omnibus Cross-Border Assumption.” This Committee recommends that the Omnibus Cross-Border Assumption be stated expressly in opinion letters. Because, however, non-U.S. recipients cannot reasonably expect U.S. opinion givers to address the matters the Omnibus Cross-Border Assumption covers, the assumption should be understood to apply even if it is not stated expressly.

III. Opinions Frequently Requested in Cross-Border Transactions and Their Relationship to Opinions Frequently Given in Domestic U.S. Transactions

Some opinions that are frequently requested in cross-border transactions are the same as, or very similar to, opinions U.S. lawyers frequently give in domestic U.S. transactions. In the cross-border context, however, these opinions can raise issues not presented in the domestic U.S. context that make them difficult or impossible to give, necessitate additional qualifications, or require other changes in their wording. Other opinions frequently requested in cross-border transactions are not usually requested or given in domestic U.S. transactions.

III-1 Avoidance of Enforceability Opinions Given “As If” the Agreement Were Governed by the Law of a U.S. Jurisdiction Rather Than the Chosen Non-U.S. Law.

In domestic U.S. practice the Chosen Law may be the law of a U.S. state that is not the state whose law is covered by the opinion letter (the “Covered Law State”). In

18 The Omnibus Cross-Border Assumption could be worded as follows:

[SAMPLE OPINION LANGUAGE].

This assumption would complement the statement traditionally included in an opinion letter regarding the law it is covering (the so-called “coverage limitation”) because, as discussed in later sections of this Report, conclusions reached by the opinion preparers under the Covered Law necessarily rely on assumptions as to matters governed by the Chosen Law even though the Chosen Law itself is not covered by the opinion. If the opinion preparers adopt the approach recommended by this Committee that outbound opinions expressly state that they are governed by U.S. customary practice, this Committee recommends for consistency that the Omnibus Cross-Border Assumption also be stated expressly. See supra note 16 and accompanying text.

19 In domestic U.S. practice many lawyers use “streamlined” forms of opinion letters in which the first few and concluding paragraphs address a limited number of matters, such as the law covered, reliance on specified sources of factual information and reliance on the opinion letter by anyone other than the addressees. These streamlined forms rely on U.S. customary practice for other matters that are generally understood without being stated in the opinion letter. See, e.g., Boston Bar Streamlined Form, supra note 16. In outbound opinions, opinion givers may choose to be somewhat more expansive to make the opinion letter easier for non-U.S. recipients to understand. For example, opinion givers may spell out particular factual or other assumptions that they normally would not state expressly in a domestic U.S. opinion letter and may make clear that the stated assumptions and qualifications are not intended to be exclusive. Also in the cross-border context the parties’ contacts with different countries may have a greater impact on the opinions that are given than in the domestic U.S. context, for example because the nexus with non-U.S. jurisdictions may factor into the legal analysis of issues such as choice of law or forum selection under the Covered Law; if so greater detail about these aspects may be warranted in the opinion letter.
that event, rather than request a separate opinion from local counsel on the enforceability of the agreement under the Chosen Law, opinion recipients sometimes are willing to accept an opinion on the enforceability of the agreement as if the Covered Law were the Chosen Law.\textsuperscript{20} When, however, the Chosen Law is the law of a jurisdiction outside the U.S., an “as if” enforceability opinion raises issues not presented in domestic U.S. practice.

“As if” enforceability opinions require the opinion preparers to consider whether the highest court of the Covered Law State would enforce the agreement if the Covered Law governed the agreement. To give the opinion, therefore, the opinion preparers must consider how that court would interpret the terms of the agreement under the Covered Law, rather than the Chosen Law. In the cross-border context this cannot be done if the agreement is governed by non-U.S. law, because an “as if” enforceability opinion would require that the opinion preparers predict how the highest court of the Covered Law State would interpret the agreement under the Covered Law even though the agreement is based on legal concepts or uses terminology that may have no comparable counterpart under the Covered Law. When the agreement was not drafted in “American English” and the opinion preparers are relying on a translation, these interpretive issues can be even more challenging. The situation may be made worse rather than better if the agreement has dual versions, one in English and one in the original language, particularly if the agreement provides that the version in the original language controls in the event of conflict or ambiguity.

Applying the “as if” approach to agreements governed by non-U.S. law may in fact lead to absurd results because sometimes provisions that do not appear in the agreement at all, such as so-called “non-derogable norms” of contract law in civil law systems, may be among the most material terms of the transaction between the parties as it is governed by the non-U.S. Chosen Law, which is in fact what the non-U.S. opinion recipient wants to happen. In this situation the opinion preparers will find no useful precedent under the Covered Law, because a court in the Covered Law State would not give those terms effect if it enforced the agreement applying the Covered Law rather than the Chosen law. Conversely, that same court would give them effect were it to apply the Chosen Law in enforcing the agreement (as indeed the contract requires it to do and the parties intended).

In addition to the interpretive problem that giving an outbound “as if” enforceability opinion on an agreement governed by non-U.S. law poses for the opinion preparers, an “as if” opinion has the potential to mislead non-U.S. recipients. In giving the opinion, U.S. lawyers may interpret terms of the agreement, even those that appear to have counterparts under the Covered Law, in ways that would come as a surprise to the non-U.S. recipient because they are based on U.S. legal principles, not the legal principles of the Chosen Law Country with which the recipient is familiar. As discussed above, the opinion preparers may not even have considered all of the material terms of

the agreement because some may not appear in the agreement itself, but be prescribed by or incorporated from a statute or other law of the Chosen Law Country.21 The non-U.S. recipient would have little or no way of knowing how the preparers of an “as if” enforceability opinion interpreted the terms of the agreement, and may well not understand that the opinion does not address what the non-U.S. recipient understood to be the parties’ true bargain because terms that are supplied by the Chosen Law do not appear on the face of the agreement.

For all these reasons, this Committee regards as well-advised the practice of not giving “as if” enforceability opinions in cross-border transactions when the agreement is governed by non-U.S. law, and believes that normally requests that U.S. lawyers give such opinions are not appropriate.22

III-2 CHOICE OF NON-U.S. LAW AS GOVERNING LAW.

When the Chosen Law is the law of a non-U.S. jurisdiction, the non-U.S. party to a cross-border transaction often insists on receiving an opinion from U.S. counsel for the U.S. party that if an action relating to the parties’ agreement were brought in a court of...
the Covered Law State, that court would give effect to the governing law clause and therefore apply the Chosen Law. In many states courts apply choice-of-law rules based on Section 187(2) of the American Law Institute’s Restatement of Conflict of Laws in deciding whether to give effect to the parties’ choice of law. Under the Restatement approach, the governing law clause is given effect unless one or both of the following exceptions apply: (1) the state whose law is chosen (the “Chosen Law State”) does not have a substantial relationship to the parties or the transaction and no other reasonable basis exists for the parties’ choice of law; or (2) giving effect to the agreement under the Chosen Law would be contrary to a fundamental policy of the state whose law would have applied had the agreement not contained a chosen-law provision (the “Default State”), if the Default State has a materially greater interest in the issue than the Chosen Law State.

In domestic U.S. transactions, when giving an opinion on the effectiveness of a governing law clause that chooses the law of another state and the choice-of-law rules of the Covered Law State follow the Restatement, U.S. lawyers take different approaches to coverage of the second prong of the Restatement test. Coverage of the second prong

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23 This request addresses the concern of the recipient about applicable law in case it may be required, or choose, to seek enforcement of the agreement in the Covered Law State (particularly when, as is often the case, the opinion giver’s client has significant operations there), rather than the jurisdiction whose law is chosen. For example, in a cross-border loan, if the lender is located in Germany, the borrower is located in New York, and the agreement chooses German law, the lender may ask a New York lawyer to give an opinion that the agreement’s choice of German law will be given effect if the lender sues the borrower in New York. See IBA REPORT, supra note 2, at 250. Unlike the “as if” enforceability opinion discussed earlier in this Report, the only issue covered by the choice-of-law opinion is whether, if a dispute relating to the agreement were litigated in New York, the governing law clause would be given effect under New York choice-of-law rules.

24 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187 (1971). This Report assumes that §187(1) (which provides that the law chosen by the parties will be applied if the particular issue is one that the parties could have resolved by an explicit provision in their agreement directed to that issue) does not apply and, thus, that the applicable test is set forth in §187(2). Some states have enacted statutes that validate, if specified conditions relating to the nature and size of the transaction are met, contractual provisions selecting that state’s own law without regard to whether the parties or the transaction have a reasonable relationship with that state. See, e.g., CAL. CIV. CODE § 1646.5 (West 2006, Supp. 2010); DEL. CODE ANN. tit. 6, § 2708 (2010); NY GEN. OBLIG. LAW § 5-1401 (2010)). Such statutes typically do not address the enforceability of a choice-of-law clause selecting the law of another jurisdiction and thus have no bearing on whether a court in the state that enacted the statute would give effect to the parties’ choice of another jurisdiction’s law. This Report only deals with choice-of-law rules based on §187(2) of the Restatement of Conflict of Laws.

25 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187(2) (1971). This Report refers to the exception under clause of §187(2) described in paragraph (2) in the text as the “second prong” of the Restatement test.

26 In many domestic U.S. transactions in which the Chosen Law is not the Covered Law, recipients do not insist on receiving an opinion that specifically addresses the effectiveness of the governing law clause under the Covered Law. In lieu of a choice-of-law opinion, recipients often are willing to accept an enforceability opinion that is given “as if” the Covered Law were the Chosen Law. In the cross-border context, as discussed earlier in this Report, “as if” enforceability opinions normally are not given. See supra text accompanying note 22.

of the Restatement test is even more problematic in the cross-border context because a foreign legal system is involved. Thus the analysis would require determining not only (1) whether the Covered Law or another U.S. state’s or non-U.S. jurisdiction’s law would govern in the absence of a governing law clause and (2) if so, whether that other jurisdiction has a materially greater interest in the issue (determinations that may be difficult, if not impossible, to make), but also (3) whether giving effect to the agreement under the Chosen Law would violate a fundamental policy.

Even if the Covered Law State is, or is treated for purposes of the choice-of-law opinion as if it were, the Default State, making the determination whether a fundamental policy of the Covered Law State would be violated would require that the opinion preparers understand at a detailed level what the agreement in fact provides and what it means under the Chosen Law, which is the law of a non-U.S. jurisdiction. U.S. lawyers with limited, if any, familiarity with the non-U.S. Chosen Law typically will not have the necessary understanding to determine whether applying that law to the agreement would violate a fundamental policy of any jurisdiction, even if they assume that the Covered Law State, whose law they do know, is the Default State. Foreign statutes may supply provisions that do not appear in the agreement or may override or modify provisions that do appear. In addition, the non-U.S. Chosen Law may interpret terms in the agreement, some of which are likely to have no comparable counterpart in U.S. law, in ways that would come as a surprise to U.S. lawyers. The inevitable imprecision of translating into English agreements written in another language ordinarily will exacerbate the

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28 Tribar Supplemental Chosen-Law Report, supra note 27, 1166 n.14 and accompanying text (Restatement requires that agreement be interpreted under the Chosen Law for purposes of determining whether under second prong of Restatement test giving effect to agreement will violate fundamental policy of the Default State; contractual provisions may have different meaning under Chosen Law, which may prevent opinion preparers from giving choice-of-law opinion, depending on type of agreement, matters covered and terminology used).

29 See supra note 21 and accompanying text (discussing this interpretive difficulty in context of as-if opinions).

30 The IBA REPORT recognizes the existence of this interpretive problem but concludes that the challenges it poses for the opinion preparers can be reduced to a manageable level if the agreement sets forth comprehensively the rights and obligations of, and the remedies available to, the parties and does not rely extensively on a general body of applicable foreign law to govern the relationship between the parties. IBA REPORT, supra note 2, at 168. The IBA REPORT also concludes that the opinion could be given based on the opinion giver’s reading of the agreement “on its face and within the four corners of the document” even though the opinion giver is not familiar with the foreign law applicable to the agreement. Id. at 260. For the reasons discussed later in this section, this Committee disagrees with these conclusions and recommends that the opinion only be given if it expressly excludes coverage of fundamental policies of any jurisdiction that might lead a court in the Covered Law State to decline to enforce the governing law clause under the second prong of the Restatement test. See infra note 33 and accompanying text.
problem. As a result, even when the terminology used in the agreement may look familiar to the opinion preparers, for example because it is based on a U.S. form of agreement, they cannot be expected to know whether the terms used have the same meaning under the Chosen Law as they do under the Covered Law.

As is the case in domestic U.S. practice when another state’s law is chosen, some U.S. lawyers are unwilling to give choice-of-law opinions in cross-border transactions in which the Chosen Law is the law of a non-U.S. jurisdiction. Non-U.S. recipients, however, often request this opinion and insist on receiving it. This Committee believes that when the choice-of-law rules of the Covered Law State are based on §187(2) of the Restatement U.S. lawyers can give an opinion on the effectiveness under the Covered Law of a governing law clause choosing the law of a non-U.S. jurisdiction, but only if the opinion does not cover the second prong of the Restatement test. In light of the reasons why coverage of the second prong of the Restatement test can be problematic, as described in detail in a 2013 report of the TriBar Opinion Committee, and the fact that those reasons have even greater force in a cross-border setting, U.S. lawyers willing to give the opinion should consider whether to state an exception or assumption for fundamental policies in the opinion letter and, if so, how broadly to phrase it. Although not always included in choice-of-law opinions in domestic U.S. practice, this Committee recommends that: (1) an express exception or assumption for fundamental policies be included in outbound choice-of-law opinions; and (2) in light of the special challenges

When the opinion preparers rely on a translation, they often disclose that reliance in the opinion letter and expressly assume that the translation is a complete, fair and accurate English rendition of the foreign language text of the agreement.

The same problems can arise even when the agreement is in English and the language of the jurisdiction whose law is chosen also is English. An example is the phrase “best efforts,” a phrase that U.S. opinion preparers would likely not know is interpreted differently in England than in many U.S. states. Under English law, “best efforts” means that a party to an agreement will do whatever is required to perform the covenant involved, no matter how onerous. In the U.S., “best efforts” in many states means that a party will use the highest level of effort that is commercially reasonable under the circumstances. Depending on the facts, a U.S. court might find that an agreement to use “best efforts” as interpreted under English law violates a fundamental policy in the U.S. against the imposition of a penalty if, for example, it would require an obligor to expend extravagant sums to address a minor defect in performance. Because a choice-of-law opinion covering the second prong of the Restatement test would cover the terms of the agreement as interpreted in accordance with English law, the understandable failure of U.S. opinion preparers to recognize the different interpretation of “best efforts” would result in an erroneous opinion that the choice of English law will be given effect under the Covered Law (even assuming that the Default State is the Covered Law State).

The exclusion of fundamental policies from the opinion’s coverage should be readily understood by non-U.S. opinion recipients because the choice-of-law rules of many foreign countries are similar to the Restatement test: first determine whether the parties’ choice of law can be recognized in general, then identify any specific limitations, including public policy limitations, on the application of the chosen law. Cf. IBA REPORT, supra note 2, at 164–68 (acknowledging the existence of an “unavoidable gap” in confirming the effectiveness of the governing law clause, as neither foreign nor U.S. counsel can say whether giving effect to the agreement under the non-U.S. law selected by the parties would violate a fundamental policy of the jurisdiction whose law would otherwise apply without having expertise in all laws that may apply, and stating that “although the practical implications of this problem are small, it should be noted that this gap does exist and cannot be closed. The risk it creates must be assumed by the person who ultimately relies on the opinion”).
discussed above in applying the second prong of the Restatement test to cross-border agreements that choose non-U.S. law, the exception or assumption cover the fundamental policies of the Covered Law State as well as those of any other jurisdiction that may be the Default State under the second prong of the Restatement test.\(^{34}\)

Even if an outbound choice-of-law opinion does not cover fundamental policies, it will still cover matters important to non-U.S. recipients. Among those matters are: (1) the presence under the Covered Law of a sufficient nexus with the Chosen Law State to satisfy the first prong of the Restatement test; (2) the inapplicability under the Covered Law of mechanical rules, for example a rule that the governing law shall be the law of the place where the contract was entered into or the law of the jurisdiction with the closest relationship to the transaction; (3) the satisfaction of formal or procedural requirements under the conflict-of-laws rules of the Covered Law State; and (4) the absence of a general prohibition on application of the Chosen Law by the courts of the Covered Law State.\(^{35}\)

When the Chosen Law is the law of a non-U.S. jurisdiction, the opinion preparers are entitled to base a choice-of-law opinion on an assumption that the agreement generally and the governing law clause specifically are valid, binding and enforceable under the Chosen Law. For this purpose they are entitled to rely without so stating on the Omnibus Cross-Border Assumption.\(^{36}\)

\(^{34}\) The opinion and related qualification for fundamental policies could be worded as follows:

**[SAMPLE OPINION LANGUAGE]**

As noted above, the second prong of the Restatement test looks to whether giving effect to the agreement under the Chosen Law would violate a fundamental policy of the Default State. In the cross-border context, however, determining whether the Default State is the Covered Law State, another state, or a foreign jurisdiction would require the opinion preparers to analyze facts that may be both complex and unknown, as well as laws from one or more jurisdictions as to which they are not experts. See generally TriBar Supplemental Chosen-Law Report, supra note 27, 1163-1164 and n. 5-13 (factors for determining Default State include needs of interstate and international systems, protection of justified expectations, and needs of judicial system; breadth and inherent imprecision of factors can (and often do) prevent opinion preparers from being able to identify Default State with the level of certainty opinion requires).

Some U.S. lawyers include in their outbound choice-of-law opinions a statement that they “do not believe” that application of the non-U.S. law chosen in the agreement would be contrary to a fundamental policy of the Covered Law State or of other jurisdictions whose law may apply. This Committee recommends against including such language because statements regarding an opinion giver’s knowledge or belief should be limited to matters of fact, not of law. See TriBar Op. Comm., Third-Party “Closing” Opinions: A Report of the TriBar Opinion Committee, 53 BUS. LAW. 591, 619 n.59 (1998) [hereinafter TriBar 1998 Report].

\(^{35}\) These are matters of concern under the law of many countries, and therefore many non-U.S. recipients would expect them to be covered by a choice-of-law opinion. See IBA REPORT, supra note 2, at 165. Not all states apply choice-of-law rules based on §187(2) of the Restatement, and even those that do may not follow the Restatement in all respects. [MENTION NY NOT BEING A RESTATEMENT STATE – SEE TRIBAR SUPPL. COL REPORT] When applying §187(2) of the Restatement, opinion preparers need to make a determination that the Chosen Law State has a reasonable relationship to the parties or the transaction. The opinion preparers in each particular state need assess what other determinations, if any, are required under the Covered Law.
III-3 INTERNATIONAL ARBITRATION.

The parties to cross-border transactions often choose arbitration as the method for resolving disputes that may later arise between them. An agreement to arbitrate, however, is of no value if courts will not enforce it or if an arbitral award made pursuant to the agreement will not be given effect in the jurisdiction where the winning party seeks to have it enforced (which often will not be where the arbitration took place, but rather where the losing party has assets). As a result, when an arbitration clause is included in an agreement in a cross-border transaction, a non-U.S. party often asks U.S. counsel for an opinion that, under the Covered Law, (1) the agreement of the parties to arbitrate is enforceable and (2) an arbitral award made in accordance with the clause will be recognized and enforced in the U.S. without a re-hearing on the merits.

The U.S. is a signatory to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). As discussed in greater detail in sections III-3.1 and III-3.2 of this

36 See supra text accompanying note 18. Because the Chosen Law is the law of a non-U.S. jurisdiction, the validity and binding effect of the agreement as a whole are not governed by the Covered Law. Often, however, non-U.S. parties will request opinions from U.S. counsel that the U.S. party has the corporate power to enter into the agreement and that it has duly authorized, executed, and delivered the agreement. See infra text accompanying notes 164-168.

37 Parties typically adopt so-called “broad form” arbitration clauses pursuant to which they elect to submit to arbitration the full range of disputes that may arise out of or relate to their contractual relationship, including issues relating to contract formation, such as fraudulent inducement to contract.

38 Although international arbitration is a private method of dispute resolution, it requires the support of the legal system if a party refuses to arbitrate or the losing party refuses to honor an arbitral award. See generally A. REDFERN & M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL ARBITRATION (4th ed. 2004). Because the law of one country may not be sufficient to deal with this problem, countries have entered into international treaties and conventions. These treaties and conventions have the force of law in all signatory countries and are applied by their national courts.

Report, if the New York Convention applies to the transaction, a U.S. lawyer usually will have no difficulty giving an opinion that, subject to limitations provided in the New York Convention, the agreement to arbitrate is enforceable under U.S. federal law and an arbitral award made in accordance with the clause will be recognized and enforced in the U.S. In effect, the opinion does no more than confirm that the prerequisites for application of the New York Convention have been satisfied. The opinion does not cover the applicability of any of the exceptions provided in the New York Convention, whether in the context of a suit brought by a party to the agreement to compel arbitration or of a suit to have an arbitral award recognized and enforced.

Chapter 2 of the Federal Arbitration Act (the “FAA”) implements the provisions of the New York Convention. The FAA preempts state law if state law conflicts with or departs significantly from the policies of the New York Convention or the FAA. While the New York Convention is not the only treaty that applies to international arbitration, it is the most important. Accordingly, this Report only covers opinions on arbitration clauses to which the New York Convention applies.

The Model Law, although not binding as a matter of U.S. law, offers valuable guidance on the interpretation of principles and practice under the New York Convention.

See infra notes 53–70 and accompanying text.

The New York Convention in the form ratified by the U.S. is not applicable to agreements to arbitrate in countries that are not signatories. See infra note 47. While this Report only deals with arbitration clauses covered by the New York Convention, if another international treaty to which the U.S. is a party applies to the arbitration clause, a U.S. lawyer may be able to give an opinion on its enforceability. The opinion preparers, however, should proceed with caution. In the absence of a governing international treaty the cost of doing the legal analysis and the difficulty of making the necessary determinations often will prevent a U.S. lawyer from giving an opinion on the arbitration clause.

See infra text accompanying notes 55, 64–65. As a practical matter, an opinion cannot address whether a U.S. court will determine that an exception provided in the New York Convention applies to a dispute that has not yet arisen at the time the opinion is given. That determination will be made at a later time by the court based on the specific claims made and the legal issues involved in the dispute.

9 U.S.C. §§ 201–08 (2006). Adoption of Chapter 2 of the FAA was necessary to bring the terms of the New York Convention into the framework of the U.S. legal system. Chapter 2 of the FAA covers all awards that have a genuine international element. U.S. arbitration agreements and awards that do not have an international element are covered by other provisions of the FAA. See generally id. §§ 1–15. Sections 203–205 of the FAA give U.S. federal courts non-exclusive jurisdiction over actions to enforce international arbitration agreements or awards, regardless of the amount in controversy, and allow defendants to remove actions brought in state court to federal court. Id. at §§ 203–05. Pursuant to sections 206–207 of the FAA, a federal court may compel arbitration in accordance with the parties’ agreement and, subject to a three-year time limit, may issue an order confirming a foreign arbitral award unless one of the exceptions enumerated in the New York Convention applies. Id. §§ 206–07.

Some aspects of state law may apply to international arbitration, so long as state law supplements but does not conflict with the FAA. The opinion preparers, therefore, should be familiar with provisions of the Covered Law on the subject of arbitration generally in addition to the FAA.

For example, the U.S. is a party to the Inter-American Convention on International Commercial Arbitration, January 30, 1975, 14 I.L.M. 336 [hereinafter Panama Convention], which Congress has
Pursuant to Section 202 of the FAA, the New York Convention applies to any arbitration agreement or foreign arbitral award arising out of an international contractual transaction. For purposes of the FAA, a transaction is not international if it is entirely between U.S. citizens, unless it otherwise involves international commerce, for example because it concerns property located outside the U.S., the contract is to be performed outside the U.S., or the transaction bears some other reasonable relationship with a foreign country. In addition, in the U.S. the New York Convention is subject to two important reservations: (1) the reciprocity reservation, which limits its application to awards made in other countries that are parties to the Convention; and (2) the commercial reservation, which limits its application to transactions considered “commercial.” The New York Convention does not define “commercial,” instead implemented in Chapter 3 of the FAA. See generally 9 U.S.C. §§ 301–07 (2006). Chapter 3 of the FAA incorporates by reference sections 202–207 of the FAA. Id. § 302. As a result, implementation of the Panama Convention tracks closely that of the New York Convention. Under both the New York Convention (as implemented by the U.S.) and the Panama Convention, U.S. courts will only recognize and enforce arbitral awards made in countries that are parties to the respective Convention (the “reciprocity requirement”). The FAA further provides that the Panama Convention applies when both conventions are applicable if a majority of the parties to the arbitration agreement are citizens of countries that have ratified or acceded to the Panama Convention and that are member states of the Organization of American States. Id. § 305. In all other cases the New York Convention applies.

The New York Convention has more signatories than any other convention relating to arbitration. See generally NEW YORK CONVENTION STATUS, supra note 39. It expressly recognizes, however, the right of the parties to an arbitration agreement to invoke, if applicable, remedies and procedures available under other multilateral or bilateral treaties or the law of the country where enforcement is sought. See New York Convention, supra note 39.

These reservations were adopted by the U.S. through a 1970 instrument of accession. See NEW YORK CONVENTION STATUS, supra note 39.

U.S. courts have interpreted the reciprocity requirement narrowly. See Fertilizer Corp. v. IDI Mgmt., Inc., 517 F.Supp 948, 953 (S.D. Ohio, 1981) (holding that reciprocity only required determination that India was signatory to New York Convention, not analysis of how Convention was applied in India).

The New York Convention allows signatory countries to declare, as the U.S. has done, that they will apply the Convention only to disputes arising out of legal relationships, whether contractual or not, that are considered commercial under the national law of the country making the declaration. See New York Convention, supra note 39. Examples of matters that under the law of many countries are not deemed “commercial” are civil rights, employment discrimination and family law and child custody. See generally WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 120 & n.18 (Oxford University Press 2006). Building upon practice under the New York Convention, the Model Law seeks to make the term more uniform and precise, stating that legal relationships of a commercial nature include: (1) trade transactions for the supply or exchange of goods or services; (2) distribution agreements; (3) commercial representation or agency arrangements; (4) factoring; (5) leasing; (6) construction of works; (7) consulting; (8) engineering; (9) licensing; (10) investment; (11) financing; (12) banking; (13) insurance; (14) exploitation agreements or concessions; (15) joint ventures or other forms of industrial or business cooperation; and (16) carriage of goods or passengers by air, sea, rail or road. See Model Law, supra note 3939. When courts in the U.S. have considered whether particular activities are “commercial” under either the New York Convention or provisions of the FAA applicable to domestic U.S. arbitration, they often have adopted a view that the concept of “commercial” in the international context encompasses a broader range of matters than in the domestic context. For a discussion of the separate, but related, concept of subject matter arbitrability see infra notes 54, 59.
allowing signatory countries to define the term. Similarly, the FAA does not define “commercial,” leaving the issue to the courts.

The New York Convention applies only to “foreign arbitral awards,” which it defines as any arbitral award that: (1) is made in the territory of a country other than the country where recognition and enforcement of the award is sought; or (2) is not considered a domestic award under the law of that country. The Convention’s definition of “foreign arbitral award” may present an issue for the opinion preparers if the agreement does not require that the arbitration take place outside the U.S. or is silent as to the location of the arbitration. In those situations many opinion preparers include in their opinion an express assumption that the transaction and the dispute subject to arbitration have a foreign nexus sufficient to satisfy the second prong of the definition of “foreign arbitral award” in the New York Convention. In the alternative, the opinion preparers may expressly assume that the arbitration will take place outside the U.S. so as to satisfy the first prong of that definition.

The New York Convention promotes international arbitration as a dispute resolution mechanism, and, consistent with that policy objective, U.S. courts have consistently compelled international arbitration, recognized and enforced international

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50 New York Convention, supra note 39, at art. 1. This definition reflects a compromise among signatory countries that favored a strict territorial approach (the first clause) and those that favored taking into account the nationality of the parties, the subject of the dispute and the rules of the arbitration, including the governing law. See generally Contini, International Commercial Arbitration, 8 Am. J. Comp. L. 283 (1959), at 293-294. Application of the first prong of the definition of foreign arbitral award is purely mechanical. Application of the second prong, however, requires a facts-and-circumstances analysis because, if an arbitral award is rendered in the U.S., the New York Convention may or may not apply depending on whether under U.S. law the award would be considered a “domestic award.” The New York Convention leaves it to signatory countries to define “non-domestic awards,” and the FAA does not provide a statutory definition. See Bergesen v. Joseph Muller Corp., 710 F. 2d 928 (2d Cir. 1983) (award made in N.Y. involving Norwegian and Swiss parties a “foreign” award because awards not considered as domestic are those made within the legal framework of another country, e.g., under foreign law or involving non-U.S. parties).

51 Section 202 of the FAA provides that an agreement or award entirely between U.S. citizens does not fall within the New York Convention unless it involves property located abroad, performance or enforcement abroad or “has some other reasonable relation with one or more foreign states.” The Convention and the FAA, when read in light of the case law, provide certainty that the New York Convention applies to: (1) arbitral awards made outside the U.S., because they satisfy the territorial prong so long as the transaction itself has a foreign nexus; and (2) arbitral awards made in the U.S. if the parties are all non-U.S. parties. What is not as certain, however, is whether an award made in the U.S. involving a transaction between a U.S. party and a non-U.S. party might be held under U.S. law to be a “domestic” award, rather than a “foreign” award. See, e.g., Yusuf Ahmed Alghanim & Sons, W.I.I. v. Toys “R” Us, Inc., 126 F. 3d 15 (2d Cir. 1997) (New York Convention clearly applies to disputes involving two non-domestic parties and a U.S. corporation and contract performance in the Middle East; yet domestic arbitration provisions of FAA apply as well, giving U.S. District Court power to vacate or modify award under the domestic law of the state in which, or under which, the award was made); Jain v. de Mézé, 51 F. 3d 686 (7th Cir. 1995), cert. denied, 516 U.S. 914 (1995) (arbitration dispute between French and Indian parties governed by French law clearly within Chapter 2 of FAA, but where agreement failed to specify a location for arbitration U.S. federal court had same power under Chapter 1 of FAA to compel arbitration in its own U.S. district as it would for domestic arbitration).
arbitral awards, and construed narrowly the grounds for judicial review.52 Outbound opinions on the enforceability under U.S. law of agreements to arbitrate outside the U.S. are discussed in section III-3.1 of this Report. Outbound opinions on the recognition and enforcement in the U.S. of future foreign arbitral awards are discussed in section III-3.2 of this Report.

III-3.1 ENFORCEABILITY OF THE AGREEMENT TO ARBITRATE.

The New York Convention requires the courts of a signatory country to enforce “an agreement in writing”53 in which the parties undertake to submit to arbitration all or any differences that may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter “capable of settlement by arbitration.”54 A court may refuse to enforce an agreement to arbitrate to which the New


53 The New York Convention provides that the term “agreement in writing” includes an arbitration clause in a contract, as well as a separate arbitration agreement, in each case signed by the parties or contained in an exchange of letters or telegrams. New York Convention, supra note 39, art. II.2. The precise form of the agreement to arbitrate, however, is not prescribed by the New York Convention, and courts have treated as “an agreement in writing” an exchange of letters or telexes through agents and brokers or subsequent conduct by parties who have received (but not signed) contract forms that include or incorporate by reference an arbitration clause. See generally Asken & Dorman, supra note 52. See, e.g., Chloe Z Fishing Co. Inc. v. Odysseus Re (London) Ltd., 109 F. Supp. 2d 1236 (S.D. Cal., 2000) (interpreting article II.2 requirement as exhaustive and mandatory, but then deeming it met by marine insurance broker’s slip and insurer’s certificate of insurance, although letters were not exchanged). This requirement is rarely an issue for the opinion preparers because closing opinions ordinarily are requested in transactions in which the parties execute and deliver a “traditional” written agreement. Even though the opinion preparers are allowed to rely on the Omnibus Cross-Border Assumption with respect to contract formation and validity generally when the agreement chooses non-U.S. law as the governing law, they ordinarily should decline to give an opinion on an agreement to arbitrate that is not part of a written contract signed by both parties. Doing so will avoid dealing with the issue whether an exchange by facsimile, e-mail, or other electronic means satisfies the requirement that the arbitration agreement be in writing.

54 See New York Convention, supra note 39, art. II(2) Whether the subject matter of a dispute arising under an agreement in a cross-border transaction is capable of being settled by arbitration is referred to as the “arbitrability” issue. Arbitrability is decided by the court being asked to enforce an arbitration clause under the law of that court’s jurisdiction. REDFERN & HUNTER, supra note 38, at 163–64. Although in theory the subject matter of all disputes is as capable of being decided by a qualified arbitrator as by a judge, in most countries some areas of the law are reserved for the courts and, therefore, under the New York Convention are not “capable of settlement by arbitration.” See, e.g., PARK, supra note 49, at 115, 121 (noting that courts have resisted giving effect to agreements to arbitrate “core” public law claims for fear that private adjudicators may under-enforce laws designed to protect society at large). While the law varies from country to country, courts in the United States
York Convention otherwise applies if it finds that it is null and void, inoperative, or incapable of being performed. Enforcement by a U.S. court of an arbitration clause under Chapter 2 of the FAA can take one of two forms. First, a party to an arbitration agreement can ask a court to compel the other party to arbitrate. Second, if a party to an agreement is incapable of being performed.

The term “arbitrability” is sometimes used to refer to the separate issue of whether under the terms of the agreement the parties intended that a particular dispute be arbitrated. Courts in the United States generally have chosen not to decide whether the main agreement is valid as a whole. Instead, they usually consider the validity of the arbitration clause standing alone, and, if they determine that the clause itself (separately from the agreement of which it is a part) is not “null and void, inoperative or incapable of being performed,” they refer the parties to arbitration and leave the validity of the main agreement, as well as any other disputed issues raised by the parties, to the arbitrators to decide.

Consistent with international practice, this Report uses the term “arbitrability” only as described in the preceding paragraph.

Courts in the United States (as in most of the jurisdictions that have adopted the New York Convention) construe these grounds for refusing to compel arbitration narrowly in light of the goal of the Convention to promote international arbitration. In applying this provision a court theoretically could approach “validity” in one of two ways: it could consider the broader “main” agreement governing the underlying transaction, or it could focus on the narrower agreement to submit arbitration any disputes arising under the main agreement (i.e. only consider the validity of the arbitration clause). Courts in the United States generally have chosen not to decide whether the main agreement is valid as a whole. Instead, they usually consider the validity of the arbitration clause standing alone, and, if they determine that the clause itself (separately from the agreement of which it is a part) is not “null and void, inoperative or incapable of being performed,” they refer the parties to arbitration and leave the validity of the main agreement, as well as any other disputed issues raised by the parties, to the arbitrators to decide. Consistent with the parties’ intent that substantive issues be resolved by arbitration, not the judicial system, U.S. courts applying the New York Convention tend to favor the validity of arbitration clauses absent compelling grounds for invalidity, for example that the agreement to arbitrate has been obtained by fraud, mistake or duress. The New York Convention also gives courts authority to assist the parties in implementing their intent to arbitrate disputes. For example, if an agreement specifies that arbitration is to take place in a particular country pursuant to the rules of an arbitration organization that does not exist in that country, a court considering whether the arbitration clause is capable of being performed may, instead of refusing to enforce the agreement, specify an alternative arbitration forum and rules so as to give effect to the parties’ intent that disputes between them be resolved outside the courts.

Commentators have pointed out that enforcing an agreement to arbitrate is different from enforcing other commercial agreements. An award of damages for breach of the arbitration clause is unlikely to be a practical remedy given the difficulty of quantifying the loss. Under the FAA, a court order compelling arbitration carries the same force and sanctions (including contempt of court) as other injunctive relief. Although authorized by the FAA and not uncommon, however, court orders for specific performance may be difficult to enforce if the non-U.S. parties against whom they are issued continue to refuse to arbitrate and are beyond the reach of the court. Indirect enforcement of an agreement to arbitrate may be the most effective remedy: if a
arbitration agreement brings suit in a U.S. court with respect to a matter subject to the agreement, the other party can ask the court to stay the proceeding pending arbitration.

An opinion normally can be given that an agreement covered by the New York Convention requiring arbitration outside the U.S. of future disputes arising in connection with a cross-border transaction is enforceable under U.S. federal law, subject to the exceptions set forth in the New York Convention. To give the opinion, the opinion preparers need to satisfy themselves that the five prerequisites for application of the New York Convention and the FAA to apply (the “Five Arbitration Prerequisites”) are met: (1) the parties have entered into a written agreement to arbitrate; (2) the agreement provides for arbitration in the territory of a signatory country to the New York Convention; (3) the agreement is between a U.S. and a foreign party or between foreign parties or, if it is entirely between U.S. parties, the underlying transaction is international in nature; (4) the agreement arises out of a legal relationship that qualifies as commercial under U.S. law; and (5) the agreement does not relate to a subject matter that is within one of the few categories that are not arbitrable under U.S. law. The first three requirements are primarily a matter of form. The last two require the opinion preparers to make substantive legal judgments, but in practice the subject matter of cross-border agreements of the kind on which outbound opinions typically are requested is extremely unlikely to fail to meet either the “commercial” or the “arbitrable” prerequisites. When a dispute arises between the parties and one party brings suit in violation of the arbitration clause, the New York Convention requires the court to stay the proceeding, leaving arbitration as the only available route for resolving the dispute.

This opinion addresses a federal statute (the FAA). Thus, to avoid the risk of misunderstanding, the opinion letter should cover U.S. federal law expressly, at least for purposes of this opinion.

The opinion could be worded as follows:

[SAMPLE OPINION LANGUAGE]

Some opinion givers refer expressly to the exceptions provided in Article II.3 of the New York Convention, which allows a U.S. court to refuse to refer the parties to arbitration if it finds that the agreement to arbitrate is null and void, inoperative, or incapable of being performed. New York Convention, supra note 39, art. II(3); see also supra note 55 and accompanying text.

For a general discussion of subject matter arbitrability, see supra note 54. Although what matters are arbitrable is the subject of many cases decided under the FAA, case law on the meaning of “commercial” is scarce. Nonetheless, in practice the two concepts overlap to a great extent. U.S. courts will enforce almost all arbitration clauses in cross-border transactions, regardless of whether the subject matter of the agreement is governed by contract or by statute. See J. McLaughlin, Arbitrability: Current Trends in the United States, 59 ALB. L. REV. 905, 906 (1996). The U.S. Supreme Court has held repeatedly that the FAA creates a strong presumption of arbitrability and over time has narrowed significantly the types of transactions in which contracting parties cannot agree to arbitration, particularly in international commerce. Id. at 940; see, e.g., Gilmer v. Interstate/Johnson Lane Corp., 50 U.S. 20 (1991) (finding claim for discrimination under Age Discrimination in Employment Act of 1967 arbitrable); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) (finding claims under Securities Act of 1933 arbitrable); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (finding claims under Securities Exchange Act of 1934 and RICO arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (finding antitrust claims arising under Sherman Act arbitrable in case involving international agreements); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (upholding compulsory arbitration of fraud-based claims where subject matter of transaction was sale of securities in case involving
the agreement selects non-U.S. law as its governing law, the opinion preparers are entitled to assume that the agreement generally and the arbitration clause specifically are valid, binding and enforceable under the non-U.S. law chosen to govern the agreement. For this purpose they are entitled to rely without so stating on the Omnibus Cross-Border Assumption.60

When international commerce is the subject of a transaction, the presumption of arbitrability applies even though the arbitration of disputes between the parties may implicate what are often regarded as “core” public laws for the protection of broad societal interests, such as antitrust and insolvent. McLaughlin, supra, at 936, 937; see, e.g., Hays & Co. v. Merrill Lynch Pierce Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir. 1989) (arbitration of churning claim brought by bankruptcy trustee enforced); Société Nationale Algerienne Pour La Recherche, La Production, Le Transport, La Transforization et La Commercialisation des Hydrocarbures v. DistriGas Corp., 80 B.R. 606, 613–614 (Bankr. D. Mass. 1987) (bankruptcy stay modified to allow international arbitration); Mitsubishi Motors, 473 U.S. at 629. Cf. [CITE GLAZER/FIELDS RATIONALE IN MEMO TO TRIBAR FROM JAN 2014 AND A CITE TO AMERICAN EXPRESS CASE].

Historically, arbitrability has been an issue when the subject matter of a dispute is intellectual property. See generally Julian D.M. Lew, Final Report on Intellectual Property Disputes and Arbitration, 9 ICC INT'L CT. ARB. BULL. 37 (1998). While the enforcement of federal patent or trademark protection is a matter reserved for the courts, private transactions between licensors and licensees of intellectual property are commonly subject to international arbitration. In 1982 Congress added Section 294 to Title 35 of the U.S. Code, expressly providing for the arbitration of patent-related issues. 35 U.S.C. § 294 (2006). Although Congress has not passed an analogous statute for trademarks and copyrights, cases have held that U.S. law does not forbid arbitration of disputes relating to the validity of a trademark or copyright. See McLaughlin, supra, at 939–40.

Employment disputes, as opposed to disputes relating to collective bargaining/labor relations, normally have been held to be arbitrable, particularly because Congress included in key statutes (section 512 of the Americans with Disabilities Act of 1990 and section 118 of the Civil Rights Act of 1991) language expressly encouraging arbitration of sex, race and disability discrimination claims. 42 U.S.C. § 12212 (2006) (Americans with Disabilities Act); 42 U.S.C. § 1981 note (2006) (Alternative Means of Dispute Resolution) (Civil Rights Act); see also McLaughlin, supra, at 916, 918, 921. But see Ionosphere Clubs, Inc. v. Shugrue, 22 F.3d 403, 409 (2d Cir. 1994) (holding that priority of vacation pay claims in Chapter 11 case were for court to resolve and not subject to arbitration under collective bargaining agreement).

Whether a matter is arbitrable continues to be a significant issue for agreements relating to the following: matrimonial and family matters, inheritance, wills and estates, consumer transactions, and labor relations. In the unlikely event that a cross-border agreement on which a closing opinion is requested covers one of these matters, the opinion preparers should proceed with caution because courts may be reluctant to sever disputes involving non-arbitrable matters from those that are arbitrable if they arise under the same agreement and to enforce the arbitration clause with respect to the latter but not the former.

60 See supra note 18 and accompanying text. Typically, however, non-U.S. parties will request an opinion from U.S. counsel that a U.S. party has the corporate power to enter into an arbitration agreement and that it has duly authorized, executed and delivered the agreement. See infra text accompanying notes 164-167.
III-3.2 RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE U.S.

If the losing party refuses to honor a foreign arbitral award, the winner typically will seek to enforce it in the courts of the state where the losing party has operations or assets. An objective of the New York Convention is to make international arbitral awards that satisfy its conditions readily transportable from country to country. It does so by requiring that arbitral awards be treated as final as to the merits of the dispute and that they be recognized and enforced by courts in all signatory countries pursuant to a uniform and streamlined set of standards.

This section of the Report discusses opinions on the recognition and enforcement in the U.S. of foreign arbitral awards to which the New York Convention applies. If the agreement to arbitrate is silent or ambiguous as to whether arbitration must take place outside the U.S., or expressly allows arbitration to occur either in the U.S. or elsewhere, the resulting award may not be a foreign arbitral award to which the New York Convention applies. In those situations many opinion givers include in their opinions an express assumption that arbitration will take place outside the U.S. Alternatively, the opinion can be based on an assumption that the transaction and the dispute subject to arbitration have a sufficient foreign nexus to satisfy the second prong of the definition of a “foreign arbitral award” in the New York Convention.

Apart from some simple formalities (producing authenticated copies of the award and the arbitration agreement with certified translations into the language of the forum court), the New York Convention allows each signatory country to establish its own procedures for enforcing foreign arbitral awards. The Convention does require, however, that signatory countries not subject the enforcement of foreign arbitral awards to substantially more onerous conditions or charges than apply to domestic awards. The U.S. established its procedures in Chapter 2 of the FAA.

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61 Often, the parties to cross-border transactions choose as the place for arbitration a “neutral” country where none of them has connections. That means that an award usually will have to be enforced in a country other than the country in which the arbitration took place (typically the “home” country of the losing party).

62 See generally New York Convention, supra note 39. Both recognition and enforcement deal with giving effect to an arbitral award, as opposed to compelling the parties to arbitrate. Typically, the winning party asks the court to recognize the award and enforce it against the losing party. Sometimes the winning party will ask a court to recognize an arbitral award as a defense or counterclaim if the losing party brings a suit relating to a dispute that has been the subject of arbitration.

63 9 U.S.C. §§ 201–08 (2006). The FAA grants U.S. federal district courts non-exclusive subject matter jurisdiction over actions arising under the New York Convention regardless of the amount in controversy, addresses issues of venue, and permits removal of the action from state court to federal court by the defendant at any time prior to trial. The FAA requires the court to have personal jurisdiction over the party against whom enforcement of the foreign award is sought, for example because that party is a resident of or owns property in the U.S. Personal jurisdiction and venue may be consented to in writing by parties who are not necessarily otherwise subject to jurisdiction or who might have an objection to venue. The period for enforcement of an award under the New York Convention is three years. Id.
The New York Convention limits both the defenses that a party resisting enforcement of an arbitration award may assert and the scope of judicial review by a court before which enforcement is sought. The New York Convention makes clear that its list of seven grounds for refusing recognition and enforcement of an arbitral award is exhaustive and not illustrative.

Five of the seven grounds for refusing recognition and enforcement under the New York Convention must be asserted and proven by the party resisting enforcement: (1) lack of legal capacity to enter into the agreement under the law applicable to the parties or invalidity of the arbitration agreement under the law chosen by the parties or otherwise applicable in the place where the award was made; (2) lack of proper notice of the arbitration to the party against whom enforcement is sought or failure of the arbitration proceedings to meet minimum standards of due process; (3) lack of jurisdiction, for example because the award relates to a dispute not covered by the arbitration agreement or exceeds the arbitrators’ authority; (4) failure of the composition of the arbitral panel or its procedure to conform to the requirements of the agreement or, if not specified in the agreement, to the law of the country where the arbitration took place; and (5) the award’s not becoming binding in, or being set aside or suspended by a competent authority of, the country in which the award was made. Consistent with U.S. policy favoring enforcement of international arbitral awards, U.S. courts generally have not refused to enforce arbitral awards on the basis of these defenses.64

The remaining two grounds for refusing recognition and enforcement under the New York Convention may be raised by either the party resisting enforcement or the court on its own motion. Those grounds are: (i) the dispute was not capable of resolution by arbitration under the law of the jurisdiction where enforcement is sought; and (ii) recognition and enforcement of the award would be contrary to the public policy of that country. U.S. courts in the international context have been very leery of holding disputes non-arbitrable.65 While the claim that recognition and enforcement of the award would

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64 See generally PARK, supra note 49, at 127 (noting that five procedural defenses are not intended to permit judicial review of merits of dispute, but merely allow courts to reject awards resulting from fraudulent, unfair or basically unjust arbitration). U.S. courts have generally interpreted these defenses narrowly. See, e.g., Parsons & Whittemore Overseas Co. v. Société Générale de l’Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974) (endorsing “pro enforcement bias” of New York Convention). If one or more of the specified grounds for refusal of recognition and enforcement are proven to exist, the New York Convention permits the forum court to refuse enforcement but does not require it to do so. New York Convention, supra note 39, art. V.

65 In the U.S, this ground ordinarily does not present an opinion problem. For a discussion of subject matter arbitrability as a requirement for the enforceability of a pre-dispute agreement to arbitrate, see supra notes 54 and 59. When a U.S. court is considering under the New York Convention whether to recognize and enforce a foreign arbitral award made pursuant to a valid arbitration clause, its determination whether a dispute is arbitrable focuses narrowly on the specifics of the dispute that was actually submitted to arbitration rather than on the general subject matter of the agreement. Although the term “arbitrability” is used in connection with both an agreement to arbitrate’s being enforced by a court and a foreign arbitral award’s being recognized by a court under the New York Convention, the work the opinion preparers are expected to perform to give opinions on enforcement of an agreement or recognition of an award is quite different. To give an opinion that an arbitration clause is enforceable, the opinion preparers must consider the broader issue of whether the subject matter of the agreement can be made subject to a pre-dispute agreement to arbitrate can attach. See supra notes 54,
be contrary to public policy is raised frequently, U.S. courts generally have construed it narrowly to avoid disrupting the international dispute resolution process. An opinion normally can be given that a foreign arbitral award made in the future pursuant to an arbitration clause to which the New York Convention applies will be recognized and enforced in the U.S. under federal law, subject to the exceptions set forth in the New York Convention. To give the opinion, the opinion preparers need to satisfy themselves that the New York Convention and the FAA apply to the award by determining that the Five Arbitration Prerequisites discussed in Section III-3.1 of this Report are met. The exceptions to enforceability provided by the New York Convention include a finding by the court asked to enforce the award, applying the law of its country, that the dispute was not arbitrable or that the award violates public policy. Prior to an actual dispute and the making of a specific award, the opinion preparers cannot determine whether an arbitral award would be subject to the exceptions in the New York Convention for arbitrability and public policy. Therefore, an opinion that a foreign arbitral award made pursuant to an arbitration clause that meets the Five Arbitration Prerequisites will be recognized and enforced in the U.S. under the New York Convention does not cover the possible application of those exceptions. While this is the case whether or not the opinion includes an express qualification to that effect, opinion

59 and accompanying text. To give an opinion that a future arbitral award will be recognized and enforced, however, the opinion preparers are not required to consider whether the arbitrability exception in the New York Convention will be applicable because that is a question that cannot be answered at the time the opinion is given. See generally Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985) (noting that after allowing arbitration of antitrust issues to go forward, courts have another opportunity at award enforcement stage to ensure that government’s legitimate interest in enforcing antitrust laws has been addressed appropriately by arbitrators). See also PARK, supra note 49, at 116, 139 (stating that Justice Blackmun’s opinion in Mitsubishi Motors promotes transnational commercial arbitration because courts may compel arbitration of public law claims and still reserve “second look” after award is rendered to protect public interest, though second look might open door to rehearing on merits).

66 The language first used by the court in Parsons & Whittemore Overseas Co. v. Société Générale de l’Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974), has become the standard for public policy challenges: “Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.” Id. at 974; see also PARK, supra note 49, at 128. See generally Gillies, supra note 52.

67 This opinion addresses a federal statute (the FAA). Thus, to help reduce the risk of misunderstandings, the opinion letter should cover U.S. federal law expressly, at least for purposes of this opinion.

68 The opinion could be worded as follows:

[SAMPLE OPINION LANGUAGE]

Some opinion givers refer expressly to the exceptions provided in Article V.2(a) or (b) of the New York Convention (subject matter of the dispute not capable of settlement by arbitration or recognition and enforcement of the award contrary to U.S. public policy). New York Convention, supra note 39, at art. V.2; see also supra notes 65–66 and accompanying text.

givers usually make this clear in the opinion letter and this Committee endorses that approach.70

III-4 Litigation in the Cross-Border Context.

The parties to cross-border agreements often choose arbitration as the method for resolving disputes in part because, unlike litigation, arbitration is governed by a well-developed network of international treaties. Litigation in the cross-border context, in contrast, presents the risk that parties from different jurisdictions will find themselves litigating disputes in unfamiliar courts under unfamiliar laws.71 To mitigate this risk, parties to cross-border agreements that do not provide for arbitration often include in their agreements a clause selecting the courts of one or more countries as the forum for resolving disputes, as well as a choice of law clause (the effectiveness of which is discussed in section III-2 of this Report). The two clauses taken together are intended to give the parties control over the courts in which any suits will be brought and the law those courts will apply.

When a forum selection clause is included in a cross-border agreement, the non-U.S. party often requests an opinion from counsel for the U.S. party that the clause will be given effect by courts in the Covered Law State. This opinion, which is discussed in section III-4.1 of this Report, provides comfort to the non-U.S. party that courts in the Covered Law State will recognize the parties’ choice in deciding whether to assert or decline jurisdiction over the merits of a dispute. In domestic U.S. transactions separate opinions are rarely requested or given on forum selection clauses.72

Non-U.S. parties also often request an opinion that courts in the Covered Law State will recognize and enforce a judgment of the non-U.S. court chosen in the agreement as the forum for resolving disputes. This opinion, which is discussed in section III-4.2 of this Report, provides comfort to the non-U.S. party that, if it is the winning party in litigation in a chosen non-U.S. court, it will be able to enforce its judgment against the losing party in the courts of the Covered Law State without a rehearing on the merits. An analogous opinion typically is not requested in domestic U.S. practice principally because the Full Faith and Credit Clause of the U.S. Constitution is generally understood to make a judgment obtained in any U.S. state enforceable in every other state.

Cross-border agreements often specify how process can be served on parties domiciled in different countries. Non-U.S. parties sometimes request an opinion from

70 See supra n. 68 and accompanying text.
71 The courts of all the various jurisdictions involved in a cross-border transaction ordinarily can claim jurisdiction over a dispute between the parties. Therefore the parties often wish to specify in the agreement the courts they want to resolve disputes under the agreement. Establishing a uniform international framework for doing so with confidence in the outcome was the impetus behind the Hague Convention on Choice of Courts Agreements (the “Hague Convention”). See infra section III-4.3 of this Report (text accompanying notes 137–152).
72 See infra text accompanying note 73.
U.S. counsel that service on its client in the manner specified in the agreement is effective. This opinion is discussed in section III-4.4 of this Report.

III-4.1 CHOICE OF JUDICIAL FORUM.

This section of the Report deals primarily with opinions on forum selection clauses that choose non-U.S. courts as the forum for resolving disputes under the agreement (referred to in this Report as “outbound forum selection clauses”). Those courts can be chosen exclusively or in the alternative to other courts, which may or may not also be named in the agreement. This section of the Report also deals to a lesser extent with issues involved in giving opinions on forum selection clauses that choose courts in the Covered Law State (referred to in this Report as “inbound forum selection clauses”) because they regularly arise in cross-border transactions.

In domestic U.S. transactions opinion recipients normally do not request opinions on the effectiveness of forum selection clauses. Absent a specific exception, the opinion often given in domestic U.S. practice when the Chosen Law is the Covered Law that the agreement as a whole is valid, binding and enforceable under the Covered Law covers the effectiveness of the forum selection clause in the agreement. This opinion scenario arises regularly in cross-border transactions, for example when the agreement designates New York law as the Chosen Law and New York courts as the forum for resolving disputes, and an opinion is requested under New York law that the agreement is valid, binding and enforceable, but is not the focus of this Report. This Report focuses instead on cross-border transactions where U.S. counsel cannot give an enforceability opinion because non-U.S. law governs the agreement, and therefore non-U.S. parties often request a separate opinion specifically addressing the forum selection clause. Under customary U.S. practice this opinion is understood to mean that a court in the Covered Law State applying the Covered Law would require the opinion giver’s client to comply with the clause. In the case of an inbound forum selection clause, the opinion

73 See generally TriBar Remedies Opinion Report, supra note 20, at 1498, n. 72 and accompanying text (discussing forum selection clause designating courts of the covered law state). In domestic U.S. transactions the remedies opinion ordinarily covers agreements that choose the Covered Law as their governing law and the courts of the Covered Law State as the forum for resolving disputes. The TriBar Remedies Opinion Report does not address opinions on forum selection clauses that do not designate courts of the Covered Law State, which is the situation often presented in cross-border transactions where the agreement designates non-U.S. law as its governing law and the courts of the Chosen Law Country. In that situation a U.S. lawyer often is asked to give an opinion that specifically addresses the validity under the Covered Law of an outbound forum selection clause that would require a court of the Covered Law State (i.e., a court that is not the one designated in the agreement) to dismiss the case.

74 See generally IBA Report, supra note 2, at 192-195.

75 The opinion for both outbound and inbound forum selection clauses could be worded as follows: “the forum selection clause in the agreement will be given effect in accordance with its terms by a court applying the Covered Law.” The opinion is subject to stated or unstated assumptions and limitations as discussed in Parts and of this Report.

76 Opinions are rarely requested or given on venue selection. Depending on the law of the Covered Law State, state courts typically exercise broad discretion in deciding the proper venue without necessarily according significant deference to the parties’ choice. Within the U.S. federal system, district courts
does not address the related, but different, matter of venue selection (i.e., designation in the agreement of a specific court, state or federal, in the Covered Law State as the only one in which suit may be brought).

III-4.1.1 PERMISSIVE AND MANDATORY FORUM SELECTION CLAUSES.

A forum selection clause is either permissive or mandatory. A permissive clause, often described as a “consent to jurisdiction clause,” typically permits the parties to bring suit in specified courts but does not prohibit them from bringing suit elsewhere. A mandatory clause typically requires the parties to bring suit only in specified courts to the exclusion of all others. Both permissive and mandatory forum selection clauses typically include a voluntary submission to the jurisdiction of the named courts.

Cross border agreements governed by non-U.S. law that include a forum selection clause may provide that in the event of a dispute, the parties either: (1) may bring suit in the courts of the Chosen Law Country (referred to in this Report as a “permissive outbound forum selection clause”); or (2) shall bring suit only in the courts of the Chosen Law Country (referred to in this Report as a “mandatory outbound forum selection clause”). Sometimes, a permissive clause in a cross-border agreement also

are given discretion expressly under 28 U.S.C. §1404(a) to transfer venue from one district to another. See infra, note [ ] and accompanying text.

77 In an agreement containing a permissive clause the parties typically submit themselves to the jurisdiction of a specified court, which assures a party who chooses to bring suit in that court that the court will have jurisdiction even if, absent the clause, the other party would have legitimate defenses to being sued there. See M. Gruson, Forum Selection Clauses in International and Interstate Commercial Agreements, 1982 U. ILL. L. REV 133, 192–205 (1982) [hereinafter Gruson, Forum Selection] (discussing contractual submission to personal jurisdiction). Permissive forum selection clauses in cross-border agreements often provide a non-U.S. party flexibility to bring suit against a U.S. party in the non-U.S. party’s own jurisdiction or in the U.S. state where the U.S. party has assets or operations. See infra notes 96-105 and accompanying text.

Permissive clauses often are accompanied by a waiver of the right to assert the doctrine of forum non conveniens if suit is brought in a court named in the agreement. The waiver is intended to prevent a court in which suit has been brought from granting a party’s request that the suit be dismissed in favor of another court (e.g., a court in that party’s own jurisdiction) on the ground that proceeding in that other court would be more convenient to the parties, the witnesses or the court itself. See, e.g., Vivendi S.A. v. T-Mobile USA Inc., 586 F.3d 689 (9th Cir. 2009). Therefore, a permissive forum selection clause accompanied by a waiver of forum non conveniens is the functional equivalent for the party being sued of a mandatory clause because, once the plaintiff chooses to bring the suit in the court named in the clause, that court will treat the case the same as it would if it were the court chosen in a mandatory clause; the party being sued cannot claim that a different court would be more convenient.

78 Even if the consent is not expressed, U.S. courts ordinarily deem it implicit in the clause. See infra note 101 and accompanying text.

79 Predictability is particularly important in cross-border transactions because of concerns parties understandably have about being forced to litigate in an unfamiliar legal system or in an inconvenient forum. See generally, Michael E. Solimine, Forum-Selection Clauses and the Privatization of Procedure, 25 U.CORNELL INT’L L.J. 51 (1992) for a discussion of contractual choice of forum clauses.

80 The discussion in this section only addresses the typical situation in which the courts selected in the
provides that the parties may bring suit in courts in the U.S. state\textsuperscript{81} where the U.S. party to the agreement is located or owns substantial assets (referred to in this Report as a “permissive inbound forum selection clause”).\textsuperscript{82}

An opinion that a permissive outbound forum selection clause will be given effect under the Covered Law requires the opinion preparers to conclude that, if the non-U.S. party sues the U.S. party in the non-U.S. court specified in the clause, courts in the Covered Law State, if presented with the question, would find that the consent of the opinion giver’s client to be sued in that non-U.S. court is effective under the Covered Law.\textsuperscript{83}

If the agreement also contains a permissive inbound forum selection clause, the opinion requires the opinion preparers to: (1) make the same determinations regarding personal and subject matter jurisdiction they would have to make if they were giving an enforceability opinion under the Covered Law on a domestic agreement containing an inbound forum selection clause,\textsuperscript{84} and (2) determine that the Covered Law does not prevent the non-U.S. opinion recipient, by reason of its status as a non-U.S. person, from bringing suit in the court or courts in the Covered Law State selected in the clause.

An opinion on a mandatory outbound forum selection clause requires the opinion preparers to conclude that a court in the Covered Law State would grant the request of the non-U.S. opinion recipient that the court refuse to hear the case on its merits and dismiss it (\textit{i.e.}, would allow the “ouster” of the case to the courts of the Chosen Law Country) should the opinion giver’s client, contrary to the agreement, sue the non-U.S. party in the Covered Law State.

The work required to give an opinion on a permissive forum selection clause (discussed in section III-4.1.3 of this Report) is different from that required for a mandatory forum selection clause (discussed in section III-4.1.4 of this Report). Thus, an initial question for the opinion preparers is whether they should treat the clause on which they are giving an opinion as permissive or mandatory. Although, depending on the wording of a particular clause, answering that question might appear easy, it often is not for the reasons discussed below.\textsuperscript{85}

\textsuperscript{81} Often, when a permissive clause names U.S. courts, it names both the state courts of the Covered Law State and federal courts sitting in that state. \textit{See infra} note 101 and accompanying text.

\textsuperscript{82} When agreements choose non-U.S. law as the governing law, forum selection clauses rarely require that suit be brought only in a court in a U.S. state.

\textsuperscript{83} \textit{See infra} text accompanying note 99. \textit{See also} \textit{infra} note 132 and accompanying text regarding a party’s agreement to submit to the jurisdiction of a foreign court in connection with the enforcement by a court in the Covered Law State of a judgment of that foreign court.

\textsuperscript{84} \textit{See} \textit{TriBar Remedies Opinion Report, supra} note 20, text accompanying n. 81 (opinion on permissive clause means that parties may bring suit in the designated forum and addresses requirements for personal and subject matter jurisdiction). \textit{See infra} text accompanying notes 102-105 and note 102.

\textsuperscript{85} This is a threshold question that a court in the Covered Law State must resolve before addressing the effectiveness of a forum selection clause. Whether the clause is permissive or mandatory is a question
As discussed later in this section of the Report, courts in the Covered Law State may apply the non-U.S. Chosen Law when deciding whether a particular forum selection clause is permissive or mandatory, \(^{86}\) while the opinion preparers may be relying on their reading of the clause under the Covered Law as permissive or mandatory. \(^{87}\) The two readings may not be the same and, to avoid uncertainty and clarify for the recipient how the opinion giver interprets the clause in analyzing its validity under the Covered Law, the opinion preparers should consider including in the opinion letter an express assumption regarding the permissive or mandatory nature of the forum selection clause. \(^{88}\)

Outside the U.S., however, forum selection clauses often are presumed to be mandatory unless the parties clearly provide that they are permissive. \(^{88}\) In the U.S., forum selection clauses usually are presumed to be permissive unless the parties clearly provide that they are mandatory. \(^{86}\) See, e.g., New Moon Shipping Company Limited v. Man B&W Diesel AG, 121 F.3d 24 (2d Cir. 1997); Caldas & Sons, Inc. v. Willingham, 17 F.3d 123 (5th Cir. 1994) (despite use of word “shall,” clause deemed permissive because lack of clear, unequivocal and mandatory language indicated parties merely submitted to the jurisdiction of Zurich courts); Global Seafood Inc. v. Bantry Bay Mussels Ltd., ___ F.3d ___ (2d Cir. 2011) (clause held permissive because it contained no specific language of exclusion depriving U.S. court of jurisdiction).

Outside the U.S., however, forum selection clauses often are presumed to be mandatory unless the parties clearly provide that they are permissive. \(^{88}\) See, e.g., Council Regulation (EC) No 44/2001 (Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) [hereinafter Brussels Regulation], art. 23, 2001 O.J. (L 12) 8 art. 23; TH Agriculture & Nutrition, LLC v. Ace European Group, Ltd (TH Agric II), 488 F.3d 1282 (10th Cir. 2007) (same clause found to be permissive under Kansas law, mandatory under Dutch law).

\(^{86}\) See infra text accompanying notes 91-95. See, e.g., Ashall Homes Limited v. Rok Entertainment Group, Inc., 992 A.2d 1239 (Del. 2010) (court will interpret clause in accordance with law (English) chosen to govern the contract); TH Agric II, supra note 85 (Dutch law applied to interpretation of clause because the agreement selected it as the governing law).

\(^{87}\) If the opinion giver’s client has counsel in the Chosen Law Country, the opinion preparers’ reading of the clause might be based on that counsel’s advice as to how the clause would be interpreted under the chosen non-U.S. law. If the opinion preparers have received such advice, they might choose to indicate their reliance on it in the opinion letter.

\(^{88}\) The opinion preparers might choose to make clear how they are reading a clause for a variety of reasons, including uncertainty whether a court in the Covered Law State would look to the Covered Law or the non-U.S. Chosen Law to determine the nature of the clause or whether, even if the court were to apply the Covered Law, it would interpret the clause as permissive or mandatory. That may be because the court is not certain what the parties intended; for example, if the agreement expressly provides for suits to be brought in a court of the Chosen Law Country but neither expressly prohibits the parties from bringing suit elsewhere nor expressly permits them to do so, some courts may conclude that the parties intended the named court as the exclusive forum, while others may infer from the lack of clarity that the parties intended to allow for suits to be brought in multiple courts. See, e.g., Boland v. George S. May Intern Co., 969 N.E. 2d 166 (Mass. App. Ct. 2012) (clause declaring that “jurisdiction shall vest in the State of Illinois” permissive absent plain statement that jurisdiction should be exclusive). U.S. courts dealing with an ambiguous forum selection clause often attempt to discern the parties’ intent from the agreement as a whole. See, e.g., Autoridad de Energia Electrica de Puerto Rico v. Ericsson Inc., 201 F.3d 15, 18-19 (1st Cir. 2000) (forum selection clause accompanied by choice-of-law language that indicated intent to make chosen court exclusive forum). The task is made more difficult when the drafters of a forum selection clause, rather than simply identifying courts where disputes are to be resolved and stating whether the selection is exclusive or non-exclusive, use less precise terms such as courts’ jurisdiction or venue, which are sometimes used interchangeably.
If the opinion preparers choose not to do so, an alternative approach is to analyze the clause both ways – *i.e.*, as both permissive and mandatory. Such an approach, however, will require the opinion preparers to do additional work that ordinarily is difficult to justify on a cost-benefit basis. Moreover, depending on the Covered Law, giving the opinion may not be possible on that basis, while it could have been had the opinion preparers treated the clause as permissive. In giving an opinion that a forum selection clause is effective under the Covered Law, the opinion preparers also need to consider other issues discussed later in this section of the Report, such as what assumptions or exceptions are appropriate regarding matters not governed by the Covered Law.

### III-4.1.2 Applicable Law

In deciding whether to give effect to a forum selection clause, a court in the Covered Law State will have to determine, as to each issue it is required to resolve, whether to apply: (1) the Covered Law; (2) the substantive law of the Chosen Law Country (the “Chosen Contract Law”); or (3) the procedural law of the non-U.S. court selected in the agreement (the “Selected Forum Law”). This Report focuses primarily on the common cross-border situation in which the Chosen Contract Law and the Selected Forum Law are the law of the same non-U.S. jurisdiction. The issues a court

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89 Analyzing the clause as both permissive and mandatory would permit the opinion preparers to give the opinion even if they have been unable to decide with the certainty required to give an opinion whether a court of the Covered Law State would find the provision to be permissive or mandatory. If the opinion giver’s client brings an action in a court in the Covered Law State and that court takes the case based on a finding that the clause is permissive and not mandatory, an opinion recipient who had intended it to be a mandatory outbound forum selection clause (so that the Covered State’s court should not take the case) would not have a basis to complain about the opinion. An opinion giver is not responsible for providing the recipient, who is not its client, legal advice on whether a clause is permissive or mandatory, but only that it is effective under the Covered Law. When the Covered Law is not the Chosen Law, it is for the opinion recipient, with advice from its own counsel, to decide whether a forum selection clause is permissive or mandatory under the non-U.S. Chosen Law.

90 As discussed later in this Report, see infra text accompanying notes 107-114, the opinion preparers, analyzing the clause as mandatory, may not be able to give the opinion if the Covered Law State has not adopted the so-called “modern view.”

91 To the extent that suit can be brought in or removed to a U.S. federal court, federal law generally and the federal rules of civil procedure in particular are implicated with respect to federal jurisdiction. See infra text accompanying note 101. See also supra text accompanying note 76 regarding venue.
in the Covered Law State typically will consider are: (i) whether a forum selection clause is presumptively effective under the Covered Law (this is often referred to as “enforceability in principle”); (ii) whether the specific circumstances of the case before it rebut the presumptive effectiveness of the parties’ choice of forum; (iii) whether the forum selection clause is invalidated by defects in the formation of the agreement such as fraud, duress or mistake; (iv) whether the agreement itself is valid under the Chosen Contract Law; and (v) the forum selection clause’s character (permissive or mandatory) and scope (types of disputes covered). Prior to 2006 U.S. courts generally applied the law of the state where they were located to all issues without engaging in a meaningful analysis of what law should apply, even when the agreement selected non-U.S. law as its governing law. Starting with a decision by the U.S. Court of Appeals for the Tenth Circuit in 2006, however, a trend developed towards applying the Chosen Contract Law in cross-border agreements to questions relating to the validity and interpretation of a forum selection clause. While this view has gained widespread acceptance, its acceptance is not universal.

92 When this is not the case, for example if Germany is the Chosen Law Country but French courts are selected in the forum selection clause (i.e., French law is the Selected Forum Law), a French court is likely to apply French law to procedural issues and German law to substantive issues, though it may choose to apply French law to some substantive issues as well. Because neither the Selected Forum Law (France’s) nor the Chosen Contract Law (Germany’s) is covered by the opinion letter, the conclusions of this Report generally should be applicable when the courts selected in a forum selection clause are not located in the Chosen Law Country, although some tailoring of the language in the opinion letter may be needed. This Report does not address opinions on forum selection clauses in agreements that do not contain a governing law clause. If faced with that situation U.S. lawyers should proceed with caution because of the difficulty of determining which law a court in the Covered Law State would apply. See infra notes 94, 95. While some commentators have argued that in the absence of an explicit choice-of-law clause the Selected Forum Law is to be regarded as the law governing the forum selection clause (because it is implicitly chosen by the parties), there does not appear to be case law to support this conclusion.


94 Yavuz v. 61 MM, Ltd., 465 F.3d 418 (10th Cir. 2006). The Yavuz court, citing Prof. Yackee’s article (see supra note 93) and the Restatement (Second) of Conflict of Laws, §187 (comment e) (1971), held that courts ordinarily should honor a cross-border agreement’s choice of forum as it is construed under the law chosen by the parties to govern the agreement, finding no reason why a U.S. court should apply to the forum selection clause a law different from the law governing other clauses. The court reasoned that international commerce requires the security parties derive from knowing that their contractual choices will be respected. Id. at 428-431 (“if parties agree on forum selection clause that has particular meaning under law of a specific jurisdiction, and also agree that contract is to be interpreted under law of that jurisdiction, respect for the parties’ autonomy and demands of predictability in international transactions require that courts give effect to that meaning under that law”). See also Phillips v. Audio Active Ltd., 494 F.3d 378, 385 (2d Cir. 2007) (citing Yavuz, holding chosen non-U.S. law applicable to interpretation of forum selection clause’s scope and meaning, although U.S. law applicable to enforceability in principle). The holding in Yavuz is consistent with decisions in the domestic U.S. context where: (1) an agreement chooses as its governing law the law of a U.S. state other than the state whose court is asked to enforce the forum selection clause; and (2) that court (which was not selected as the forum in the agreement), after holding the outbound choice-of-law clause effective, interprets the forum selection clause under the Chosen Contract Law. See,
Therefore, when a court in the Covered Law State is asked to give effect to a forum selection clause in an agreement that chooses the law of a non-U.S. jurisdiction as its governing law, the court can be expected to apply the law of the Chosen Law Country to at least some issues bearing on effectiveness of the clause, although the specifics may vary depending on the state and the wording of the agreement. The result, as discussed in detail in section III-4.1.3 of this Report for permissive forum selection clauses and section III-4.1.4 of this Report for mandatory forum selection clauses, is that in giving an opinion that the clause will be given effect under the Covered Law, the opinion preparers need to rely on assumptions regarding issues governed by the Chosen Contract Law (such as contract formation, validity and interpretation) and by the Selected Forum Law (such as personal and subject matter jurisdiction), since those laws are not covered by the opinion letter.

III-4.1.3 OPINIONS ADDRESSING PERMISSIVE FORUM SELECTION CLAUSES.

The purpose of a permissive forum selection clause is to give the parties the option to resolve their disputes in any of the courts named in the agreement. For example, the clause may be drafted to provide a non-U.S. party with the flexibility to bring suit against a U.S. party in a court in the Chosen Law Country or in a court in a U.S. state (which may be the Covered Law State) where the U.S. party has assets or operations. While the same flexibility might be provided by simply omitting a forum selection clause from the agreement altogether, the advantage of including a permissive clause is that it documents the consent of the parties to being sued in courts to whose personal jurisdiction they otherwise might not be subject.

An opinion that a permissive clause will be given effect under the Covered Law only addresses application of the clause to a suit brought in a court named in that clause. Permissive clauses often name the courts of only one or two jurisdictions while also allowing the parties, either expressly or by implication, to bring suit in courts of other, unnamed jurisdictions. If a permissive clause does not name courts in the Covered Law State, however, the opinion does not address the question whether those courts will take the case if suit is brought there rather than in a named court.

*e.g., Jacobson v. Mailboxes Etc. USA, Inc., 646 N.E.2d 741, 741 and 744 n. 6 (Mass. 1995) (where agreement chose California law as governing law and California courts as exclusive forum, Massachusetts court applied governing law (California) both to enforceability of forum selection clause generally and to interpretation of that clause).

See generally Courson, supra note 93, at 615-620. See also, e.g., Abbott Laboratories v. Takeda Pharmaceutical Co. Ltd., 476 F.3d 421, 423 (7th Cir 2007); Doe 1, Doe 2 and Ramkissoon v. AOL, 552 F.3d 1077 (9th Cir. 2009). Courts and commentators continue to differ as to which specific aspects of forum selection relate to contract formation/interpretation as opposed to enforceability in principle, which issues are procedural (and therefore presumptively governed by the Covered Law as the *lex fori*) and which issues are substantive (and therefore presumptively governed by the Chosen Contract Law). Courson, supra note 93, at 621-624. See also Peter M. Haver, Enforceability of Forum Selection Clauses in U.S. Court Proceedings: What Law Applies in an International Setting?, 1–2, 4–6 (Apr. 22, 2010) (unpublished manuscript, on file with the Reporter, as presented to the meeting of the Joint Cross Border Finance and International Commercial Law Subcommittee of the ABA Section of Business Law in Denver on April 22, 2010).
Whether the clause is permissive outbound or permissive inbound, as discussed below, the opinion only covers issues governed by the Covered Law. The effectiveness of a forum selection clause, however, depends also on matters that are governed by applicable non-U.S. law, for example proper formation of the contract and validity of the forum selection clause under the Chosen Law. Because these matters are not governed by the Covered Law, the opinion preparers are entitled to address them by assuming that the agreement generally and the forum selection clause specifically are valid, binding and enforceable under the Chosen Law. For this purpose they are entitled to rely without so stating on the Omnibus Cross-Border Assumption. The opinion does not address whether a court outside the Covered Law State, whether in another U.S. state or in a foreign country, would have jurisdiction because those issues are not governed by the Covered Law.

III-4.1.3.1 PERMISSIVE OUTBOUND CLAUSES.

A U.S. opinion giver normally will be able to give an opinion that under the Covered Law a court in the Covered Law State will give effect to a forum selection clause permitting suit to be brought in a non-U.S. court named in an agreement where the law of a non-U.S. jurisdiction is the Chosen Law. The opinion means that the Covered Law does not prohibit the opinion giver’s client from consenting to submit to the jurisdiction of the named non-U.S. court or impose conditions that have not been met on an agreement to be sued in that court. The opinion does not mean that a court in the Covered Law State would find the named non-U.S. court a suitable forum for resolving a dispute between the parties (which may be relevant to a later action by the non-U.S. party

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96 See generally Yackee, supra note 93, at 50-56. Formal conditions for validity, which may include the form, content or location of the forum selection clause, are not uncommon outside the U.S. See, e.g., Brussels Regulation, supra note 85 (establishing four specific “forms” in which forum selection agreements must be made, which the European Court of Justice has suggested should be strictly construed); Art. 48 of the French New Code of Civil Procedure (requiring forum selection clause to be specified in an instrument signed by the party against whom enforcement is sought and specification to be “very apparent”); Cass.com., Feb 27, 1996, REV. CRITIQUE DROIT INT’L PRIVE 1996, 734 (French court finding invalid forum selection clause printed in very small type on back of first page of contract); Bundesgerichtshof (BGH), Feb 22, 2001, (F.R.G.) (German Supreme Court finding forum selection clause included in loan guarantee form invalid because not physically signed by borrower). Contrary to the law of many U.S. states and European Union law, the law of some non-U.S. jurisdictions may provide that forum selection clauses are unenforceable in principle or valid only under limited circumstances. In addition, in some civil law countries for certain categories of contracts to be valid they must be executed in the presence of a notary public acting, depending on the circumstances, as a witness or as a public official.

97 See supra text accompanying note 18. Typically, however, non-U.S. parties will request an opinion from a U.S. lawyer as to a U.S. party’s corporate power to agree to a forum selection clause choosing a non-U.S. court, as well as its due authorization, execution and delivery of the agreement. See infra text accompanying notes 164-167.

98 Insofar as the opinion addresses U.S. federal courts sitting in the Covered Law State, to help reduce the risk of misunderstandings, the opinion letter should cover U.S. federal law expressly, at least for the purposes of this opinion.

99 IBA REPORT, supra note 2, at 194, 279.
to have a foreign judgment enforced in the Covered Law State), because that is a matter as to which the opinion preparers cannot make a professional judgment.

As a matter of U.S. customary practice the forum selection opinion is understood not to cover specialized federal or state statutes, rules or regulations that may prohibit or restrict commerce with the jurisdiction in which the named non-U.S. court is located unless they are addressed expressly. The opinion does not address the effectiveness of the submission by the opinion giver’s client to the jurisdiction of the named non-U.S. court under the Chosen Contract Law or the Selected Forum Law. Thus, the forum selection opinion simply provides a non-U.S. recipient comfort that courts in the Covered Law State, if presented with the question, would not apply the Covered Law to shield the opinion giver’s client from being sued in the non-U.S. court selected in a permissive outbound forum selection clause.

III-4.1.3.2 PERMISSIVE INBOUND CLAUSES.

If a permissive forum selection clause names a court in the Covered Law State as one of the courts where the parties may bring suit and sufficient contacts exist between the parties or the transaction and that state, a U.S. lawyer normally will be able to give an opinion that if a suit is brought in a court in the Covered Law State, that court will give the clause effect because the parties submitted voluntarily to its jurisdiction, even though the agreement chooses the law of a non-U.S. jurisdiction as its governing law. If the clause names a U.S. federal court as one of the courts where the parties may bring suit, the federal rules of civil procedure apply and, in particular, the opinion preparers need to recognize that U.S. federal courts have special rules governing subject matter, as well as personal jurisdiction. While many opinion givers do not take an exception for the possible lack of federal subject matter jurisdiction, some do.

As would an opinion on the enforceability of a domestic agreement containing a permissive inbound forum selection clause that names the courts of the Covered Law State, an opinion in the cross-border context covering a permissive inbound forum selection clause requires that the opinion preparers be satisfied that under the Covered Law State, if presented with the question, courts would not apply the Covered Law to shield the opinion giver’s client from being sued in the non-U.S. court selected in a permissive inbound forum selection clause.

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100 See infra text accompanying notes 182-192. A number of U.S. statutes, rules and regulations, mostly federal, that rarely apply to domestic U.S. transactions apply to similar transactions cross-border because non-U.S. parties are involved or performance occurs outside the United States. For example, the Office of Foreign Asset Control (OFAC) within the U.S. Treasury Department manages sanctions and trade restrictions with particular countries and parties pursuant to the International Emergency Economic Powers Act (50 U.S.C. § 1701 et seq.), the National Emergencies Act (50 U.S.C. § 1601 et seq.), or other similar statutes (see, e.g., OFAC regulations regarding Syria, 31 CFR part 542, and OFAC’s Specially Designated Nationals List of persons and entities with whom, and with whose affiliates, U.S. citizens are not permitted to conduct business).

101 See generally TriBar Remedies Opinion Report, supra note 20, at n. 78 (when a forum selection clause permits but does not require an action to be brought in federal court, many lawyers do not take an exception for the possible lack of federal subject matter jurisdiction. Some, however, do. Both practices are common. The opinion preparers cannot know the facts and circumstances of a future suit when they give the opinion and therefore cannot predict whether requirements for federal court jurisdiction will be satisfied. See also supra note 76 for a discussion of venue. 28 U.S.C. §1404(a) gives federal district courts the ability to transfer a case from one district to another.)
Law, based on the circumstances at the time the opinion is given, a state court of the Covered Law State that is named as a possible forum in the clause would have personal jurisdiction over the parties to, and subject matter jurisdiction over disputes arising under, the agreement.102 The opinion preparers also must be satisfied that the Covered Law does not prevent the recipient by reason of its status as a non-U.S. person from bringing suit in the named court in the Covered Law State.103 If the agreement includes a waiver of the doctrine of forum non conveniens, the opinion covers its effectiveness, absent an express exception. If the agreement does not include such a waiver, the opinion does not cover the possible refusal of the named court to hear the case based on the application of that doctrine.104

When an agreement contains a permissive forum selection clause, different parties may bring suit in different courts over the same dispute. An opinion covering the inbound aspect of the clause does not address whether a court of the Covered Law State would grant a motion to dismiss or stay the case if one party has brought suit in that court and another party has brought suit with respect to the same dispute in another court.105

102 See TriBar Remedies Opinion Report, supra note 20, at 1499. The personal and subject matter jurisdiction of a U.S. court named in the forum selection clause are governed by the Covered Law, not the Chosen Law. Even if the forum selection clause is not accompanied by an express consent of the parties to personal jurisdiction, U.S. courts ordinarily deem that consent implicit. Id. at note 77 and accompanying text. Normally, the requirement of subject matter jurisdiction is satisfied if the chosen state court is a court of general jurisdiction. Id. at note 78 and accompanying text (if a clause specifies a particular type of court, such as for example the Delaware Chancery Court, the opinion preparers must determine whether disputes under the agreement are within that court’s subject matter jurisdiction, because the parties cannot by contract confer subject matter jurisdiction on a specialized court). The opinion preparers’ analysis is based on the facts as of the date of the opinion letter, and the opinion need not point out that the requirements for personal or subject matter jurisdiction may no longer be satisfied when suit actually is brought. Id. at note 76 and accompanying text. See also Glazer Treatise, supra note 10, at 387, and Gruson, Forum Selection, supra note 77.

Some states, such as New York and California, have enacted statutes expressly validating forum selection clauses for transactions above a specified size when they are included in an agreement that selects the courts of that state as the forum for resolving disputes and chooses the law of that state as the governing law. Those statutes also may provide that the parties are deemed to have waived the right to assert the doctrine of forum non conveniens. Such statutes are not applicable to an agreement that chooses the law of another jurisdiction, such as a non-U.S. jurisdiction, as its governing law.

103 Thus the opinion provides comfort to the non-U.S. recipient that it would not face automatic dismissal if it were to bring suit in a court in the Covered Law State named in the agreement, as might be the case, for example, in countries whose law restricts the voluntary election by private parties to sue or be sued in their courts.

104 TriBar Remedies Opinion Report, supra note 20, at 1501 (permissive clause does not foreclose suit elsewhere or prevent application of doctrine of forum non conveniens (absent waiver); thus opinion does not mean that a party may not bring suit in another court or that named court will hear case). Although not required, in the absence of a waiver, some opinion preparers state expressly that the named court may decline to hear the case on the ground that it is an inconvenient forum.

105 Whether the court would grant the motion may depend on which suit was brought first (lis alibi pendens rule), the convenience of the parties, witnesses or the court (absent a waiver of forum non conveniens) or other priority/ordering considerations that cannot be known by the opinion preparers when the opinion is given.
III-4.1.4 OPINIONS ADDRESSING MANDATORY FORUM SELECTION CLAUSES.

III-4.1.4.1 MANDATORY OUTBOUND CLAUSES.

To give an opinion on the effectiveness under the Covered Law of a mandatory outbound forum selection clause choosing a non-U.S. court as the exclusive forum for resolving disputes, the opinion preparers need to satisfy themselves that, if a party sues in a court in the Covered Law State in violation of the agreement, the court will decline to consider the merits of the case.\(^\text{106}\) Although state law varies, most U.S. states have adopted the so-called “modern view” that forum selection clauses will be given effect unless doing so would be unfair or unreasonable or violate a strong public policy of that state.\(^\text{107}\) Some U.S. states, however, adhere to an older view that courts are generally free to determine for themselves whether to take jurisdiction over cases brought before them based on a variety of discretionary factors, without according meaningful weight to the parties’ contractual choice.

III-4.1.4.2 BREMEN AND THE MODERN VIEW.

The modern view was adopted in the cross-border context by the U.S. Supreme Court in 1972 in *M/S Bremen & Unterweser Reederel, GmbBH v. Zapata Off-Shore Co.*\(^\text{108}\) In *Bremen* the court held\(^\text{109}\) that an outbound forum selection clause is presumptively

\(^{106}\) When a party to an agreement brings suit in a court that is not named in a mandatory forum selection clause, that court typically enforces the clause by granting the other party’s motion to dismiss or stay the proceedings, thus requiring the plaintiff, if it wishes to pursue the action, to bring a new suit in the court named in the agreement.

\(^{107}\) See *TriBar Remedies Opinion Report*, supra note 20, at 1501 and n. 84 (as interpreted by the courts, for enforcement to be unfair or unreasonable, a judicial determination is required that “enforcement of the clause would be so unreasonable and unjust as to make a trial in the selected forum so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court”).

\(^{108}\) 407 U.S. 1 (1972). Prior to 1972 U.S. courts considered agreements selecting foreign courts as the exclusive forum for resolving disputes to be an impermissible ouster of their jurisdiction. *Bremen* marked the U.S. Supreme Court’s rejection of the “per se invalidity” rule in favor of a “prima facie validity” rule. The forty years since the *Bremen* decision have witnessed a sea change in the willingness of U.S. courts to enforce mandatory outbound forum selection clauses in cross-border agreements. *See generally* Yackee, *supra* note 93, at 47-50 and 64-67. The following *dicta* in *Bremen* is often quoted by U.S. courts: “The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on the parochial concept that all disputes must be resolved under our laws and in our courts. . . . The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce and contracting.” *Id.* at 9, 14. In Phillips v. Audio Active Ltd., 494 F.3d 378, 383-384 (2d Cir. 2007), the Second Circuit Court of Appeals set forth a four-part analysis under the modern view for courts to determine the validity and enforceability of a forum selection clause in a cross-border agreement: (1) was the clause reasonably disclosed to the resisting party? (2) is the clause mandatory or permissive? (3) does the clause extend to the claims involved in the suit? and (4) has the *Bremen* presumption been rebutted?  The different prongs of the *Bremen* exception require a court to ascertain facts that may call into question the effectiveness of the consent of the parties or to evaluate public policy issues that may hinge on the interpretation of statutes or judicial decisions under the Covered Law or the Chosen Law (or both).

\(^{109}\) Although *Bremen* was decided under federal admiralty and maritime jurisdiction, it expresses the
effective and should not be set aside unless the party challenging it makes a strong showing that: (i) enforcement would be unreasonable and unjust, (ii) the clause is invalid for such reasons as fraud or overreaching, undue influence or abuse of bargaining power, or (iii) giving effect to a forum selection clause when it would require the case to be dismissed in favor of another court will result in the enforcement by that other court of a contractual provision that would contravene a strong public policy of the jurisdiction where suit is brought, whether declared by statute or by judicial decision. All of these grounds are referred to in this Report collectively as the “Bremen exception.” Some state statutes codify specific public policy exceptions to the enforcement of mandatory outbound forum selection clauses to protect identified classes of contracting parties from exploitative contractual terms.

If the Covered Law State has adopted the modern view, an opinion normally can be given that under the Covered Law a court in the Covered Law State will give effect to a mandatory outbound forum selection clause when the agreement chooses the law of a non-U.S. jurisdiction as its governing law and specifies a court of that same or another

The public policy ground only comes into play when the court considering whether to enforce a mandatory forum selection clause is not the chosen court. Thus, it applies only when the plaintiff sues in a court other than the court selected as the exclusive forum in the agreement and that court is asked by the defendant to dismiss the suit. In Atlantic Marine the Court held that when the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid mandatory forum selection clause, that court’s “dismissal would work no injustice on the plaintiff” even if, through application of a statute of limitations or otherwise, it is unable to pursue its action in the chosen court. Cases involving a breach of a forum selection clause are different from forum non conveniens cases, which place a heavy burden on the party seeking to move the case to a different court because of the harsh results of dismissal. See, e.g., Sinochem Int’l v. Malaysia Int’l Shipping Co., 549 U.S. 422, 430 (2007); Norwood v. Kirkpatrick, 349 U.S. 29, 39 (1955).

Courts in several states have considered the public policy ground in deciding whether to enforce a mandatory forum selection clause. Although a key issue in Bremen was whether giving effect to a forum selection clause choosing English courts would violate a U.S. policy of not enforcing exculpation provisions in some situations, U.S. courts are generally reluctant to apply the public policy exception to deny enforcement of a forum selection clause in agreements between sophisticated commercial parties. Yackee, supra note 93, at 48-49, 79-83, n. 276 and accompanying text. See also id. at n. 202 (observing that cases applying Bremen strive to identify strong public policies and to deflect criticism of public policy exception as “unmanageably elastic” and “muddled and ambiguous”).

See, e.g., Jones v. GNC Franchising, Inc., 211 F.3d 495 (9th Cir. 2000) (refusing to enforce mandatory forum selection clause choosing Pennsylvania courts, because it contravened “strong public policy to protect California franchisees from expense, inconvenience, and possible prejudice of litigating in non-California venue” as articulated by California franchising statute).

For the same reasons why opinions on the effectiveness of forum selection clauses normally are not requested or given in domestic U.S. transactions, they normally are not given in cross-border
non-U.S. jurisdiction as the exclusive forum for resolving disputes. Different states, however, express the modern view differently, and some may do so in a manner that leads the opinion preparers to question whether they have, in fact, adopted the modern view. Thus, the opinion preparers may need to tailor their opinion to reflect the specifics of the Covered Law. An opinion on the effectiveness of a mandatory outbound forum selection clause is understood as a matter of U.S. customary practice not to cover the applicability of the Bremen exception, whether or not the opinion includes an express assumption or exception to that effect. That is because a court will address the Bremen exception when a suit is actually brought based on actual claims made by the parties, the facts and circumstances at that time, and the legal issues raised, many of which the opinion preparers cannot ascertain at the time the opinion is given.

When giving an opinion on the effectiveness of a mandatory outbound forum selection clause under the law of a state that has adopted the modern view, the opinion preparers need to consider whether to refer expressly in the opinion letter to the Bremen exception and, if so, how. In domestic U.S. transactions, where the forum selection clause often is covered by an enforceability opinion on the agreement, the Bremen exception is well known and the impact of its public policy prong more limited than on outbound opinions; therefore, many opinion preparers do not include an express qualification for the possibility that a court might decline to give effect to the clause because of it. In cross-border transactions, however, where non-U.S. recipients often

transactions when the agreement chooses the Covered Law as its governing law. In those situations, absent an express exception, an opinion that the agreement is valid, binding and enforceable under the Covered Law covers the effectiveness of the forum selection clause. See supra text accompanying note 74. Insofar as the opinion addresses suits brought in a U.S. federal court sitting in the Covered Law State, to help reduce the risk of misunderstandings, the opinion letter should cover U.S. federal law expressly, at least for the purposes of this opinion.

Opinion givers should proceed with caution when a forum selection clause is drafted broadly to cover not only contractual disputes involving the agreement, but also obligations arising in connection with the transaction that are outside the agreement. This type of clause may be found more frequently in transactions involving parties from EU member countries because Council Regulation (EC) No 864/2007 (Law Applicable to Non-Contractual Obligations), art. 14, 31/07/ 2007 O.J. (L 199) 40, 46 [hereinafter Rome II Regulation] governing choice of law by EU courts in non-contractual (e.g., tort) matters specifically allows the parties to provide in their agreement that the law that governs the agreement also applies to non-contractual causes of action. Depending on the law of a specific state, a U.S. court may be unwilling to defer to the parties’ choice of forum with respect to extra-contractual disputes, with the court’s determination often turning on whether the claims are intertwined with, or dependent upon the construction of, the parties’ contractual relationship. See, e.g., Lambert v. Kysar, 983 F.2d 1110, 1121 (1st Cir. 1993) (refusing effort to evade enforcement of forum selection clause through artful pleading of tort claim in context of contract dispute); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 203 (3rd Cir. 1983) (pleading of alternative non-contractual theories of liability does not prevent enforcement of forum selection clause when relationship contractual), overruled on other grounds 490 U.S. 495 (1989); Ashall Homes Limited v. Rok Entertainment Group, Inc., 992 A.2d 1239, 1948 (Del. 2010) (in policing boundary between contract and tort, court should consider extent to which tort claims relate to contractual relationship or hinge on contract’s scope). In pure tort cases jurisdiction and applicable law are typically determined by reference to the place where the claim arose, e.g., where the wrongful conduct took place or harm occurred.

While modern view states generally place limitations similar to the Bremen exception on the enforcement of mandatory forum selection clauses, these limitations vary from state to state. In some states the modern view is codified in a statute. In others it is articulated in judicial decisions.
ask for an opinion on the effectiveness of a mandatory outbound forum selection clause specifically, this Committee recommends that, to help reduce the risk of misunderstandings, the opinion preparers expressly refer to the *Bremen* exception. If they do so, the opinion letter should identify the specific grounds that a court in the Covered Law State could use to refuse to give effect to the clause under the Covered Law, including an express reference to the public policy exception.\(^\text{116}\)

While the opinion only covers issues governed by the Covered Law, the effectiveness of a mandatory forum selection clause depends on matters that are governed by non-U.S. law, for example formation of the contract and the validity of the forum selection clause under the Chosen Contract Law.\(^\text{117}\) Because these matters are not governed by the Covered Law, the opinion preparers are entitled to assume without so stating that the agreement generally and the forum selection clause specifically are valid, binding and enforceable under the Chosen Law.\(^\text{118}\)

In addition, a court of the Covered Law State may be unwilling to decline jurisdiction over the case unless it is satisfied that the selected non-U.S. court will give effect to the parties’ choice of forum and hear the case if suit is brought there; otherwise the parties might not have any forum in which to resolve their dispute. Therefore, to give

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\(^{115}\) See *TriBar Remedies Opinion Report*, supra note 20, at 1502 and text accompanying n. 87-89. The report does not, however, address the situation when the chosen court is not in the Covered Law State and also observes that this practice is not universal, with some lawyers pointing out in their opinion letter the possible application of the *Bremen* exception.

\(^{116}\) An express exclusion for public policy can be similar in form to the exclusion for fundamental policies in a choice-of-law opinion, if one is given in the transaction. See *supra* text accompanying notes 33 and 34. If a choice-of-law opinion is not given, the opinion preparers should consider including in the opinion letter an express assumption that under the Covered Law the choice of non-U.S. law as the governing law of the agreement will be given effect. The recipient could argue that the assumption is technically unnecessary because, if the forum selection clause is mandatory and chooses a non-U.S. court, and if a court in the Covered Law State would give it effect, the courts of the Covered Law State will never have occasion to consider independently the merits of the case and, therefore, will never reach the choice-of-law issue. See, e.g., Gruson, *Forum Selection*, *supra* note 77, at 191 (noting that once parties to agreement validly agree that foreign forum should adjudicate their disputes, it is difficult to see what legitimate concern an excluded forum in which suit was brought would protect by deciding choice-of-law question). As discussed earlier, however (see *supra* notes 92-95 and accompanying text), to decide that a mandatory outbound forum selection clause is effective, a court in the Covered Law State applying the Covered Law first must give effect to the choice of the law of the Chosen Law Country in the agreement. Absent a choice-of-law opinion, an express assumption that a court in the Covered Law State would give effect to the choice-of-law clause will eliminate the risk that an opinion on the effectiveness of a forum selection clause choosing the courts of the Chosen Law Country will be interpreted to include an implicit, unqualified opinion that a court in the Covered Law State also will give effect to the choice of the Chosen Law Country’s law. Some U.S. lawyers believe that this assumption need not be states expressly.

\(^{117}\) This is the same as for opinions on the effectiveness of permissive forum selection clauses. See *supra* text accompanying notes 98-100.

\(^{118}\) These are all matters covered by the Omnibus Cross-Border Assumption. See *supra* text accompanying note 18. Typically, however, non-U.S. parties will request an opinion from a U.S. lawyer as to a U.S. party’s corporate power to agree to a forum selection clause choosing a non-U.S. court, as well as due authorization, execution and delivery of the agreement. See *infra* text accompanying notes 164-167.
an opinion on a mandatory outbound forum selection clause, the opinion preparers are entitled to rely on an assumption that the selected non-U.S. court will take jurisdiction over the parties and decide the merits of the dispute. This assumption can be stated or unstated. Matters regarding the chosen non-U.S. court’s jurisdiction and interpretation of a forum selection clause ordinarily will be governed by the Selected Forum Law. If the opinion preparers choose to state the assumption expressly, they can either word the Omnibus Cross-Border Assumption broadly enough for that purpose or draft a separate assumption.

To summarize, an opinion on the effectiveness of a mandatory outbound forum selection clause provides comfort to the non-U.S. recipient that courts in the Covered Law State will defer to the parties’ choice of a non-U.S. court as the exclusive forum for resolving disputes. This deference is particularly important for non-U.S. parties who often want not only the law of the Chosen Law Country to govern, but also the courts of the Chosen Law Country applying the Chosen Law to be the only ones that can resolve disputes under the agreement. Also, the effectiveness under the Covered Law of submission by a U.S. party to the jurisdiction of a chosen non-U.S. court is relevant when a foreign judgment must be enforced in the Covered Law State, as discussed in section III-4.2 of this Report. A U.S. lawyer, however, would generally be unable to give the opinion unless the Covered Law State has adopted the modern view. As discussed above, the opinion necessarily is subject to exceptions and based on assumptions regarding matters governed by non-U.S. law, and this Committee recommends that, to help reduce

The opinion could be worded as follows:

[SAMPLE OPINION LANGUAGE].

This Committee recommends that this assumption be stated expressly if, as recommended by this Committee in section II-3 of this Report, the Omnibus Cross-Border Assumption is stated expressly in the opinion letter. See supra note 18 and accompanying text. See also supra text accompanying note 116 and note 16 and accompanying text (discussing whether outbound opinions should include an express statement that their preparation and interpretation are governed by U.S. customary practice).

This is consistent with the modern view, as opposed to a systems where, instead of deferring to the parties’ choice of forum, a court decides whether to decide the merits of the case by applying broad discretionary standards such as reasonableness, fairness, the extent of contacts with the parties and the transaction, the burden on the court, or the convenience of the parties or the witnesses. Because under the law of many countries courts do not give substantial weight to mandatory outbound forum selection clauses, this opinion addresses an issue of importance to a non-U.S. recipient, if its goal is to foreclose a U.S. party from bringing suit in a U.S. court. See generally Haver, supra note 95, at 2–3. The opinion also gives a non-U.S. recipient comfort that under the Covered Law a court in the Covered Law State will not require that special form requirements, such as capitalized, large or bold face type, a specific placement within the agreement or special signing formalities, be satisfied for a mandatory forum selection clause to be valid. Compliance with any such form requirements under the Chosen Contract Law or the Selected Forum Law is covered by the Omnibus Cross-Border Assumption. See supra notes 117-119 and accompanying text. In addition, the opinion could be important to a non-U.S. recipient because the validity under the Covered Law of the submission by a U.S. party to the exclusive jurisdiction of a foreign court may be relevant to the enforcement of the clause by the selected non-U.S. court under the Chosen Contract Law or the Selected Forum Law (just as its validity under non-U.S. law is relevant to enforcement of the clause by a U.S. court, see supra text accompanying note 117). See generally M. Gruson, Controlling Site of Litigation, in SOVEREIGN LENDING: MANAGING LEGAL RISK 29, 35–36 (Gruson & Reisner eds., 1984).
the risk of misunderstandings, the opinion preparers consider stating those exceptions and assumptions expressly.

III-4.1.4.3 MANDATORY INBOUND CLAUSES.

In the unusual case in which a cross-border agreement chooses the law of a non-U.S. jurisdiction as its governing law and specifies a court in the Covered Law State as the exclusive forum for resolving disputes, an opinion normally can be given that the mandatory inbound forum selection clause will be given effect under the Covered Law, so long as sufficient contacts exist between that state and the parties or the transaction, because the parties submitted voluntarily to the jurisdiction of that court, even though a court of the Covered Law State will have to apply substantive non-U.S. law to resolve the dispute. The opinion does not cover issues that may impair the ability of the recipient to maintain an action in the courts of the Covered Law State other than jurisdiction, such as failure to qualify to do business there when otherwise required.

Prior to 2013, U.S. Circuit Courts were divided over the standard to be applied in deciding whether to enforce a mandatory forum selection clause when an action is brought in a federal court other than the federal court chosen in a mandatory forum selection clause. The U.S. Supreme Court resolved the issue in Atlantic Marine, holding that, so long as the chosen federal court satisfies the requirements of federal law on proper venue, a mandatory forum selection clause is to be given controlling weight in all but the most exceptional cases under the applicable federal statute.

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121 See supra note 102 regarding subject matter and personal jurisdiction. Cf. Cambridge Biotech Corp. v. Pasteur Sanofi Diagnostics, 666 N.E.2d 1003 (Mass. 2000) (upholding parties’ choice of French courts as forum for resolving disputes arising under agreement that chose Massachusetts law to govern, even though result was that Massachusetts law would be applied by French courts). If the clause specifies a U.S. federal court as the exclusive forum, the opinion preparers need to consider that U.S. federal courts have special rules governing subject matter jurisdiction, as well as personal jurisdiction. See supra text accompanying note 101.

122 See, e.g., Credit Suisse International v. Uribi, DeSarrollos Urbanos, S.A.B. de C.V. (Sup. Ct. N.Y. Co. Aug 21, 2013) (foreign corporation doing business in New York without qualifying to do so prohibited from bringing suit there even if N.Y. law prevents the defendant, who agreed to inbound forum selection clause, from asserting that New York courts are inconvenient or lack jurisdiction).

123 See supra note 109.

124 Federal venue generally is governed by 28 U.S.C. §1391, which provides three alternative grounds for establishing whether venue is proper. The Atlantic Marine court held that if venue is improper, the case must be dismissed or transferred under 22 U.S.C. §1406(a) or Fed. Rule of Civ. Proc. 12(b)(3). See, e.g., Richards v. Lloyd’s of London, 135 F.3d 1289, 1292 (9th Cir. 1998) (dismissing for improper venue under Rule 12(b)(3)); Jones v. Weinbrecht, 901 F.2d 17, 19 (2d Cir. 1990) (dismissing claim covered by mandatory forum selection clause for improper venue under Rule 12(b)(3)); Lambert v. Kysar, 983 F.2d 1110, 1112 n.1 (1st Cir. 1993) (applying Rule 12(b)(6)); Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988) (valid forum selection clause given controlling weight in all but the most exceptional cases). Whether the parties entered into a contract containing a forum selection clause has no bearing on whether a case falls into one of the categories of cases listed in §1391(b) for federal venue purposes, and in any event opinions are rarely requested or given on venue selection. See supra note 76. Nevertheless, because the holding in Atlantic Marine is predicated on venue in the chosen U.S. District Court not being “wrong” under §1406(a) or “improper” under Rule 12(b)(3), when giving an opinion on the enforceability of a mandatory
III-4.2 RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE U.S.

Because the non-U.S. parties to a cross-border agreement may obtain a judgment for breach of the agreement outside the U.S. but then have to enforce it in the U.S., they often request an opinion that judgments they obtain in non-U.S. courts will be recognized and enforced by courts in the Covered Law State without a rehearing on the merits of the case. As discussed below, a U.S. lawyer usually will be willing to give this opinion because it in effect does no more than confirm that a statute in the Covered Law State provides for the enforceability of foreign judgments if specified requirements are met. The opinion is often given in cross-border transactions even though compliance with most of the statutory requirements can only be ascertained after a foreign judgment has actually been obtained.

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125 22 U.S.C. Section 1404(a). The court stated that a refusal to transfer the case to the federal court named in a mandatory forum selection clause is “conceivable” but “will not be common” and requires “extraordinary circumstances unrelated to the convenience of the parties.” Contrary to the wide discretion federal courts have under Section 1404 generally in allocating venue within the federal system, in mandatory forum selection cases the court will not consider the parties’ private interests (convenience for them or their witnesses). Because all federal courts are part of the same judicial system, the court in which suit was brought in violation of the agreement can simply transfer the case to the court selected in the agreement. *Atlantic Marine*, supra note 109 at 14. Conversely, when the forum selection issue involves a federal court and a state court, or state courts in different states, the court would have to dismiss the suit.

126 A non-U.S. party often will seek to enforce an agreement that chooses non-U.S. law as its governing law in the courts of the non-U.S. jurisdiction whose law is chosen. If, however, the U.S. party’s assets or operations are in the U.S., the non-U.S. party may need a U.S. court to enforce a judgment it has obtained outside the U.S.

127 Recognition and enforcement are related but distinct concepts. Recognition of a foreign judgment means that a U.S. court accepts the determination of legal rights and obligations made by the non-U.S. court that decided the case on its merits. Enforcement involves the use of legal process in the U.S. to ensure that the losing party obeys the judgment of the foreign court. Recognition is a prerequisite to enforcement.

128 For many years enforcement of foreign judgments in the U.S. was solely a common law issue. The U.S. Supreme Court decision in Hilton v. Guyot, 159 U.S. 113 (1895), was the leading case. That case has been largely superseded by state statutes or state common law, which currently provide the applicable legal framework. The Hague Convention (discussed *infra* in section III-4.3 of this Report) is the first international treaty signed by the U.S. on this subject but has not yet come into effect. If and when it comes into effect and is ratified by the U.S. Senate, and depending on the provisions of implementing legislation, the Hague Convention will govern many judgments relating to cross-border transactions in which the agreement contains a mandatory forum selection clause. Until then, and even after for judgments relating to agreements that do not contain a mandatory forum selection clause covered by the Hague Convention, enforceability of foreign judgments is governed by state law. In 2005 the American Law Institute completed work on a proposed federal statute that would preempt state law. *See Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Fed. Statute* (Proposed Final Draft Apr. 11, 2005). One of the ALI’s objectives was to provide a comprehensive uniform regime designed to address concerns about U.S. law frequently voiced by other countries, and thereby promote bilateral or multi-lateral treaties broader in scope than the Hague Convention.

129 The opinion could be worded as follows:
Many U.S. states have adopted a version of the Uniform Foreign-Country Money Judgments Recognition Act (the “Uniform Act”).\(^{130}\) The Uniform Act governs the recognition of a judgment by a court of a foreign country that grants or denies recovery of a sum of money,\(^ {131}\) other than for taxes, fines or domestic support, and that is final, conclusive and enforceable under the law of that country, unless one of the grounds for nonrecognition specified in the Uniform Act applies. The Uniform Act provides three mandatory grounds for nonrecognition\(^ {132}\) and eight discretionary grounds.\(^ {133}\) With the

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**[SAMPLE OPINION LANGUAGE].**

See IBA REPORT, supra note 2, at 196 (noting that, though of limited value, the opinion is frequently requested because legal requirements vary significantly in number and specificity from country to country (most often including requirements relating to fair and due process, no violation of public policy and reciprocity)).

\(^{130}\) UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005) [hereinafter Uniform Act], available at http://www.law.upenn.edu/bll/archives/ule/ufmjra/2005final.htm. The Uniform Act has been adopted by a majority of the U.S. states. It establishes minimum standards under which state courts are required to enforce foreign judgments, while also leaving them free to recognize foreign judgments more broadly under principles of comity. See, e.g., CAL. CIV. PROC. CODE §§ 1713–1713.8. The Uniform Act does not apply to judgments enforcing foreign arbitral awards, because arbitral awards are covered by the FAA. See supra notes 39, 43–45 and accompanying text.

\(^{131}\) When the foreign judgment is expressed in a currency other than U.S. dollars, a U.S. court must also decide how it should be satisfied. Many states have adopted the Uniform Foreign Money Claims Act (UNIF. FOREIGN-MONEY CLAIMS ACT prefatory note (1989) [hereinafter FOREIGN-MONEY CLAIMS ACT], available at http://www.law.upenn.edu/bll/archives/ule/fmca89.htm). That act (1) recognizes the parties’ right to select the currency for their transaction and allocate the risk of exchange rate fluctuations, and (2) in the absence of an agreement, codifies the basic principle that the aggrieved party should be restored to the economic position in which it would have been had the breach not occurred. That result can be accomplished by applying the so-called “payment day rule” (conversion of foreign currency into U.S. dollars at the exchange rate in effect when the judgment is paid), which is followed most often. There are other rules (such as the “breach day rule” and the “judgment day rule”) that courts may choose to apply instead. The Uniform Foreign Money Claims Act is intended to promote uniform judicial determination of claims expressed in a foreign currency, thereby reducing forum shopping and uncertainty, and to address related issues such as adjustments to and interest on foreign money claims. These issues are not covered by an opinion on the recognition and enforcement of foreign judgments under the Uniform Act.

\(^{132}\) They are: (1) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign court did not have personal jurisdiction over the defendant, except that jurisdiction is deemed established, if the defendant: (i) was served with process personally in the foreign country; (ii) voluntarily appeared other than to contest jurisdiction; (iii) agreed to submit to the jurisdiction of the foreign court; or (iv) had an office in the foreign country (the specified grounds are not exclusive and the forum court may find that the foreign court had personal jurisdiction on some other basis); or (3) the foreign court did not have jurisdiction over the subject matter of the dispute. UNIFORM ACT, supra note 130, §§ 4(b), 5.

\(^{133}\) They are: (1) the defendant did not receive notice of the proceeding in sufficient time to prepare a defense; (2) the judgment was obtained by “extrinsic” fraud on the part of the prevailing party that deprived the losing party of an adequate opportunity to present its case (such as deliberately serving the defendant at the wrong address), as opposed to “intrinsic” fraud (such as false testimony or forged evidence) which is a matter for the foreign court to deal with; (3) the judgment is repugnant to the public policy of the forum state or the U.S. (a stringent test, requiring clear injury to public health, public morals or public confidence in the administration of law, as opposed to a mere difference in law, no matter how significant); (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign court was contrary to a valid agreement such as an
exception of reciprocity as a condition of recognition for a foreign judgment, the Uniform Act codifies general common law rules of comity.

In states that have adopted a version of the Uniform Act, an opinion normally can be given that foreign judgments will be recognized and enforced by a court applying the Covered Law subject to the prerequisites and exceptions set forth in the Uniform Act as enacted in the Covered Law State. Some opinion givers choose to spell out the precise statutory prerequisites and/or grounds for nonrecognition under the statute. Others express the opinion in a way that limits its coverage by reference to the statutory prerequisites and exceptions, for example by incorporating them into the opinion without restating or summarizing them.

In states that have not adopted the Uniform Act or a statute to similar effect, the recognition and enforcement of foreign judgments normally is governed by the law of comity. Lawyers in those states may or may not be able to give an opinion that a judgment by a foreign court will be recognized and enforced in the Covered Law State depending on what the cases provide on application of the law of comity in their state. Some states require that the courts of the foreign country where the judgment was obtained would recognize and enforce, in a reciprocal manner, a judgment by that state’s courts. A determination that the reciprocity requirement is met may be difficult or impossible to make without the advice of a lawyer with expertise in the law of the foreign country, and therefore, if a U.S. lawyer is willing to give an opinion at all, he may need to rely on an express assumption to that effect.

III-4.3 PENDING HAGUE CONVENTION.

In 2005 the Hague Conference on Private International Law adopted the Convention on Choice of Courts Agreements (the “Hague Convention”) with the goal of achieving for mandatory forum selection clauses in cross-border agreements and resulting judgments what the New York Convention achieved for arbitration clauses and resulting awards. The Hague Convention was signed by the U.S. on January 19, 2009, by the

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134 The drafters of the Uniform Act decided, after lengthy debate, not to include a reciprocity requirement, noting that “while recognition of U.S. judgments continues to be problematic in a number of foreign countries, there [is] insufficient evidence to establish that a reciprocity requirement would have greater effect on encouraging foreign recognition of U.S. judgments.” UNIFORM ACT, supra note 130 at prefatory note.

135 Spelling out all or even most of the prerequisites and exceptions may add significantly to the length of the opinion letter, even if the statutory language is paraphrased.

136 In some cases the cost of preparing the opinion may be prohibitive. In other cases only a reasoned or qualified opinion may be possible.

137 Hague Conference on Private Int’l Law, Convention on Choice of Court Agreements, June 30, 2005,
European Community on April 1, 2009, and by Mexico on September 26, 2007.\footnote{138} It is expected to be signed in the near future by Argentina, Australia, and Canada, among others. As of the date this Report goes to publication the Hague Convention has not yet entered into force.\footnote{139} Although commentators expect the U.S. Senate to give its consent, full ratification by the U.S. likely will be delayed until implementing legislation has been enacted (as was the case with U.S. accession to the New York Convention).\footnote{140}

For the Hague Convention to apply, once it comes into effect, a forum selection clause must: (1) be between at least two parties; (2) be in writing or expressed in another clause must: (1) be between at least two parties; (2) be in writing or expressed in another

\footnote{138}See Hague Conference on Private Int’l Law, STATUS TABLE, 37: CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS, available at http://www.hcch.net/index_en.php?act=conventions.status&cid=98#nonmem. As of December 1, 2009 The European Union has replaced the European Community and succeeded to all its rights and obligations. The European Union has exclusive authority to ratify the Hague Convention, which does not need to be signed by individual member countries (except for Denmark) to be binding on them.

\footnote{139}Whether the minimum number of countries necessary for the Hague Convention to enter into force will sign and ratify it is an open question, as is whether a sufficient number of countries will implement it to make it meaningful in cross-border practice. \textit{See HAGUE CONFERENCE OUTLINE, supra} note137, at 2.

\footnote{140}Implementing legislation may take the form of a combination of federal and state statutes in what has been referred to as a "cooperative federalism" approach, whereby a state could opt out of coverage under the federal implementing law and instead enact a uniform act. Although the objective would be for the federal implementing legislation and the uniform state act to be as nearly identical as possible to ensure consistency across the U.S., the precise balance between federal and state law on those issues that the Hague Convention leaves to be determined under the law of each signatory country remains an open question.
acceptable means of communication; (3) designate the courts of one signatory country to
the exclusion of all other courts for the resolution of disputes arising under the
agreement; and (4) relate to international civil or commercial cases (the “Four Hague
Prerequisites”). The Hague Convention by its terms applies to mandatory forum
selection clauses only, but it also permits signatory countries to declare that they will
apply it in the case of permissive forum selection clauses that meet the other prerequisites
for the Hague Convention’s application. The Hague Convention provides that: (i) the
chosen court must hear the case if the mandatory forum selection clause is effective
according to the standards established by the Hague Convention, unless the clause is null
and void under the law of the chosen court’s country; and (ii) if a party to the
agreement commences an action in any court other than the chosen court (a “non-chosen
court”), the non-chosen court must dismiss proceedings covered by the mandatory forum
selection clause, unless one of five exceptions established by the Hague Convention
applies. The Hague Convention applies to commercial agreements and specifically
excludes, among others: agreements involving consumers; employment agreements; real
property and tenancies; the validity, nullity or dissolution of business entities and the
validity of decisions of their governing bodies; and the validity of intellectual property
rights other than copyright unless the action is brought for a breach of contract.

A case is not deemed “international” for purposes of the Hague Convention if all parties are from the
country where recognition and enforcement is sought and all issues relating to the dispute, other than
the location of the chosen court, involve only that country. Hague Convention, supra note 137, at art.
1(2). Entities are resident where they were formed, have their statutory seat, or have their
headquarters or other principal place of business. Id. at art. 4(2).

Id. at art. 22. This is a reciprocal system that extends applicability of the Hague Convention only if
both the country of the chosen court and the country of the court being asked to enforce the judgment
have made the declaration. If they have, judgments rendered by a court designated in a permissive
forum selection clause will be recognized and enforced if: (1) suit was brought in that court first, and
(2) a judgment has not already been rendered by another court that would be permitted to hear the
case under the agreement on the same cause of action. Id. The declaration would also limit the
availability of the doctrine of forum non conveniens. Commentators see the potential for this optional
declaration, if made widely, to increase greatly the impact of the Hague Convention, because
agreements in cross-border transactions often designate multiple courts on a non-exclusive basis.

Id. at art. 5(1). In particular, the chosen court may not decline jurisdiction because it believes that a
court of another country is more appropriate (forum non conveniens) or that a suit was brought first in
such other court (lis alibi pendens). The jurisdictional rules of the Hague Convention do not affect
signatory countries’ internal rules as to the chosen court’s subject matter jurisdiction, minimum value
of the claim or venue, although the Hague Convention recommends that when the chosen court has
discretion on these issues it give due consideration to the contractual choice of the parties. Id. at art.
5(3)(b). The chosen court also may refuse jurisdiction if it determines that the country chosen has no
connection with the defendant or the claim, other than the forum selection clause itself, because the
Hague Convention discourages “random” forum shopping. Id. at art. 19.

Those exceptions are: (1) The forum selection clause is null and void under the law of the jurisdiction
in which the chosen court is located, including its conflict-of-law rules; (2) a party lacked the capacity
to enter into the choice of court agreement under the law of the country of the court asked to enforce
the agreement; (3) giving effect to the agreement would lead to a manifest injustice or would be
manifestly contrary to the public policy of the country of the court asked to enforce the agreement; (4)
for reasons beyond the parties’ control, the agreement cannot reasonably be performed; and (5) the
chosen court has declined to hear the case. Id., at art. 6.

Id. at art. 2. Other subjects excluded are: status and legal capacity of natural persons; spousal and
III-4.3.1 EFFECTIVENESS OF FORUM SELECTION CLAUSE.

The Hague Convention should achieve a degree of harmonization of the legal standards applicable to issues that under the rules of international comity applied by national courts are currently a source of uncertainty, as discussed earlier in this Report with respect to U.S. courts. For example: Article 2 provides that the Hague Convention does not apply to tort or criminal claims that do not arise under the agreement; Article 3 provides that a forum selection clause shall be deemed mandatory unless the parties expressly provide otherwise; and Article 6 provides that determinations by a non-chosen court as to whether an agreement is null and void must be made under the law of the jurisdiction of the chosen court. The Hague Convention allows a non-chosen court to apply, at least in part, the law of its own jurisdiction (as opposed to the Chosen Contract Law or the Selected Forum Law) to some issues that bear upon the enforcement of forum selection clauses covered by the Convention. For example, Article 6 provides that grounds for not enforcing a forum selection clause include lack of capacity to enter into the agreement, manifest injustice or violation of public policy, in each case as determined under the law of the non-chosen court being asked to enforce a mandatory forum selection clause.

If the Hague Convention comes into effect and is ratified by the U.S. without additional qualifications, U.S. opinion givers should be able to give an opinion that a court in the Covered Law State will give effect to a mandatory forum selection clause that satisfies the Four Hague Prerequisites and names the courts of a non-U.S. country that is a signatory to the Convention, subject to the exceptions set forth in the Hague Convention. To give the opinion, the opinion preparers would need to confirm that the Four Hague Prerequisites are satisfied. Because the Hague Convention provides that exceptions similar to the Bremen exception can be invoked by a non-chosen court to deny the enforcement of a mandatory forum selection clause, the discussion in section III-4.1.4.2 of this Report regarding the Bremen exception would apply to opinions given under the Convention.

If the agreement designates non-U.S. courts for the resolution of disputes and non-U.S. law as its governing law, the opinion would not cover the threshold issue of whether a mandatory forum selection clause is null and void under the Selected Forum Law or the Chosen Contract Law. Because these matters are not governed by the Covered Law, the opinion preparers would be entitled to address them by assuming that the agreement generally and the forum selection clause specifically are valid, binding and

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146 Because the matters addressed by the opinion are governed by a treaty to which the U.S. is a party and therefore are a matter of federal law, to avoid the risk of misunderstanding, the opinion letter should cover U.S. federal law expressly, at least for purposes of this opinion.

147 See supra text accompanying notes 115 and 116.
enforceable under all applicable non-U.S laws. For this purpose, the opinion preparers are entitled to rely without so stating on the Omnibus Cross-Border Assumption.¹⁴⁸

III-4.3.2 RECOGNITION AND ENFORCEMENT OF JUDGMENTS.

The Hague Convention mandates that, if a judgment on the merits¹⁴⁹ is rendered by a court of a signatory country designated in a mandatory forum selection clause that satisfies the Four Hague Prerequisites, that judgment must be recognized and enforced by the courts of all other signatory countries without a review of the merits, unless the judgment falls within one of the exceptions established by the Hague Convention.¹⁵⁰

Except for the right to review the chosen court’s decision to determine whether one of the exceptions set forth in the Hague Convention applies, the courts of signatory countries would be bound by the findings of fact and decisions of law of the chosen court. The Hague Convention provides that the amount of compensatory damages awarded is not reviewable, but allows a court of a signatory country that is asked to enforce a foreign judgment to refuse to recognize awards of punitive or exemplary damages. The enforcing court may postpone recognition and enforcement of a judgment if the chosen court is reviewing the case or the time limits to seek review of that court’s decision have not expired.

¹⁴⁸ See supra text accompanying note 18. Sometimes, non-U.S. parties request a specific opinion that a U.S. party has the corporate power to choose a non-U.S. court as the forum for resolving disputes. This opinion is generally subsumed within the typical opinion that a U.S. party has duly authorized, executed and delivered the agreement. See infra text accompanying notes 164-167.

¹⁴⁹ Injunctions and other interim measures of protection or relief are excluded from the scope of the Hague Convention. The Hague Convention, therefore, neither requires nor precludes the grant, refusal or termination by a non-chosen court of interim protective measures, such as preliminary injunctions. Hague Convention, supra note 137, at art. 7. The Hague Convention requires that settlements approved by the chosen court that have the force of judgments under its law be recognized and enforced in every signatory country in the same manner as foreign judgments. Id., at art 12.

¹⁵⁰ The exceptions include the following: (1) The judgment was given by default, such that the court being asked to enforce the judgment is not bound by the findings of fact on which the chosen court based its jurisdiction; (2) the judgment does not have effect or is subject to review in the country of the chosen court; (3) the agreement was null and void under the law of the country of the chosen court, including its conflict-of-law rules, unless the chosen court has determined that the agreement is valid; (4) a party lacked the capacity to conclude the agreement under the law of the country of the court being asked to enforce the judgment; (5) the defendant either (i) did not receive notice of the complaint in sufficient time and in such a way as to enable it to arrange for its defense, unless the defendant entered an appearance and presented its case in the chosen court without contesting lack of notice, or (ii) was notified of the complaint in the country of the court being asked to enforce the judgment in a manner that is incompatible with fundamental principles of that country’s law concerning service of process; (6) the judgment was obtained by fraud in connection with a matter of procedure; (7) recognition or enforcement would be manifestly incompatible with the public policy of the country of the court being asked to enforce the judgment, including because the specific proceedings leading to the chosen court’s judgment were incompatible with fundamental principles of procedural fairness of that country; (8) the judgment is inconsistent with another judgment rendered in a signatory country (including the country of the chosen court and that of the court being asked to enforce the judgment) in a dispute between the same parties that satisfies the conditions for being recognized and enforced under the Hague Convention; or (9) the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. Id., at art. 8–9.
If the Hague Convention comes into effect and is ratified by the U.S. without additional qualifications, U.S. opinion givers normally should be able to give an opinion that a judgment by a court designated in a mandatory outbound forum selection clause and located in a country that is a signatory to the Hague Convention will be recognized and enforced in the U.S., subject to the exceptions set forth in the Hague Convention. To give the opinion, the opinion preparers would need to determine that the Four Hague Prerequisites are satisfied as of the date of the opinion. Because the Hague Convention provides as grounds for refusing recognition and enforcement of a foreign judgment that the judgment violates public policy under the law of the country where enforcement is sought, U.S. opinion givers should not have to include an express public policy exception (although to help reduce the risk of misunderstandings they may choose to do so).

III-4.4 SERVICE OF PROCESS.

Agreements in cross-border transactions often contain a provision that specifies the manner in which a party wishing to bring suit can serve process on the other party. Such a clause provides certainty and allows the parties to avoid the complexity, cost and delay of resorting to procedures established by multilateral conventions or bilateral treaties for international service of process if the defendant is not in the same country as the plaintiff. When a cross-border agreement contains a service of process clause, non-U.S. parties sometimes request an opinion from counsel for the U.S. party that service on

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151 If the U.S. makes the declaration discussed supra note 142 and accompanying text, the opinion could also be given when a non-U.S. court is designated in a permissive forum selection clause if the chosen court’s country also has made the declaration.

152 Because the matters addressed by the opinion would be governed by a treaty to which the U.S. is a party, and therefore a matter of federal law, to avoid the risk of misunderstanding, the opinion letter should cover U.S. federal law expressly, at least for the purposes of this opinion.

153 The principal treaty is the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Hague Service Convention”). The Hague Service Convention provides for one main channel of transmission to be used when documents need to be transmitted between parties in different signatory countries, which relies on governmental authorities in both countries involved. It also provides for four alternative channels that involve different parties, both governmental and non-governmental, in the country of origin and in the destination country in which service is to be made. The destination country may object to the use of some of the alternative channels and “derogatory channels” are allowed in bilateral or multilateral agreements among specific countries.

The Hague Service Convention does not address substantive rules on actual service of process under the laws of signatory countries. Depending on which channel of transmission is chosen, additional steps not governed by the Hague Service Convention may be required under the internal laws of the destination country for service of process to be effective on the ultimate addressee. In some cases service using channels provided in the Hague Service Convention can be made with compulsion, if the laws of the destination country allow it, while in other cases voluntary acceptance by the addressee is required.

The Hague Service Convention also includes provisions protecting the defendant, both prior to and after a judgment by default, which operate differently depending on which channel is used and the requirements of the internal laws of the destination country. At least six months must elapse between the date of transmission of the complaint and the entry of a default judgment and the defendant has at least one year after the entry of a default judgment to challenge the effectiveness of service of process.
the U.S. party in the manner specified in the agreement will be effective under the
Covered Law. This opinion addresses the concern that a court in the Covered Law State
would find service in the manner provided by the agreement inadequate to establish
jurisdiction over the opinion giver’s client. The issue of adequacy of service process
under the Covered Law can arise in a variety of procedural settings depending on how
suit is brought.

III-4.4.1 SERVICE OF PROCESS FOR SUITS IN NAMED NON-U.S. COURT.

When the agreement contains an outbound forum selection clause and the
agreement chooses the law of a non-U.S. jurisdiction as its governing law, an opinion of
U.S. counsel that service of process in the manner specified in the agreement is effective
provides a non-U.S. recipient comfort that a court in the Covered Law State will not
refuse to recognize a judgment of the named non-U.S. court against the opinion giver’s
client on the ground that the service made on the opinion giver’s client was inadequate.154
The opinion does not address whether the service of process clause is effective under the
Chosen Law or whether the methods specified in the clause satisfy the requirements for
validly commencing the suit in the named non-U.S. court. These are matters governed by
non-U.S. law and are covered by the Omnibus Cross-Border Assumption, on which the
opinion preparers are entitled to rely without so stating.

If a court in the Covered Law State is ever asked to enforce a judgment of the
named non-U.S. court, the law of the Covered Law State will determine whether the
method used to serve process to bring suit in the named non-U.S. court was permissible
under the Covered Law. If it is held not to be permissible, the court in the Covered Law
State will likely refuse to recognize and enforce the non-U.S. court’s judgment, even
though (i) under procedural rules of the Selected Forum Law the non-U.S. court had
personal jurisdiction over the U.S. party against whom the judgment was rendered, and
(ii) under the Chosen Contract Law the agreement of the U.S. party to resolve disputes in
the named non-U.S. court was valid.155

Giving the opinion should present no difficulty if under the Covered Law the non-
U.S. party seeking to have a foreign judgment enforced could have used the methods for
service of process specified in the agreement to bring suit against the U.S. party in a court
in the Covered Law State (disregarding for purposes of this analysis whether or not doing
so would be permitted under the agreement’s forum selection clause).156 Thus, the

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154 See supra text accompanying notes 126-136 for a discussion of recognition and enforcement of
foreign judgments. If the Covered Law State has adopted some version of the Uniform Act, a court in
the Covered Law State may refuse to enforce a foreign judgment if the defendant did not receive
notice of the proceeding in sufficient time to prepare a defense. See supra text accompanying note 133.
If the Covered Law State has not adopted the Uniform Act, the opinion preparers will have to
look to the law of comity and U.S. due process standards. See supra text accompanying note 136.
The Hague Convention (which is discussed supra in section III-4.3 of this Report) allows for
nonrecognition of a foreign judgment if the defendant was notified of the proceedings in an untimely
fashion or in a manner incompatible with fundamental principles concerning service of process under
the law of the court being asked to enforce the judgment. See supra text accompanying note 150.

155 See IBA REPORT, supra note 2, at 195.
opinion normally will present no difficulty when the agreement only permits service in person on the U.S. party or on its duly appointed agent.\footnote{157}

If the methods for service of process specified in the agreement would not be clearly permitted to bring suit against the U.S. party in a court in the Covered Law State, the opinion preparers will need to consider whether service using those methods would be grounds for a court in the Covered Law State to refuse to recognize a foreign judgment.\footnote{158} The laws of many states impose special conditions on or expressly disallow waivers of service of process, and may restrict the effectiveness of service of process by mail, publication or methods other than personal service or service on an agent if they do not assure adequate and timely notice to a defendant that a suit has been brought. Depending on the method for service in question, the law may not be clear enough to permit an opinion to be given or may only permit a reasoned opinion.

III-4.4.2 SERVICE OF PROCESS WHEN SUIT CAN BE BROUGHT IN THE U.S.

If a cross-border agreement that designates non-U.S. law as its governing law names courts in the Covered Law State as a forum in which the parties may bring suit to resolve disputes under the agreement, the opinion provides a non-U.S. recipient comfort that service of process in the manner specified in the agreement will establish personal jurisdiction over the opinion giver’s client if the recipient sues the opinion giver’s client in the Covered Law State. The opinion also provides the non-U.S. party comfort that the methods provided in the agreement to serve process will be effective if the non-U.S. party commences an action against the U.S. party in a court in the Covered Law State to enforce a judgment by a non-U.S. court relating to the agreement.\footnote{159}

\footnote{156} Ordinarily what those methods are will be obvious from a review of the agreement. That, however, may not always be the case, for example because the service of process clause makes reference to non-U.S. law. In such a situation the opinion preparers may need to consult with non-U.S. counsel (and if they receive advice from non-U.S. counsel, may choose to state their reliance on that advice in the opinion letter).

\footnote{157} Although many number of different methods for service of process might be permissible under the applicable non-U.S. law, as a practical matter parties to cross-border agreements in transactions in which closing opinions are delivered often choose methods on which an opinion can be given. Service of process clauses also often include (i) an express consent to submit voluntarily to the jurisdiction of a particular court or courts, (ii) waivers of related procedural defenses, and/or (iii) a covenant not to claim that service of process in the manner provided in the agreement was ineffective. The opinion on service of process does not cover these matters.

\footnote{158} If the agreement provides for alternative methods of service of process, the opinion preparers will have to consider whether each one is permissible under the law of the Covered Law State. The opinion preparers may choose not to cover methods that are problematic under the Covered Law, but will have to say so expressly in the opinion letter. The opinion preparers also will need to consider issues that may arise under the Covered Law if the service of process clause purports to bind some but not all parties (for example a U.S. borrower being sued by a non-U.S. lender, but not vice versa) or otherwise treats different parties differently under comparable circumstances.

\footnote{159} In either case the Covered Law alone governs the adequacy of service of process for commencing the suit. In the case of enforcement of a foreign judgment, as discussed earlier in this section, a separate question is whether the method for service of process in the non-U.S. court is permissible under the Covered Law. As a practical matter, if an opinion can be given that the method specified in the agreement for service of process to bring suit in a non-U.S. court is permissible as discussed earlier in
Whether the opinion can be given will, again, depend on the methods for service of process specified in the agreement and the law of the Covered Law State. Some states have statutes or rules of court governing service of process, while others have left the matter to judicial decisions. Sometimes, the law covering a particular method specified in the agreement will not be clear enough to permit an opinion to be given or may only permit a reasoned opinion.

III-4.4.3 SERVICE OF PROCESS THROUGH AGENTS OUTSIDE THE U.S.

Cross-border agreements often provide for the appointment by the U.S. party of an attorney-in-fact or other agent in a foreign country and permit notices to be given and service of process to be effected through that agent. Non-U.S. parties sometimes request an opinion that the agent has been duly appointed by the opinion giver’s client. U.S. state laws generally permit the appointment of agents for service of process. If the creation and scope of the agency relationship are governed by the Covered Law, the requested opinion normally can be given.

Non-U.S. parties sometimes request an additional opinion that under the Covered Law the opinion giver’s client can be served in the manner specified in the agreement through the agent it has appointed. Giving this opinion should present no difficulty if an opinion could be given that (i) the agent was duly appointed and (ii) service on the agent in the manner specified in the agreement would be effective under the law of the Covered Law State as discussed earlier in this section of the Report. If the agency relationship is not governed by the Covered Law (for example because it is created under an agreement governed by non-U.S. law), the opinion giver is permitted to assume the validity of the agent’s appointment under the governing non-U.S. law by relying on the Omnibus Cross-Border Assumption. The opinion thus means that under the Covered Law the U.S. party duly authorized, executed and delivered the document effecting the appointment and, for purposes of service of process, the appointment of the agent is effective against the U.S. party, assuming the validity of the agency relationship under applicable non-U.S. law.

III-5 ENTITY STATUS, POWER, AND ACTION.

If an agreement designates non-U.S. law as its governing law, that law governs the validity, binding effect and enforceability of the agreement. The Chosen Law, however, does not govern the corporate power of the U.S. party to the agreement to enter into and to perform its obligations under the agreement, or its authorization, execution and delivery of the agreement. A closing opinion on these matters typically is requested.

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160 See supra note 156 and accompanying text.
161 See generally IBA REPORT, supra note 2, at 276–77.
162 This opinion would be subsumed in the opinion discussed earlier in this section with respect to the effectiveness of service of process generally if the agent is appointed in the agreement itself.
163 See infra text accompanying notes 164-167.
and given in domestic U.S. transactions, and typically the non-U.S. party to a cross-border agreement requests a similar opinion from U.S. counsel. The wording of the opinion and the work the opinion preparers are expected to perform to support this opinion are the same in cross-border transactions (even when the agreement chooses non-U.S. law as its governing law) as it is in domestic U.S. transactions, because these matters are governed (at least in part) by the law of the state of the U.S. party’s organization, which this Report assumes is the Covered Law.164

In doing the analysis needed to conclude that a U.S. corporation or other legal entity has the power to enter into and perform its obligations under, and has duly authorized, the agreement (a “power and authority opinion”), the opinion preparers need to understand the general scope of the activities their client is committing to perform, because some activities may exceed the entity’s power under its organizational documents or the law of the state in which it was formed.165 To give a power and authority opinion under the Covered Law, however, the opinion preparers do not have to consider every provision of the agreement, because all they need to understand are the nature of the business activities the transaction involves and the general scope of the U.S. corporation’s or other entity’s undertakings in the agreement. Ordinarily, as in domestic U.S. transactions the activities a party is committing to perform, for example repayment of a loan with interest, purchase of goods or services, or issuance of shares of capital stock or other securities, will be obvious to the opinion preparers based on their familiarity with the transaction and general review of the agreement. When those activities are not obvious, however, for example because the agreement makes reference to non-U.S. law or uses non-U.S. concepts that the opinion preparers are not comfortable correlating to comparable concepts under the Covered Law with which they are familiar, the opinion preparers may wish to seek clarification.166

In the cross-border context, some aspects of due execution and delivery, such as authentication by a notary, attestation by witnesses, or special form requirements for specific types of agreements or undertakings, may be governed by the non-U.S. Chosen Contract Law or by some law other than the Covered Law, such as the law of the jurisdiction where the agreement is executed and delivered.167 As to those aspects of due


165 For example, in the case of a corporation the business activities in which it has the power to engage may be restricted by a provision in its charter or, as is the case for banking and insurance activities in many states, by the corporation law of the state in which it is organized. See TriBar 1998 Report, supra note 3434, §§6.3-6.4 and text accompanying n. 142-144 and n.146; see also GLAZER TREATISE, supra note 10, at 236-244, 264-280. In addition, the applicable corporation statute and the corporation’s charter and bylaws determine which matters may be approved by the board of directors alone, or even by officers, and which also require shareholder approval.

166 Depending on the circumstances, reliance on the client’s factual representations as to the activities contemplated by the agreement may be sufficient. Alternatively or in addition, the opinion preparers may decide to consult with non-U.S. counsel on aspects of the transaction or of non-U.S. law that affect their analysis of their client’s power under the Covered Law (and if the opinion preparers receive the advice of non-U.S. counsel, they may choose to state their reliance on that advice in the opinion letter).

167 See IBA REPORT, supra note 2, at 146 (under most countries’ conflict-of-law rules, the law of the
execution and delivery, the opinion preparers are permitted to rely, without so stating, on the Omnibus Cross Border Assumption that the agreement is an enforceable obligation of the parties. This is no different than in domestic U.S. practice: under the choice-of-law rules of states that follow the Restatement (Second) of Conflict of Laws, the Chosen Law normally governs the formalities required to create a valid contract. Thus, when the opinion does not cover the Chosen Law, it will not cover all aspects of execution and delivery in either domestic U.S. or cross-border practice.\textsuperscript{168}

III-6 \textbf{NO BREACH OR DEFAULT.}

The non-U.S. party to a cross-border agreement may ask U.S. counsel for the U.S. party for an opinion that the execution and delivery of the agreement and its performance by the opinion giver’s client will not result in a breach of or default under other specified contracts to which the opinion giver’s client is a party.\textsuperscript{169} This opinion addresses the concern of the opinion recipient that the transaction might have an adverse effect on the U.S. party under its existing contracts, for example because the transaction would violate a negative covenant, or on the opinion recipient, for example because the transaction might expose the non-U.S. party to a claim that entering into it tortiously interferes with another contract to which the U.S. party is already a party.

When a cross-border agreement designates non-U.S. law as its governing law, giving a no breach or default opinion can be more difficult than in a domestic U.S. transaction even though the wording of the opinion is the same. The incremental difficulty is because the opinion requires the opinion preparers to understand, in addition to the general structure of the transaction, the specific contractual obligations the opinion giver’s client is undertaking, even though those obligations are governed by the law of a non-U.S. jurisdiction as to which the opinion preparers cannot be expected to have expertise. For the limited purpose of giving a no breach or default opinion, the opinion

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\textsuperscript{168} For example, a “duly executed” opinion for a Delaware corporation means that persons having the actual authority to bind the entity signed the agreement in such a manner as to bring it into effect as a binding obligation of the corporation, based on the Delaware General Corporation Law, the corporation’s charter and by-laws, resolutions of the board of directors, and evidence of the incumbency of signing officers. If, however, the agreement designates as its governing law the law of a jurisdiction other than Delaware, the opinion of Delaware counsel would not cover execution and delivery to the extent that the law of such other jurisdiction governs these matters (unless that law also is covered by the opinion letter). It is up to the opinion recipient and its counsel to satisfy themselves that applicable requirements under the Chosen Law have been met.

\textsuperscript{169} \textit{See generally} TriBar 1998 Report, \textit{supra} note 34, §6.5 (no breach or default) at 654-661. Sometimes the requested opinion is broader, covering acceleration of the company’s obligations, creation of rights in others to exercise remedies or require payments, creation of liens on the company’s assets or termination of a contract. Another closely related opinion that is often requested is that the execution, delivery and performance of the agreement will not violate any court order to which the opinion giver’s client is subject.
preparers do not need a complete understanding of every obligation their client is undertaking, but instead only those that could result in a breach of or default under the contracts covered by the no breach or default opinion. \(^{170}\) What those obligations are will depend on: (1) the nature of the transaction; and (2) the terms of the opinion giver’s client’s other contracts addressed in the opinion.

Recognizing that the opinion preparers may not fully understand the obligations their client is undertaking under an agreement governed by non-U.S. law, the opinion preparers nevertheless may determine that they can give a no breach or default opinion based on their general familiarity with the transaction and their review of the agreement being entered into by their client. \(^{171}\) In making that determination, however, the opinion preparers may need additional clarification about the obligations their client is undertaking before they can give the opinion, if they can give it at all. \(^{172}\)

Normally a company is a party to many contracts, only some of which are likely to be of practical concern. Therefore, the parties and their counsel should identify which contracts the opinion should cover, as well as the practicality of doing the work necessary to cover them. \(^{173}\) The contracts identified for coverage may include contracts governed by the law of a jurisdiction other than the Covered Law State. In domestic U.S. practice, when a contract selected for coverage by a no breach or default opinion designates as its governing law the law of another U.S. state, U.S. customary practice permits the opinion preparers to interpret that contract in accordance with its plain meaning. \(^{174}\) The “plain

\(^{170}\) Normally, those contracts will be specifically identified. See infra note 173.

\(^{171}\) In many transactions in which non-U.S. law is the governing law and a closing opinion of U.S. counsel is requested, non-U.S. counsel will be involved in advising the client as well, and U.S. and non-U.S. counsel will have worked together on the structure of the transaction and the terms of the agreement. The roles of U.S. and non-U.S. counsel vary depending on the client’s business, the nature and complexity of the transaction and other circumstances. Such variations can affect the process U.S. counsel follows in giving a no breach or default opinion and its ability to give the opinion, as well as the nature and extent of the involvement of non-U.S. counsel in supporting the opinion preparers.

\(^{172}\) Opinion preparers may be able to obtain sufficient clarification through consultation with their client (for example as to the commercial terms of the transaction and business activities contemplated by the agreement). If they conclude that further clarification is necessary, for example because the agreement makes reference to the provisions of foreign statutes or uses concepts under non-U.S. law with which they are not familiar, they may have to turn to non-U.S. counsel for assistance in doing the analysis necessary to give the opinion. In some circumstances the cost of doing so may not be justified by the benefits of the opinion, or the complexity of the transaction or intricacies of the governing non-U.S. law may be such that the opinion cannot be given or may need to be limited or qualified. If the opinion preparers receive advice from non-U.S. counsel, they may state that they are relying on that advice in the opinion letter. Alternatively, the opinion preparers may choose to describe in the opinion letter their understanding of those aspects of the transaction or agreement on which they base their no breach or default analysis, or to rely on express assumptions about aspects governed by non-U.S. law.

\(^{173}\) See ABA GUIDELINES §3.4, supra note 5, n. 12 at 879. Practice has shifted away from covering contracts “known to counsel” and towards limiting the coverage of the opinion to specific contracts listed on an existing or specially prepared schedule.

\(^{174}\) TriBar 1998 Report, supra note 34, at 661 and n. 161 (opinion preparers entitled to assume, without
meaning” approach applies whether or not stated, but to help reduce the risk of misunderstandings, some U.S. opinion preparers expressly state their reliance on that approach. The same practice for giving a no breach or default opinion that covers contracts to which the company is a party when they are governed by the law of another U.S. state applies whether the agreement that calls for the opinion is governed by U.S. or non-U.S. law.

The “plain meaning” approach ordinarily used to interpret contracts governed by U.S. law when giving a no breach or default opinion covering them does not work well if it is applied to interpret contracts that are governed by non-U.S. law. Foreign contracts to which the opinion giver’s client is a party are likely to contain terms that are unfamiliar to a U.S. lawyer and their interpretation may hinge on concepts that do not have an equivalent under typical U.S. usage or a counterpart under the Covered Law. They also may incorporate (with or without explicit reference) provisions from the law of the non-U.S. jurisdiction. Thus, foreign contracts may have a meaning that is materially different from what the opinion preparers would ascribe to them using the “plain meaning” approach. Therefore, U.S. lawyers giving no breach or default opinions should not be expected to cover contracts governed by the law of another country.

III-7 NO VIOLATION OF LAW; NO APPROVALS OR FILINGS.

Opinion recipients sometimes request an opinion that execution and delivery of an agreement by the company do not, and performance by the company of its obligations under the agreement will not, violate statutes, rules and regulations under the Covered Law. This opinion covers statutes, rules and regulations that, if violated, will subject the company to a fine, penalty or other governmental sanction.

so stating, that contracts would be interpreted in accordance with their plain meaning; in the case of technical terms, meaning is what lawyers generally understand those terms to mean in the Covered Law State).

If the opinion preparers identify a possible problem, they may decide to obtain an opinion from local counsel. TriBar 1998 Report, supra note 34, text following n. 161.

The wording could be as follows:

[SAMPLE OPINION LANGUAGE].

Some lawyers follow a variant that states expressly that they interpret contracts addressed by the no breach or default opinion as they would be interpreted in the Covered Law State.

See also supra section III-1 as to why, when an agreement is governed by non-U.S. law, U.S. lawyers are well-advised not to give an “as if” enforceability opinion. The CLLS Opinion Guide, supra note 4, ¶45 reaches a similar conclusion (English lawyers should give a no breach or default opinion only on contracts governed by English law, and then only when the opinion giver is fully familiar with their terms).

See generally TriBar 1998 Report, supra note 34, §6.6 (violation of law) at 661-662. Whether the opinion is cast in the present or future tense, it covers not only violations of law resulting from the company’s entering into the agreement but also violations that could result from future performance by the company of its obligations under agreement. Id. at 662 and also 657-658. Depending on the transaction, covering future performance may broaden significantly the analysis the opinion preparers must conduct, particularly if the agreement imposes on the company contingent as well as fixed obligations. As a matter of U.S. customary practice the opinion preparers are not required to
Despite its apparent breadth, a no violation of law opinion does not cover all statutes, rules and regulations of the Covered Law because no lawyer, no matter how diligent, can reasonably be expected to be familiar with every law that might possibly apply. Instead, as a matter of U.S. customary practice, the opinion is understood to cover only statutes, rules and regulations\textsuperscript{180} that a lawyer in the Covered Law State exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction or agreement to which the opinion relates.\textsuperscript{181} Moreover, as a matter of U.S. customary practice, even some laws that are clearly applicable, such as tax, insolvency and securities laws, are not covered unless an opinion refers to them expressly.\textsuperscript{182}

speculate about future facts or to take into account changes in law after the date of the opinion letter (except for statutes then enacted but not yet in effect). \textit{Id.} text accompanying n. 155-156. Some opinion preparers give a more limited opinion that removes the future element by covering only the execution and delivery of the agreement and “consummation of the transaction on the date of the closing.” By covering only the performance of acts called for by the agreement up to the closing of the transaction, this more limited opinion reduces the cost of preparing the opinion. If the more limited opinion is given and the recipient also wants an opinion on particular aspects of the company’s future performance, it should request that they be specifically addressed.

\textsuperscript{179} A statute might, for example, make it illegal to export a certain type of goods, and sanctions might range from a fine to a prohibition on the company’s performance of its contractual obligations to deliver such goods (e.g. technology with military applications). In domestic U.S. transactions the no violation of law opinion complements the remedies opinion because statutes, rules or regulations that, if violated, may subject the company to fines or government sanctions may not render the agreement unenforceable as against the company, and thus would not require an exception to an opinion on the agreement’s enforceability. \textit{TriBar 1998 Report, supra} note 34, at 661. The no violation of law opinion itself does not, however, address the enforceability of the agreement under the Covered Law (which will not be addressed at all by U.S. counsel when the agreement in a cross-border transaction chooses non-U.S. law as its governing law).

\textsuperscript{180} As used in the no violation of law opinion, the term “law” is understood as a matter of U.S. customary usage to refer to both statutes and published rules and regulations of federal and state government agencies to the extent the substantive law at issue is covered by the opinion. The term “law” is understood not to cover local law, such as ordinances or regulations adopted by political subdivisions below the state level. \textit{TriBar 1998 Report, supra} note 34, text accompanying n. 164-165.

\textsuperscript{181} ABA PRINCIPLES, \textit{supra} note 3, paragraph II.B. See also \textit{TriBar 1998 Report, supra} note 3434, at 627-28 (opinion preparers do not ordinarily seek (nor are they expected to seek) guidance from experts in every specialized field of law that might be implicated by the undertakings in an agreement; effort would seldom be cost-justified even in very large transactions).

\textsuperscript{182} Which statutes, rules and regulations are understood to be excluded depends on the parties and the transaction. See, e.g., \textit{TriBar 1998 Report, supra} note 34, at 628 and n. 81 (while federal securities laws customarily not covered, opinion preparers should consider application of Investment Company Act of 1940 when subject of opinion is a registered investment company) and at 661 (opinion preparers should consider laws regulating sale of narcotics when company in the pharmaceutical business is selling assets that include controlled substances, sale of which could expose both parties to serious sanctions). Discussions regarding the coverage of the no violation of law opinion may lead the opinion recipient to request that particular statutes, rules or regulations be covered expressly, leaving it to the opinion preparers to decide whether and, if so, how, they can cover them. See, e.g., \textit{id.} at 628-629 (opinion does not cover statutes or regulations applicable solely to opinion recipient; custom not clear regarding coverage of application of Federal Reserve Board’s margin regulations to specific bank loan and, therefore, separate opinion better practice if margin regulations are to be covered).
A no violation of law opinion in a cross-border transaction raises the same issues as the similar opinion in a domestic U.S. transaction: (1) what statutes, rules and regulations would the opinion preparers, exercising customary professional diligence, reasonably be expected to recognize as being applicable to the entity, transaction or agreement to which the opinion relates; and (2) which statutes, rules and regulations, even if applicable, should be understood as not being covered unless they are addressed expressly. The answers to these questions are not always clear in domestic U.S. opinion practice; they are even less clear in cross-border opinion practice, because of the absence of consensus which laws among those specifically applicable to cross-border transactions should be understood to be covered. In addition, the answer may differ from transaction to transaction. As a result, although practice varies, many opinion givers include a non-exclusive list of statutes, rules and regulations that may be applicable but that they nonetheless are not covering.  

Some U.S. statutes, rules and regulations relating to cross-border transactions may not be “violated” as a technical matter by a U.S. party’s execution, delivery or performance of its obligations under the agreement. For example, the Committee on Foreign Investment in the United States, or “CFIUS,” a federal interagency committee empowered to review foreign investments in U.S. companies for national security concerns, has the power to require that the parties to an agreement mitigate those concerns, or, if they cannot be mitigated, to block a transaction. The parties can submit the transaction to CFIUS for pre-closing review, which prevents CFIUS from revisiting a completed transaction or ordering post-closing mitigation. While a pre-closing filing with CFIUS is voluntary, and thus a failure to make the filing does not violate a U.S. statute or regulation, the consequences of a failure to file can be significant (including divestiture). As a result many U.S. lawyers take an exception for CFIUS review when giving a no violation of law opinion in a transaction for which a pre-closing filing was not made.

One way to help reduce the risk of misunderstandings about the coverage of a no violation of law opinion in a cross-border transaction is to include: (1) a general statement that the opinion only covers statutes, rules and regulations that a lawyer in the Covered Law State exercising customary professional diligence would reasonably be expected to recognize as being applicable to the entity, transaction or agreement to which the opinion relates; and (2) a non-exclusive list of specific U.S. laws affecting cross-

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183 This approach is less common in domestic U.S. transactions, where opinion givers often choose not to state expressly what is understood as a matter of U.S. customary practice. See generally TriBar 1998 Report, supra note 34, at 630 (ordinarily counterproductive for opinion givers to try to list in opinion letter each area of law that is not covered, as list can never be complete).

184 See, e.g., CFIUS 2013 order that Polaris Financial Technology Ltd, an Indian company, divest its 85.3% ownership stake in IdenTrust Inc., a U.S. company providing digital identification services, including to banks and U.S. government agencies; CFIUS 2011 order that Huawei Technologies, a Chinese company, divest the assets of U.S.-based 3Leaf Systems, a cloud computing technology company. See also infra, note 189.

185 An alternative to an exception would be to point out in the opinion letter that no filing with CFIUS has been made, thereby putting the recipient on notice that under the statute a post-closing review of the transaction is possible and mitigation measures may be imposed.
border transactions that might be applicable but are nevertheless not covered.\textsuperscript{186} A number of specialized statutes, rules and regulations, mostly federal, which rarely apply to domestic U.S. transactions apply to similar transactions cross-border because non-U.S. parties are involved or performance occurs outside the United States.\textsuperscript{187} Whether these laws apply to a particular cross-border transaction often depends on such facts as the nationality of entities that are not the opinion giver’s clients or that may be controlled, directly or indirectly, by persons from different jurisdictions. Often in these situations the opinion preparers cannot determine the relevant facts with the certainty necessary to give an opinion.\textsuperscript{188} In addition, many of these statutes, rules and regulations have an expansive reach and their possible impact on a particular cross-border transaction may be uncertain because of the broad discretion that may be exercised by the various agencies of the U.S. federal government that are charged with their interpretation and enforcement.\textsuperscript{189}

\textsuperscript{186} The opinion could be worded as follows:

“Except as set forth below, execution and delivery of the agreement by the Company and consummation by the Company of the transactions contemplated by the agreement do not violate statutes, rules or regulations of the United States and [Covered Law State] that we would reasonably be expected to recognize as normally applicable to an entity, transaction or agreement of the type to which this opinion relates. This opinion does not cover, without limitation, the following laws, rules and regulations: […].”

Whether it says so or not, the list should be understood not to be exhaustive or exclusive. Some opinion preparers couple a list with wording such as the following:

“or other laws customarily understood to be excluded even though they are not expressly stated to be excluded.”

This wording is intended to put the recipient on notice that, as a matter of U.S. customary practice, unless an opinion addresses them expressly, some matters (such as tax, insolvency and securities laws) are not covered. Whether or not the opinion letter says so, however, those matters are not covered.

\textsuperscript{187} Among these statutes, rules and regulations are: (i) the Exon-Florio Amendment to the Defense Production Act of 1950 (Exon-Florio), as amended by the Foreign Investment and National Security Act of 2007, including procedures governing CFIUS reviews thereunder; (ii) the Trading with the Enemy Act; (iii) the International Emergency Economic Powers Act, the National Emergencies Act and regulations issued thereunder, as well as other laws prohibiting or restricting, or imposing sanctions on persons engaging in, certain types of activities involving specified countries; (iv) the Export Administration Regulations (EAR) of the U.S. Department of Commerce, Bureau of Industry and Security; (v) the International Traffic in Arms Regulations (ITAR) of the U.S. Department of State, Directorate of Defense Trade Controls; (vi) the Foreign Assets Control Regulations of the U.S. Department of the Treasury, Office of Foreign Assets Control (OFAC); (vii) the U.S.A. PATRIOT Act and other anti-money laundering (AML) laws and regulations; (viii) a variety of United States Executive Orders (such as the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism); and (ix) the Foreign Corrupt Practices Act (FCPA). Many opinion preparers believe that some or all of these laws are not covered by a no violation of law opinion even if not expressly excluded. Including a specific exception in the opinion letter, however, seems advisable to help reduce the risk of misunderstandings.

\textsuperscript{188} For example, a statute or regulation may apply to a transaction if it involves parties from a “black-listed” jurisdiction. The opinion preparers cannot be expected to become investigators to uncover facts with respect to the entities involved in the transaction and their affiliates that may establish their true provenance from a jurisdiction that would make the statute or regulation applicable.

\textsuperscript{189} For example, in recent years CFIUS’ authority to scrutinize any foreign investment that could result in
A non-exclusive list of laws opinion preparers do not cover in an outbound no violation of law opinion, if tailored thoughtfully to the circumstances, would make the opinion clearer and help to reduce the cost of its preparation.

In many cross-border transactions, in the course of advising their clients the parties’ own counsel give substantive attention to particular U.S. laws that may be applicable to the entity, transaction or agreement. In those cases, the transaction often is structured to take those laws into consideration and provisions are included in the agreement (such as warranties, covenants or conditions) to deal with legal compliance if required. When the opinion preparers are willing to cover some of those laws in an outbound no violation of law opinion, they could reduce the risk of misunderstandings over which laws they are or are not covering by referring expressly to the particular laws they are intending to cover.

Because cross-border practice is not well established, the opinion preparers should discuss with the recipient early in the transaction which of the many specialized statutes, rules and regulations that might apply to the entity, transaction or agreement they are prepared to cover in the opinion. In reaching an understanding on the coverage of the no violation of law opinion, each side should be guided (as in domestic U.S. practice) by the practicality of addressing particular laws, considering such matters as the degree of certainty that is possible, the significance of specific laws to the particular transaction, and the cost of performing the additional work, if any, required to give the opinion.

In addition to a no violation of law opinion, non-U.S. opinion recipients (like opinion recipients in domestic U.S. transactions) sometimes request an opinion that the execution and delivery by the opinion giver’s client of the agreement and the foreign control (evaluated functionally) of a business engaged in interstate commerce in the U.S. to determine the effect of the transaction on U.S. national security has been extended to an increasingly broader range of transactions. The term “national security” is not defined by statute or regulation. While the statute does list certain factors that may be considered and CFIUS has provided some guidance about the types of national security considerations that it has reviewed, those factors (such as “critical infrastructure” or “critical technologies”) are non-exclusive and general in nature. This Committee is not aware of any published decisions explaining CFIUS’ analysis of its jurisdiction.

This is often the case when failure to comply with a particular law could result in invalidation of the agreement, rather than a relatively small fine or an immaterial administrative sanction.

This could be as simple as adding at the end of the first sentence in the italicized opinion language in note 186 above “including, without limitation, [...]” See generally TriBar 1998 Report, supra note 34, at 662, text following n. 166 referring to id. at 627-630 (in the absence of custom or in areas where custom is unclear, the opinion recipient should request specifically that the opinion cover those matters it wishes to have covered; custom is unclear as to many laws that may bear on an agreement, including among others antitrust laws and Exon-Florio).

See TriBar 1998 Report, supra note 34, text accompanying n. 166 and at 627-28, analyzing which bodies of law are covered by the remedies opinion. That analysis also is referenced in that report’s discussion of the no violation of law opinion, id. at 661. Delaying a discussion regarding the coverage of the opinion with the opinion recipient may have the practical effect of limiting what the opinion preparers can analyze in the available time and may prevent them from addressing some laws altogether.
consummation by it of the transactions contemplated by the agreement do not require, except as set forth in the opinion, any consent, approval, license or exemption by, order or authorization of, or filing, recording or registration by the opinion giver’s client with any governmental authority pursuant to the Covered Law. Some of the U.S. statutes, rules and regulations that apply to cross-border transactions provide for review or approval by or require filings with the federal government. The analysis discussed above for the coverage of outbound no violation of law opinions also applies to outbound no approvals or filings opinions, and which laws are covered should be determined in a similar manner at an early stage of the transaction.

If the agreement chooses non-U.S. law as its governing law, to give either a no violation of law opinion or a no approvals or filings opinion the opinion preparers need to have a general understanding of the transaction and relevant obligations the parties are undertaking in the agreement as interpreted under the Chosen Law. Gaining that understanding and deciding what needs to be done to give the opinion will depend on what statutes, rules and regulations are applicable and may require advice from others about the transaction or the agreement before the opinion preparers can do their legal analysis under the Covered Law. In many cases an understanding comparable to that required to give a no breach or default opinion (see supra section III-6) may suffice. When, however, the opinion covers specialized statutes, rules or regulations that affect cross-border transactions, giving the opinion may require a more in-depth understanding of matters covered by the Chosen Law such as the legal structure of the transaction, the respective rights and obligations of the parties under the agreement, and the status, domicile and affiliations of non-U.S. parties. In some cases the opinion preparers may not be able to achieve such an understanding with the certainty necessary to give an opinion.

III-8 SOVEREIGN IMMUNITY.

Under U.S. law, the federal government, the governments of the various states, and the governments of foreign nations, as well as their respective instrumentalities, may be entitled to sovereign immunity, i.e. to be immune from suit and from having their properties attached by creditors and claimants. Sovereigns can waive their immunity and ordinarily are not immune when they act in a private or commercial capacity. The scope of sovereign immunity for states, their agencies and their instrumentalities, as well

193 See generally TriBar 1998 Report, supra note 34, §6.7 (approvals and filings) at 664-665 (opinion overlaps considerably with no violation of law opinion).

194 Depending on the circumstances, reliance on the client’s factual representations about the scope of its undertakings in the agreement may be sufficient. Alternatively or in addition, the opinion preparers may decide to seek legal advice of non-U.S. counsel on some aspects of the agreement or on the governing non-U.S. law (and if the opinion preparers receive that advice, they may choose to state their reliance on it in the opinion letter).

195 See also supra notes 171 and 172 and accompanying text.

196 See generally IBA Report, supra note 2, at 211. Going back centuries, sovereign immunity has been recognized as a legal principle in most legal systems, either as a procedural matter (one can't sue the king in the courts he created) or as a substantive one (the king can do no wrong).
as political subdivisions of the state, including counties and municipalities and their instrumentalities, is a matter of state law and differs from state to state. Federal law governs the immunity of the U.S. government, its agencies and its instrumentalities.

197 In many jurisdictions the legal doctrine that traditionally has shielded state and local governments, as well as their instrumentalities, from litigation is comprised of two related principles: (1) sovereign immunity, which applies to the state itself and its agencies, officers and employees and immunizes them from suit in that state’s own courts without the state’s consent (see generally Restatement (Second) of Torts § 895B(1) [YEAR]); and (2) governmental immunity, which derives from, but is narrower in scope than sovereign immunity and applies to political subdivisions of the state, such as counties and municipal corporations (see, e.g., Tilton v. Dougherty, 126 N.H. 294, 493 A.2d 442 (1985); Tilli v. Northampton County, 370 F.Supp. 459 (E.D. Pa. 1974) (Pennsylvania law); Evans v. Board of County Com’rs of El Paso County, 174 Colo. 97, 482 P.2d 968 (1971); Board of Educ. of Prince George’s County v. Mayor and Common Council of Town of Riverdale, 320 Md. 384, 578 A.2d 207 (1990)). The difference stems from the fact that political subdivisions and municipal corporations have the dual character of governmental entities and corporate bodies functioning as private entities. Both sovereign and governmental immunity are procedural in nature and shield states and political subdivisions from judicial authority. Both may be waived at the pleasure of the state. Technically they only apply when a state is sued in its own courts, but another state’s courts may give them effect voluntarily as a matter of comity. Nevada v. Hall, 440 U.S. 410 (1979).

Immunity may be based on common-law, constitutional provisions or state statutes. Under traditional common-law principles, governmental immunity applies with respect to governmental or discretionary functions, but not corporate, ministerial or proprietary functions. State constitutions may recognize the state’s sovereign immunity, but generally do not deal with the governmental immunity of political subdivisions. Many state constitutions neither adopt nor abolish sovereign immunity, but give the legislature express authority to determine its scope. In most, if not all states, common-law doctrines of both sovereign and governmental immunity have been abrogated and replaced by statutes which take a variety of approaches, such that the scope of immunity may range from nearly absolute to nearly nonexistent.

Whether governmental or administrative bodies below the level of state government are protected from suit varies from state to state and typically depends on the relationship between the state and the entity based on a wide variety of tests and factors. See, e.g., Rucker v. Hartford County, 316 Md. 275, 558 A.2d 399 (1989); Kentucky Center for the Arts Corp. v. Berns, 801 S.W.2d 327 (Ky. 1990); Ohio Valley Contractors v. Board of Ed. of Wetzel County, 170 W.Va. 240, 293 S.E.2d 437 (1982). Statutory provisions, and in particular nomenclature like “agency,” “department” or “division,” often are significant in the determination, but are not always dispositive. Other factors that often are relevant include: was the entity created by the legislature? Is it subject to the control of the legislature or the state’s executive branch? Is its funding part of the state budget? Does the entity operate state-wide? Examples of governmental entities that often are entitled to share in the state’s immunity include: departments of the state’s executive branch and their divisions; state law enforcement agencies; state hospitals; state prisons; state agencies engaged in certain non-governmental, business functions; state universities; and local school districts. In the absence of statutory provisions providing for immunity for specific entities or functions or types of claims, counties and municipal corporations may be subject to suit to the same extent as private parties. Identification and application of the rules on sovereign immunity and/or governmental immunity may be straightforward in some situations and not in others.

198 The sovereign immunity of the United States is inherent in the constitutional structure of the federal government and not based on specific provisions of the U.S. Constitution. See, e.g., Cohens v. State of Virginia, 19 U.S. 264 (1821); Williamson v. U.S. Department of Agriculture, 815 F.2d 368 (5th Cir. 1987); Christensen v. Ward, 916 F.2d 1462 (10th Cir. 1990). As a jurisdictional defense, when sovereign immunity applies it operates as a complete bar to lawsuits against the U.S. government, its departments and agencies and their officers and employees in their official capacity, even if the government’s conduct may have been wrongful. See, e.g., State of Fla, Dept. of Business Regulation
federal statute, the Foreign Sovereign Immunities Act of 1976 ( "FSIA") governs the immunity in the United States of foreign sovereigns and their instrumentalities generally.

III-8.1 OPINIONS ADDRESSING THE IMMUNITY OF U.S. PARTIES.

In a cross-border transaction, the non-U.S. party sometimes asks for an opinion from counsel for the U.S. party that neither the U.S. party nor its property is entitled to sovereign immunity. The opinion typically deals with the two aspects of sovereign immunity: absence of immunity from court jurisdiction (including legal process required to commence a suit or enforce a foreign judgment) and absence of immunity from attachment of assets (which typically is sought in connection with execution of a judgment, but also may be sought prior to obtaining a judgment).

Normally U.S. v. U.S. Dept of Interior, 768 F.2d 1248 (11th Cir. 1985); Kozera v. Spirito 723 F.2d 1003 (1st Cir. 1983); Drake v. Panama Canal Com’n, 907 F.2d 532 (5th Cir. 1990). Congress has the power to endow governmental corporations with immunity, even though they have functions that are comparable to private entities and may not inherently possess sovereign immunity. See, e.g., Edmonds v. Federal Crop Ins. Corp., 684 F.Supp. 656 (N.D. Ala 1988). The government’s waiver of immunity or consent to suit is a prerequisite for a court’s jurisdiction. U.S. v. Mitchell, 463 U.S. 206 (1983). Congress alone has authority to enact legislation waiving immunity and giving consent to suit. U.S. v Testan, 424 U.S. 392 (1976). Congress’ authority includes the power to place conditions and limitations on a waiver (Honda v. Clark, 386 U.S. 484 (1967); U.S. v. Sherwood, 312 U.S. 584 (1941)) and to withdraw a waiver at any time it deems proper (Maricopa County, Ariz. V. Valley Nat. bank of Phoenix, 318 U.S. 357 (1943)).

Statutes creating federal administrative agencies and corporations often contain clauses permitting such entities to sue and be sued. These clauses have been construed as waiving sovereign immunity broadly for the entity. Roche v. American Red Cross, 680 F.Supp. 449 (D. Mass. 1988). General “sue and be sued” provisions are liberally construed because the Supreme Court has stated that, when Congress authorizes federal corporations to engage in commercial and business transactions with the public, it must be clearly shown that implied restrictions are necessary to avoid grave interference with the performance of a governmental function or that for other reasons it was plainly Congress’ intent to fashion the “sue and be sued” clause narrowly. Franchise Tax Bd. of California v. U.S. Postal Service, 467 U.S. 512 (1984); Federal Housing Administration, Region No. 4 v. Burr, 309 U.S. 242 (1940).

The reason why opinions regarding sovereign immunity are requested in cross-border transactions and not in domestic U.S. transactions is largely historical: in the past sovereigns accounted for a much larger proportion of cross-border transactions; the resulting practice of requesting opinions on sovereign immunity in those transactions has continued even though today private parties dominate cross-border transactions.

The opinion could be worded as follows:

“The Company is subject to suit in connection with the agreement and neither the Company nor its properties or assets are immune on grounds of sovereign immunity from the jurisdiction of courts in [the Covered Law State] and related legal process, including service of process or attachment,
counsel will be able to give this opinion as it relates to U.S. law either (1) because the opinion preparers are satisfied that the U.S. party is a private business entity and not under the control of the federal government, a state government or another entity that is entitled to sovereign immunity (a “U.S. sovereign”), or (2) if they are not so satisfied, because the U.S. party has legally waived sovereign immunity.

When the U.S. party is a private business and the opinion recipient can confirm for itself that the U.S. party is neither a U.S. sovereign nor controlled by one, its inability to claim sovereign immunity is self-evident and an opinion that it is not entitled to sovereign immunity serves no purpose and ordinarily should be unnecessary. Nevertheless, if an opinion is requested some U.S. lawyers are willing to give it, in which case to satisfy themselves that the U.S. party is a private business not under the control of a U.S. sovereign, they may rely on express factual assumptions or obtain a certification regarding the U.S. party’s owners and the absence of voting or other arrangements that give a U.S. sovereign control over it.

If the U.S. party is an agency or instrumentality of a U.S. sovereign, it may or may not be entitled to sovereign immunity in the specific transaction, depending on the circumstances and applicable federal or state law. For example, U.S. sovereigns generally are not immune when they engage in commercial activities or enter into or perform agreements involving such activities. Generally, however, the opinion preparers will need to start with a presumption that the states and the federal government, their agencies and their instrumentalities, as well as political subdivisions of the states such as counties and municipalities, are entitled to immunity unless the opinion preparers can point to a clear provision to the contrary in the Covered Law.

The legal analysis to determine whether a U.S. sovereign is in fact entitled to sovereign immunity under the Covered Law with respect to specific obligations, transactions or activities often is not straightforward and an unqualified conclusion that immunity does not apply under the particular circumstances may not be possible. Therefore, despite the possible, even likely, availability of an exception from sovereign immunity for commercial activities (or of some other exception under the Covered Law), if any doubt exists that immunity may apply, the non-U.S. party typically insists on including in the agreement a provision that unconditionally and irrevocably waives sovereign immunity with respect to the U.S. party’s obligations under the agreement. In the absence of such a contractual waiver of sovereign immunity, U.S. lawyers ordinarily are unwilling to give an opinion that a U.S. sovereign is not immune or at the most can give only a qualified, reasoned opinion that as a result of the application of the commercial activity exception under the Covered Law a U.S. sovereign should not be entitled to sovereign immunity.

If the opinion is based on a contractual waiver, it means that under the Covered Law: (i) the U.S. party has the power (corporate or governmental) to grant the waiver under its constituent documents, as well as any enabling legislation and implementing regulations, (ii) the U.S. party has taken all action (corporate or governmental)
required by its constituent documents, as well as any enabling legislation and implementing regulations, to waive sovereign immunity, and (iii) the waiver is valid and binding and cannot be unilaterally withdrawn or revoked by the U.S. party or by the U.S. sovereign of which it is an agency or instrumentality.

Although a waiver of sovereign immunity may be worded broadly to cover more than the U.S. party’s obligations under the agreement, the opinion should be drafted to cover only the non-U.S. party’s ability under the Covered Law to bring suit to enforce the agreement against the U.S. party, to execute a judgment after it is obtained in such a suit, and to attach the assets of the U.S. party pursuant to such a judgment.

If the agreement containing the waiver chooses non-U.S. law as its governing law, the opinion may be based, without so stating expressly, on the Omnibus Cross-Border Assumption insofar as the effectiveness of the U.S. party’s waiver of sovereign immunity depends on the Chosen Law or on some other non-U.S. law.

Even if a U.S. sovereign waives its immunity, a creditor may not be able to attach assets of that sovereign if they are needed to fulfill its public purpose. See, e.g., Tooke v. City of Mexia, 197 S.W.3d 325, 330 (Tex. 2006) (legislation allowing for waiver of sovereign immunity may include measures designed to insulate public resources from the reach of judgment creditors or objective limitations on potential liability). If the opinion preparers are aware of requirements under the Covered Law that may affect the specific waiver of sovereign immunity to which the opinion relates, such requirements would ordinarily be covered by the opinion absent a specific exception or assumption. As a matter of U.S. customary practice, the opinion is understood to be subject to an implicit qualification that the ordinary remedies of a judgment creditor may be limited as a matter of public interest, public policy or equitable theories with respect to properties of a U.S. sovereign that are integral to its governmental or non-commercial function.

This, of course, assumes that the opinion letter covers the law and regulations governing the U.S. party’s legal status, power and authority to waive sovereign immunity. Depending on the circumstances and the law covered by the opinion letter, the opinion preparers may have to interpret specialized statutes, rules and regulations that affect the U.S. party’s sovereign immunity, or its power to waive it, and also apply judicial decisions interpreting them. If the opinion preparers cannot make the necessary legal determinations regarding the waiver with sufficient certainty, they will need to qualify the opinion (or may not be able to give it at all). Sometimes an opinion also is requested that the waiver is valid, binding and irrevocable under the Covered Law. Giving that opinion, however, would not require the opinion preparers to make any different or additional determinations than they are required to make to give the “main” sovereign immunity opinion (see supra note 201); therefore, a separate opinion on the effectiveness of the waiver adds nothing to that opinion and, if given, would serve no purpose.

An overly broad waiver might refer, for example, to “all immunities, including sovereign immunity, in any jurisdiction and under all applicable laws.” In the extreme, the concept of “legal immunity” is the opposite of the concept of “legal liability.” Ordinarily, U.S. sovereigns are subject to a different legal liability regime than private parties. For example, a state agency often is shielded from some aspects of tort liability, exempt from taxation, and excused from complying with some statutes, rules or regulations that apply to private parties. While the opinion preparers may be able to give an opinion that the agency has effectively waived immunity from suit with respect to specific contractual obligations, ordinarily they will not be able to give an opinion that the waiver is effective as to all of its privileges and exemptions under all laws.
III-8.2  OPINIONS ADDRESSING THE IMMUNITY OF NON-U.S. PARTIES.

U.S. counsel representing a party that is, or may be, a foreign state or one of its agencies or instrumentalities (a “foreign sovereign”) in a transaction in the U.S. sometimes is asked for an opinion that under the FSIA the foreign sovereign is not entitled to sovereign immunity in the U.S. with respect to the transaction. Under the FSIA (1) a foreign state is immune from suit in federal and state courts in the U.S., and (2) property in the U.S. of a foreign state is immune from attachment and execution, except as otherwise specifically provided by the FSIA. The FSIA provides for seven specific exceptions from immunity, one of which is a waiver of immunity by a foreign state.

In the absence of a waiver, the exception most often applicable to the types of transactions in which a closing opinion typically is requested is for activities of a foreign state that are commercial by their nature and that either are carried on in the U.S. or are the direct effect in the U.S. of a foreign state’s commercial activity elsewhere. Other exceptions may be available in specific circumstances. However, rather than relying

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206 See supra text accompanying note 18. If, for example, the Chosen Law Country has a statute similar to the FSIA that governs the immunity of foreign sovereign entities when they engage in transactions in that jurisdiction (see infra text accompanying notes 199-209), which may include its own requirements for a valid waiver of immunity, compliance with that statute would also be covered by the Omnibus Cross-Border Assumption.

207 28 U.S.C. §1604, §1609. “Foreign state” is defined to include a political subdivision of a foreign state and an agency or instrumentality of a foreign state. An agency or instrumentality is defined to include a separate legal person that is an organ of a foreign state or political subdivision of a foreign state and an entity organized under the laws of, and the majority of whose shares or other ownership interests are owned by, a foreign state or political subdivision. Thus, a corporation that is majority-owned by a foreign state and is incorporated in that state is a “foreign state” within the meaning of the FSIA. Examples in which this definition may raise issues include financings by public-private partnerships, investment in or by sovereign wealth funds, and business transactions by enterprises in which the government owns a minority stake but also holds a “golden share” that gives it veto power on certain matters. See generally Corporacion Mexicana De Servicios Maritimos, S.A. De C.V. v. The M/T Respect, 1996 U.S. App. LEXIS 22068 (9th Cir. 1996) (also discussing the status of indirect subsidiaries); Proyecfin De Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390 (2d Cir. 1985); O’Connell Mach. Co., Inc. v. M.V. “Americana,” 734 F.2d 115 (2d Cir. 1984), cert. denied, 469 U.S. 1086 (1984); Kao Hwa Shipping Co., S.A. v. China Steel Corp., 816 F. Supp. 910 (S.D.N.Y. 1993); GSS Group Ltd. v. National Port Authority, 680 F. 3d 805, 811 (D.C. Cir. 2012); Gang Chen v. China Central Television, 320 Fed. Appx 71, 72-73 (2d Cir. 2009); Globe Nuclear Servs. & Supply, Ltd. v. AO Teshsnabexport, 376 F. 3d 282, 285 (4th Cir. 2004).

208 28 U.S.C. §1605(a)(2); 28 U.S.C. §1603(d) (2006). The legislative history of the FSIA indicates, for instance, that a foreign state’s borrowing of money from U.S. commercial banks is of a “commercial” nature and that a foreign state’s incurrence of indebtedness in the U.S. (if the loan agreement is negotiated and executed in the U.S.) is a commercial activity carried on in the U.S. See, e.g., Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992). For other examples of commercial activities, see Shapiro v. Bolivia, 930 F.2d 1013 (2d Cir. 1991); Eckert Int’l, Inc. v. Government of Fiji, 834 F. Supp. 167 (E.D. Va. 1993), aff’d, 32 F.3d 77 (4th Cir. 1994). Courts have great latitude in determining what activities are commercial and whether a particular commercial activity has been performed in the U.S. See e.g. Birch Shipping Corp. v. Embassy of Tanzania, 507 F. Supp. 311 (D.D.C. 1980).

209 For example, the FSIA contains an exception for the judicial enforcement of an agreement to arbitrate
on the commercial nature of the transaction or another exception to sovereign immunity provided by the FSIA, U.S. parties typically require a non-U.S. party that might be a “foreign state” as defined in the FSIA to waive sovereign immunity through an express, unconditional and irrevocable waiver in the agreement itself.\footnote{210}

A U.S. lawyer ordinarily can give an opinion that a foreign sovereign’s waiver of sovereign immunity is valid, binding and effective under the FSIA. The opinion would not cover, however, matters typically governed by non-U.S. law such as: (i) a foreign sovereign’s status, power and authority to waive sovereign immunity; (ii) governmental approvals required for the waiver to be valid and binding in the foreign sovereign’s jurisdiction; or (iii) effectiveness of a contractual waiver of sovereign immunity under the non-U.S. law chosen to govern the agreement (if that is the case) or under mandatory provisions of foreign law, or the right to revoke the waiver unilaterally.\footnote{211}

If a non-U.S. party has not waived sovereign immunity, whether an opinion can be given that it is not immune under the FSIA depends on the circumstances. An unqualified opinion could be given if the opinion preparers are able to conclude with the necessary level of certainty that the non-U.S. party is not a “foreign state” as defined in the FSIA.\footnote{212} Some opinion givers may be willing to give a qualified, reasoned opinion that, for example, a foreign sovereign’s activities in the transaction are commercial in nature and, therefore, the transaction should fall within the related exception in the FSIA.

\begin{footnote}{210} While an implicit waiver is not prohibited by the FSIA, it lacks the certainty of an express waiver, particularly one that is part of the main transaction agreement itself and that (i) covers expressly immunity from suit, immunity from execution upon a judgment, and immunity from attachment prior to or after a judgment and (ii) provides expressly that it remains in effect notwithstanding any attempt to revoke or withdraw it. See generally Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A., 875 F.2d 1174, 1177 (5th Cir. 1989), cert. denied, 493 U.S. 1075 (1990); Proyecfín De Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., supra footnote 214, 760 F.2d at 393; Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47 (2d Cir. 1982); ICC Chem. Corp. v. Industrial and Commercial Bank of China, 886 F. Supp. 1 (S.D.N.Y. 1995); Capital Ventures Intern. v. Republic of Argentina, 552 F. 3d 289 (2d Cir. 2009). Determining how far a waiver extends under the FSIA, however, may not be straightforward. See, e.g., EM Ltd. V. Republic of Argentina, \footnote{F.3d \footnote{2011} [CHECK STATUS OF CERT PETITION TO USCS]} (bondholders blocked from reaching funds of foreign central bank on deposit in NY because, even if bank is alter ego of foreign state that has waived immunity, FSIA requires the two to be treated separately when enforcing judgment entered against the sovereign).
\end{footnote}

\begin{footnote}{211} The opinion could be worded as follows:

\begin{quote}{\textbf{SAMPLE OPINION LANGUAGE}}

On these issues the opinion can be based, without so stating expressly, on the Omnibus Cross-Border Assumption. See supra text accompanying note 18. Alternatively, the opinion preparers may expressly assume that under any applicable non-U.S. law the foreign state’s waiver is valid, binding and effective, is unconditional, and cannot be unilaterally withdrawn or revoked.

While an implicit waiver is not prohibited by the FSIA, it lacks the certainty of an express waiver, particularly one that is part of the main transaction agreement itself and that (i) covers expressly immunity from suit, immunity from execution upon a judgment, and immunity from attachment prior to or after a judgment and (ii) provides expressly that it remains in effect notwithstanding any attempt to revoke or withdraw it. See generally Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A., 875 F.2d 1174, 1177 (5th Cir. 1989), cert. denied, 493 U.S. 1075 (1990); Proyecfín De Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., supra footnote 214, 760 F.2d at 393; Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47 (2d Cir. 1982); ICC Chem. Corp. v. Industrial and Commercial Bank of China, 886 F. Supp. 1 (S.D.N.Y. 1995); Capital Ventures Intern. v. Republic of Argentina, 552 F. 3d 289 (2d Cir. 2009). Determining how far a waiver extends under the FSIA, however, may not be straightforward. See, e.g., EM Ltd. V. Republic of Argentina, \footnote{F.3d \footnote{2011} [CHECK STATUS OF CERT PETITION TO USCS]} (bondholders blocked from reaching funds of foreign central bank on deposit in NY because, even if bank is alter ego of foreign state that has waived immunity, FSIA requires the two to be treated separately when enforcing judgment entered against the sovereign).

The opinion may need to be based on assumptions as to factual matters and qualified to the extent that the non-U.S. party’s status depends on non-U.S. law.
\end{footnote}
III-9 NO REQUIREMENT TO QUALIFY TO DO BUSINESS IN THE U.S.

Lenders sometimes ask for an opinion that making a loan and, in the case of a secured loan, taking a security interest in a borrower’s property in a state in which the lender is not otherwise conducting business will not require the lender to qualify to do business as a foreign company in that state. Although it was once more common, today this opinion is rarely requested or given in domestic U.S. practice. Some non-U.S. lenders, however, continue to request it in cross-border transactions.

Some U.S. lawyers are willing to give the opinion with respect to activities of a non-U.S. lender contemplated by the agreement, but only when it is clear under the Covered Law that they do not require the lender to qualify to do business in the Covered Law State. Activities covered by the opinion ordinarily should be limited to making a loan when the borrower or a guarantor is from the Covered Law State and/or taking a security interest in collateral located there. To give the opinion the opinion preparers do not have to determine whether future activities by a non-U.S. lender in the Covered Law State, such as exercising remedies under the agreement against a borrower or guarantor or enforcing rights against collateral, would constitute “doing business” there under the Covered Law.

The opinion preparers ordinarily rely on a factual assumption that the non-U.S. lender has no other activities in or contacts with the Covered Law State and/or phrase the opinion to relate solely to specific activities involved in the transaction.

See generally Tribar 1998 Report, supra note 34, §6.1.6 and n. 119 (opinion provides comfort that recipient is not exposed to fines, penalties or administrative sanctions for failure to qualify); GLAZER TREATISE, supra note 10, at 229 and n. 26. Failing to qualify to do business in a state, if required, can expose an entity to adverse consequences, including the inability to enforce its rights under contracts in that state, typically unless and until the failure is cured. See, e.g., CAL. CORP. CODE § 191(d) (West 1990) (discussing foreign lenders); Credit Suisse International v. Urbi, DeSarrollos Urbanos, S.A.B. de C.V. (Sup. Ct. N.Y. Co. Aug 21, 2013) (unauthorized foreign corporation doing business in New York prohibited from bringing suit even if choice of N.Y. forum valid). An opinion that a foreign judgment may be enforced in the Covered Law State does not address the need for the lender to qualify to do business in that state. See supra text accompanying n. 135. The opinion that a party is not required to qualify to do business as a result of a particular transaction requires an analysis of the legal definition of “doing business.” That distinguishes it from the opinion that an out-of-state entity is duly qualified to do business in a particular state, which is sometimes given in domestic U.S. practice based on a certificate from state officials that the company has qualified to do business in the state. State officials do not issue certificates that qualification is not required. See also ABA GUIDELINES §4.1, supra note 5 (opinion that company is qualified as a foreign corporation in all jurisdictions in which its properties or activities require qualification should not be requested; analysis of “doing business” requirements in all relevant states is rarely cost-justified, and requires knowledge of facts and expertise opinion preparers typically do not have).

The opinion could be worded as follows:

“Lender will not be required to qualify to do business in the State of _________ solely by reason of the execution and delivery of the credit documents and consummation of the transactions contemplated thereby.”

Depending on the facts and the Covered Law, steps a lender can take to enforce its rights under the agreement, such as attachment of assets to execute on a judgment, foreclosure on collateral, or taking possession or disposing of the borrower’s or a guarantor’s property, can present difficulties for the opinion preparers. While statutes in some states include in the list of activities that do not constitute
This opinion ordinarily is requested only in lending transactions by a non-U.S. lender that is not otherwise conducting activities in, and therefore is not qualified to do business generally in, the Covered Law State when the lender is concerned that its activities in making a specific loan by itself could require it to so qualify. Sometimes non-U.S. lenders request an opinion that covers additional matters under the Covered Law, such as licensing requirements, being treated as a resident for tax or other purposes, and exposure to being sued in the Covered Law State. Such requests are generally inappropriate because they relate to matters as to which the lender should be seeking advice from its own counsel rather than counsel for the borrower.

IV OTHER OUTBOUND OPINION ISSUES: SOME GUIDELINES FOR CONSTRUCTIVE ENGAGEMENT.

Although this Report covers most of the opinions that are commonly given by U.S. lawyers in cross-border transactions, it does not cover all opinions that non-U.S. recipients may request. Moreover, non-U.S. parties and their counsel may insist on formulations of opinions that are different from what U.S. lawyers commonly use. Thus, notwithstanding the guidance in this Report, opinion giving in cross-border transactions will continue to present challenges and opportunities for misunderstanding.

217 “doing business” specifically foreclosure by a lender on property in which it has a security interest and taking possession of collateral, the statutes of many other states do not. If the lender requests that future activities in which it may engage in the Covered Law State be covered by the opinion, but, as often will be the case, the Covered Law is not clear on whether they would constitute “doing business” for purposes of the qualification requirement, a U.S. lawyer may not be able to give the opinion at all or may have to qualify it accordingly.

218 A complex web of state and federal regulations of financial services and financial institutions determine what filings or permits are required for different types of lending. These matters require an analysis of the lender’s structure and operations in the U.S. well beyond what counsel for the borrower giving a third party legal opinion on a specific loan can reasonably be expected to conduct. Eligibility for the benefits of bilateral treaties against double taxation often hinge on non-resident status or whether a non-U.S. entity has a “permanent establishment” in the U.S., rather than the terms of a specific transaction. Whether a non-U.S. party’s activities subject it to taxation in the U.S. at the federal, state or local level is often a complex issue that goes well beyond checking the requirements to be qualified to do business as a foreign entity under applicable state statutes.

219 The CLLS OPINION GUIDE, supra note 4, ¶55, contains a list of comparable opinions English lawyers give when transaction documents are governed by foreign law.

220 The risk of misunderstandings is magnified by the growing number of countries and parties involved in cross-border transactions. Moreover, opinion discussions can be complicated by language barriers and widely different legal systems. Also, as discussed earlier in this Report, in many countries limited guidance is available on what third-party opinions can be given, what assumptions and exceptions are reasonable, what various opinions mean, and what work is required to support them.
Bar groups in the U.S. have articulated a “Golden Rule”\(^\text{221}\) to provide guidance on what opinions U.S. lawyers can properly be asked and expected to give in domestic U.S. transactions.\(^\text{222}\) The Golden Rule, however, does not translate easily to the cross-border setting.\(^\text{223}\) This is principally because the Golden Rule is based on an assumption that the opinion giver and counsel for the recipient are likely to be in analogous but opposite positions in subsequent transactions. That assumption is not true in the cross-border context when opinion givers and recipients’ counsel practice in altogether different legal systems. Cross-border transactions involve agreements governed by the law of different jurisdictions and the opinions requested and given in one jurisdiction are often different from those requested and given in another. A uniform approach does not work for all opinion letters, even when they relate to the same transaction.\(^\text{224}\)

While discussions between U.S. opinion givers and non-U.S. counsel for the recipient may present challenges that opposing U.S. lawyers do not face in domestic U.S. practice, this Committee believes that the guidelines below, which derive in part from experience with the Golden Rule, will reduce friction if followed by all parties and their counsel and increase efficiency in cross-border transactions.

First, lawyers should not be asked to give outbound opinions otherwise than in accordance with the customary practice of the jurisdiction where they practice.\(^\text{225}\)

\(^{221}\) Section 3.1 of the ABA GUIDELINES, supra note 5, at 878, expresses the Golden Rule as follows:

“An opinion giver should not be asked to render an opinion that counsel for the opinion recipient would not render if it were the opinion giver and possessed the requisite expertise. Similarly, an opinion giver should not refuse to render an opinion that lawyers experienced in the matters under consideration would commonly render in comparable situations, assuming that the requested opinion is otherwise consistent with these Guidelines and the opinion giver has the requisite expertise and in its professional judgment is able to render the opinion.”

\(^{222}\) See infra note229. Many of the opinions U.S. lawyers should not give are identified in bar association reports, which often characterize even requests for these opinions as being inappropriate.

\(^{223}\) See CLLS OPINION GUIDE, supra note 4, ¶8 and ¶59 (the Golden Rule can minimize difficulties and costs, but can be difficult to apply). As discussed in prior sections of this Report, outbound opinions raise issues that do not arise in the domestic context, even when the subject matter appears to be the same. Moreover, opinions are requested and given in cross-border practice that are not normally requested in domestic U.S. practice (e.g. separate opinions on choice of law, forum selection and arbitration).

\(^{224}\) Customary practice, rules of professional conduct, ethical rules and market expectations differ from country to country. Even when a law firm has lawyers with expertise in the law of multiple countries, it generally provides a separate opinion letter covering each country whose law it is covering. This Committee believes that careful consideration should be given to the risk of confusion if matters of non-U.S. as well as U.S. law are covered in the same opinion letter. When a U.S. lawyer needs an understanding of non-U.S. law as it applies to the transaction, local counsel is often consulted to give advice on those issues and reliance on that advice can be noted in the opinion letter that covers matters of U.S. law.

\(^{225}\) See supra, text accompanying notes 9 to 16. Similarly, non-U.S. lawyers giving opinions to U.S. recipients should not be asked to give opinions otherwise than in accordance with their own customary practice. See CLLS OPINION GUIDE, supra note 4, ¶60.
Second, the parties to a cross-border agreement and their counsel should consider the cost of preparing each opinion requested relative to its benefit to the recipient in the specific transaction. Often, the benefit of an opinion will not justify the cost of preparing it.

Third, a non-U.S. recipient should not insist on receiving a particular opinion simply because U.S. lawyers give similar opinions in domestic U.S. transactions. If the opinion is one that the non-U.S. recipient does not regularly request of non-U.S. lawyers in its jurisdiction in comparable circumstances, a question can legitimately be raised why it is asking U.S. counsel to give that opinion, and whether the opinion’s benefit to the recipient justifies the cost to the opinion giver’s client. Conversely, if the opinion is one that is both regularly requested in the recipient’s jurisdiction and regularly given by U.S. lawyers in domestic U.S. practice, and the incremental cost of preparing it in the cross-border context is not significant, a question can legitimately be raised why a U.S. lawyer is refusing to give it to a non-U.S. recipient. This question may be legitimate even though non-U.S. counsel for the recipient, acting under its jurisdiction’s practice, could not give an analogous opinion if the roles were reversed.

Fourth, opinion preparers and counsel for the recipient should always deal with each other professionally and should not treat a closing opinion as a bargaining chip in an economic exchange. Each side should work in good faith to bridge gaps in opinion coverage and achieve a sensible result for all parties under the circumstances. The

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226 The principle that the benefit of an opinion to the recipient should warrant the time and expense required to prepare it is particularly important in cross-border transactions. See, generally, supra text accompanying notes 6 and 7. See also ABA GUIDELINES §1.2, supra note 5, at 878. The cost-benefit analysis should take into account such factors as the type of transaction, the importance of the agreement to the transaction, the role played by U.S. law, and the relevance of the issues to be covered by the opinion to the commercial bargain between the parties. See also CLLS OPINION GUIDE, supra note 4, ¶54. These factors may be weighted differently in the cross-border setting than in the domestic U.S. setting. Legal advice from a party’s own counsel may, in some jurisdictions or transactions, take the form of a written opinion; in that case, it is legitimate to discuss, in the context of the cost-benefit analysis, whether the cost of an opinion by U.S. counsel that duplicates an opinion the recipient already is receiving from its own counsel can be justified by the incremental benefit to the recipient.

227 Some opinions that appear on the surface to be the same as in domestic U.S. transactions are more difficult to give or more costly to prepare in cross-border transactions. See, e.g., supra sections III-6 and III-7 regarding no breach or default and no violation of law opinions). See also supra text following note 6.

228 Gaps cannot always be bridged, particularly in cross-border practice. Opinions serve as part of the recipient’s diligence, providing the opinion giver’s professional judgment on legal issues that the recipient has determined to be important in the transaction. See ABA GUIDELINES §1.1, supra note 5, at 875. The IBA REPORT acknowledges, however, that in cross-border transactions practical considerations limit any attempt to cover with a seamless opinion web all important legal issues under all applicable legal systems, and therefore “some gaps will remain, but the opinion recipient should understand those gaps.” See generally IBA REPORT, supra note 2, at 23–25. When U.S. counsel is unable to give a requested opinion, the recipient is put on notice that a legal issue may exist, and may then choose between changing the structure of the transaction to address the issue or proceeding anyway as a business matter and foregoing the opinion.
opinion process should not be approached as a game that one side wins and the other side loses.\textsuperscript{229}

Fifth, non-U.S. counsel for the recipient should recognize that U.S. opinions are normally worded in particular ways and should not press U.S. opinion givers to deviate from commonly-used language for which U.S. customary practice supplies a well-understood meaning (referred to as “\textit{customary usage}”).\textsuperscript{230} Customary usage is more than a matter of style. It is understandable that non-U.S. counsel representing the recipient may phrase the initial opinion request differently from the way in which a U.S. lawyer customarily would word it. U.S. lawyers should recognize that such wording may result from differences in law and practice from country to country, and not necessarily see it as a sign of substantive opinion issues. Misunderstandings and delay can be avoided if non-U.S. recipients and their counsel are sensitive to U.S. lawyers’ focus on customary usage, and receptive to opinions worded accordingly even if they do not track the initial request.

Sixth, non-U.S. recipients should not treat an opinion given by U.S. counsel for the other party to a transaction as providing anything more than the opinion giver’s professional judgment on the specific legal issues the opinion addresses. Recipients should look primarily to their own counsel to help structure the transaction, negotiate agreements, identify potential legal issues, and obtain advice on how to solve them. This is particularly important in transactions where market practice is not well settled and/or both parties are represented by lawyers with the necessary expertise to advise their own client on the relevant issues without incurring the cost and delay of negotiating and preparing third-party opinions.

\textsuperscript{229} An opinion request requiring more than an expression of professional judgment on legal issues or seeking overly broad opinion coverage is inappropriate. \textit{See ABA GUIDELINES §1.2, supra note 5, at 876} (opinion should be limited to reasonably specific and determinable matters that involve the exercise of professional judgment by the opinion giver). Examples cited by the ABA GUIDELINES of inappropriate requests include: an opinion that a client is qualified to do business wherever such qualification is required, possesses all necessary licenses and permits to conduct its business, is not in violation of any applicable laws or regulations, or is not in default under any of its contracts; a statement as to the absence of prior security interests on a client’s assets; a statement as to the accuracy of a client’s representations and warranties in the agreement; and a blanket statement as to the absence of pending or threatened litigation or as to the expected outcome of litigation. Inappropriate opinion requests are not rendered appropriate by limiting them to the opinion giver’s knowledge or subjecting them to broadly worded disclaimers.

\textit{See also CLLS OPINION GUIDE, supra note 4, ¶9} (inappropriate for scope of opinion to become part of commercial negotiation; law firm instructed to request opinion it would be unwilling to give might explain to client opinion is unlikely to assist in practice and could lead to difficulty and greater cost, attempt to pressure opinion giver would not change the law, and reasonableness of client’s reliance on opinion, if given, could be undermined in view of opinion giver’s reluctance).

\textsuperscript{230} Starting with a seminal 1979 report (TriBar Op. Comm., \textit{Legal Opinions to Third Parties: An Easier Path, 34 BUS. LAW. 1891} (1979)), U.S. customary practice has evolved over the past 30 years, with U.S. lawyers developing a common understanding of the meaning of legal opinions.
V CONCLUSION

Outbound opinions raise issues that the opinion preparers may not face in domestic U.S. opinion practice because of the interaction between the Covered Law and non-U.S. law when the latter is chosen as the governing law. In addition, issues of contract interpretation that ordinarily are considered manageable when agreements are governed by the laws of different states become much harder when non-U.S. law is involved. As a result, the expectations of U.S. opinion preparers and non-U.S. opinion recipients can be misaligned and the risk of misunderstandings is much greater in cross-border practice than in U.S. domestic practice.

That risk can be reduced by spelling out in outbound opinions assumptions or qualifications that in domestic U.S. opinions ordinarily need not, and customarily may not be spelled out. The opinion preparers, however, should exercise judgment in balancing the goal of clarifying their opinion letters’ coverage and meaning for non-U.S. opinion recipients, as well as non-U.S. courts that may be called upon to interpret them if a dispute arises, with their reliance on U.S. customary practice, particularly with respect to qualifications that apply whether stated or unstated. It would be unfortunate if cross-border opinion practice were to slide back towards the “kitchen sink” approach that has fallen out of favor in domestic U.S. opinion practice.

For third party closing opinions to be workable in cross-border practice, U.S. lawyers need to rely on U.S. customary practice in giving outbound opinions and non-U.S. recipients need to commit the time and resources (possibly including retention of U.S. counsel to advise them) to become conversant with it. The most important thing is for U.S. opinion givers and counsel for non-U.S. opinion recipients to discuss candidly: (1) the work required to deliver every requested opinion, (2) the costs to the opinion giver’s client of preparing each opinion compared to its benefits to the recipient, and (3) the proper scope of assumptions, qualifications and exceptions. Friction may be relieved by remembering that in some cases the role of the opinion process is to identify areas of legal uncertainty that the opinion itself cannot eliminate or bridge. In those cases it is for the parties to understand the risk, and then either eliminate it or allocate it between them.
## APPENDIX A

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<tr>
<td>U.S. sovereign</td>
<td>64</td>
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APPENDIX B

LIST OF SAMPLE OPINION CLAUSES