Opinions on Choice of Law, Forum Selection, Arbitration, and Enforcement of Foreign Judgments or Arbitral Awards in Cross-Border Transactions

With increasing frequency U.S. lawyers are delivering closing opinions to non-U.S. parties in cross-border transactions. The ABA Legal Opinions Committee is close to releasing for publication a report that covers cross-border closing opinions of U.S. counsel, the first comprehensive report on the subject since the report by the International Bar Association prepared by Michael Gruson many years ago.¹

These opinions often are given in transactions in which the agreement chooses the law of a country other than the U.S. as its governing law. The opinions can only cover U.S. law and therefore do not include an enforceability opinion on the agreement as a whole. Instead they are based on an assumption (which the report recommends be express) that under the law of the non-U.S. country whose law has been chosen to govern, the agreement is valid and binding and each of its provisions, including the chosen-law clause, is enforceable under the governing non-U.S. law.

In the absence of a remedies opinion, non-U.S. recipients ordinarily request opinions specifically covering the effectiveness under U.S. law of key aspects of the agreement, such as choice of law, forum selection, the recognition and enforcement of foreign judgments, international arbitration and the enforceability of foreign arbitral awards.

Assuming that the agreement as a whole is enforceable under the governing non-U.S. law, comfort on the effectiveness of these provisions under U.S. law matters a great deal to non-U.S. parties because of the potential impact of these provisions on how claims to enforce rights against U.S. parties will be resolved (e.g., being confident in one’s ability to litigate breach of a German law contract before a German court as the exclusive forum or being confident that a suit brought by a U.S. party before a U.S. court will be dismissed in favor of binding international arbitration abroad).

Therefore cross-border opinions typically include separate opinions on these “procedural” provisions of the agreement, whereas domestic opinions often do not because these matters may either be covered by a remedies opinion (choice of law, forum selection) or be excluded from the coverage of the opinion (e.g. arbitration) or simply are not applicable (e.g., recognition of other state courts’ judgments).

**CHOICE OF LAW**

Sample opinion language:

*If a dispute is properly presented, a court of [COVERED LAW STATE] or a United States federal court sitting in [COVERED LAW STATE] having proper jurisdiction and applying the law of [COVERED LAW STATE] would give*

effect to the express choice of [FOREIGN COUNTRY’S] law as the law governing the Agreement, unless applying [FOREIGN COUNTRY’S] law would violate a fundamental policy of [COVERED LAW STATE] or of another state or country whose law would apply in the absence of a governing law provision and that has a materially greater interest in the determination of the issue.

- This language is designed to cover agreements that choose foreign law (“outbound” choice of law) as their governing law based on the application of the Restatement Second of Conflict Laws (§ 187).

- Section 187(2) of the Restatement has a two-pronged test:
  o whether there is a sufficient relationship between the parties or the transaction and the chosen law jurisdiction
  o whether application of the chosen law would be contrary to a fundamental policy of the jurisdiction whose law would have applied in the absence of a choice-of-law clause and that jurisdiction has a greater interest in the issues (the “default” state)

- A number of states have statutes addressing choice of law. Statutes like NY 5-1401/1402 only validate “inbound” choice of law and choice of forum clauses (assuming the transaction satisfies the conditions set forth in the statute), but do not apply to outbound choice of law. Conversely statutes like Tex. Bus & Comm Code ch. 271 do give effect to an agreement’s choice of another state’s (and therefore another country’s) law if specific conditions are met. If the covered law state has the latter type of statute, the Restatement approach may not be applicable to the extent the transaction falls within one of the statutory safe harbors.

- Even though the chosen law in the agreement is non-U.S. law, an opinion covering matters of U.S. law (federal and state) is predicated on the agreement’s being valid and enforceable under the governing law.

- Omnibus Cross Border Assumption: the agreement, including the choice of law clause, is valid, binding and enforceable under the chosen non-U.S. law. The report recommends that the assumption be stated expressly.

- Applying the second prong of the Restatement test is difficult, see TriBar Supplemental Choice of Law Report. The TriBar report describes in detail how practice differs in domestic practice when choice-of-law opinions are requested and given. Some opinion givers rely on the coverage limitation. Some bar reports (e.g. California) state that the opinion does not cover the second prong of the Restatement test. Some opinion givers prefer to make it clear that they are not covering the second prong and do so in a variety of ways.

- Our objective here is not to “take sides” in that debate, but to point out how cross-border opinions differ from domestic opinions and to point out what the ABA cross-border report recommends.
• It is tougher to apply the second prong of the Restatement test cross-border because:
  o determining which is the default state or country is even more difficult
  o how does the opinion giver know how application of the chosen non-U.S. law to a
    given issue would turn out when the opinion giver knows little or nothing about the
    law of the default state or country?
  o even if the opinion giver assumes that the covered law state is the default state and is
    confident that it knows what “covered state fundamental policies” are, how does it
    know whether they are implicated by application of non-U.S. law?
  o Can a lawyer always determine what covered state policies are fundamental?

• The ABA cross-border report concludes that giving choice-of-law opinions cross-border
  is both possible and important because the opinion giver is not giving a remedies opinion.

• But the challenges of covering the second prong of the Restatement test are such that,
  regardless of how the opinion giver feels about that issue in domestic practice, to help
  reduce the risk of misunderstanding the report recommends that the opinion expressly
  state that it does not cover the fundamental policies of any jurisdiction, including those
  of the covered law state.

FORUM SELECTION

Sample language:

**[IF THE AGREEMENT CONTAINS A MANDATORY (i.e., EXCLUSIVE) OUTBOUND FORUM SELECTION CLAUSE]** A court of [COVERED LAW STATE] or a United States federal court sitting in [COVERED LAW STATE] having proper jurisdiction and applying the law of [COVERED LAW STATE] would give effect to the Company’s agreement that [FOREIGN COUNTRY’S] courts will have exclusive jurisdiction with respect to disputes arising from or in connection with the Agreement or the performance by the Company of its obligations thereunder, unless giving effect to the Company’s agreement that [FOREIGN COUNTRY’S] courts will have exclusive jurisdiction would be unfair or unjust or contravene a strong public policy of [COVERED LAW STATE].

**[IF THE AGREEMENT CONTAINS A PERMISSIVE OR (i.e., NON-EXCLUSIVE) FORUM SELECTION CLAUSE]** A court of [COVERED LAW STATE] or a United States federal court sitting in [COVERED LAW STATE] having proper jurisdiction and applying the law of [COVERED LAW STATE] would [IF THE AGREEMENT SPECIFICALLY NAMES NON-US COURTS --] give effect to the Company’s agreement to submit to the non-exclusive jurisdiction of the courts of [FOREIGN LAW COUNTRY] [IF THE AGREEMENT SPECIFICALLY NAMES US COURTS --] recognize the Company’s submission to the non-exclusive jurisdiction of the courts of [COVERED LAW STATE] and United States federal courts sitting in
[COVERED LAW STATE] with respect to disputes arising from or in connection with the Agreement or the performance by the Company of its obligations thereunder.

[IF THE AGREEMENT CONTAINS AN INBOUND CHOICE OF NY LAW AND NY COURTS] If a dispute regarding the Company’s obligations under the Agreement is properly presented, a court of the State of New York or a United States federal court sitting in New York having proper jurisdiction and applying New York law would give effect to the express choice of New York law set forth in Section __ of the Agreement as the law governing the Agreement and to the submission by the Company to personal jurisdiction in the State of New York with respect to disputes arising from or in connection with the Agreement or the performance by the Company of its obligations thereunder.

- Again, statutes like NY 5-1502 only apply to inbound forum selection, not when foreign courts are chosen.

- The first issue to be determined by the opinion giver is whether the forum selection clause is mandatory or permissive. The interpretive issue is not as simple as it might appear due to:
  - the language/intent of the parties being unclear
  - the norm outside the U.S. (e.g., EU) being that a clause is presumed mandatory unless it is clearly permissive (opposite presumption in the U.S.)
  - which law a court will apply to the determination of the nature of the clause not being clear.

- The analysis required when the forum selection clause is mandatory is different, and in some respects more complex, because the opinion means that a U.S. court would dismiss the case and send the plaintiff off to the chosen foreign court (so called “ouster”) though it may not know whether the foreign court will be available to resolve the dispute.

- Nonetheless the report concludes that the opinion is one that non-U.S. parties typically expect and can be given so long as the covered law state has adopted the “modern view” that the parties’ choice is entitled to great deference (vs. the “old” view that “the court always knows best”).

- Even under the modern view, the *Bremen* exception can be applied to rebut the presumption of validity of an “outbound” forum selection when:
  - dismissing the suit would be unreasonable or unjust (*i.e.*, the contractual choice would deprive the plaintiff of its day in court)
  - the choice-of-forum clause was the product of fraud or over-reaching by the other party, or
  - letting the case be decided by a foreign court would contravene a strong public policy of the covered law state.
• The opinion giver cannot predict whether/how a court in the covered law state would apply the Bremen exception.

• The possible application of the Bremen exception is not covered by the opinion. While the exception need not be expressly stated, the report recommends that the opinion refer to the possible application of the Bremen exception expressly to help reduce the risk of misunderstanding, particularly because the “public policy” dimension of the exception is implicated whereas in the U.S. domestic context it generally is not.

• Federal vs state courts: the handling of forum selection in the federal courts was a source of uncertainty until a conflict among the circuits was resolved by SCOTUS in Atlantic Marine in 2013. Atlantic Marine strongly affirmed that the “modern view” applies in the federal court system.

• But opinion givers should be careful when the agreement covers “venue” in addition to forum selection and submission to jurisdiction.

• In the federal system the venue issue is governed by USC § 1404, which gives federal courts discretion to transfer the case from one district to another (even though Atlantic Marine clarified the interplay between choice of venue and choice of forum and strongly affirmed the enforceability of the latter).

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Sample language:

A final and conclusive judgment granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, rendered by a court of [FOREIGN COUNTRY] against the Company with respect to its obligations under Agreement that is enforceable in [FOREIGN COUNTRY] would be recognized and enforced by the courts of [COVERED LAW STATE] or by a United States federal court sitting in [COVERED LAW STATE] having proper jurisdiction and applying the law of [COVERED LAW STATE] without a re-examination of the substantive issues underlying the judgment, subject to: (i) grounds for non-recognition and exceptions to enforceability set forth in the [CITE: Uniform Foreign Money-Judgments Recognition Act as adopted in [COVERED LAW STATE]] (the “Act”), which include, but are not limited to: (A) lack of personal jurisdiction by the foreign court over the Company, (B) lack of jurisdiction by the foreign court over the subject matter, (C) lack of an impartial tribunal or procedures compatible with the requirements of due process of law, (D) the Company not receiving notice of the proceedings in sufficient time to enable it to defend the action, (E) the judgment being obtained by fraud or in conflict with another final and conclusive judgment, (F) the judgment or the cause of action being repugnant to the public policy of [COVERED LAW STATE], and (G) the proceeding in the [FOREIGN COUNTRY’S] court being contrary to an agreement between the parties under
which the dispute in question was to be determined otherwise than by proceedings in that court; (ii) the court’s power to stay proceedings to enforce a foreign judgment pending determination of any appeal or until the expiration of time sufficient to enable the defendant to prosecute an appeal; and (iii) [IF APPLICABLE IN THE COVERED LAW STATE — the laws of [FOREIGN COUNTRY] requiring a court of competent jurisdiction in [FOREIGN COUNTRY], in a reciprocal manner, to recognize and enforce a final and conclusive civil judgment of a court of [COVERED LAW STATE] or a federal court applying the law of [COVERED LAW STATE] without a rehearing of the merits of the case (the requirement of this clause (iii) hereafter referred to as the “Reciprocity Requirement”)].

- Most states have adopted some version of the Uniform Act and therefore giving the opinion is essentially a matter of statutory analysis. Opinion givers should be careful to conform the scope of the opinion (and its qualifications) to the specifics of the statute in effect in the covered law state.

- Different states have different statutory exceptions/requirements (which in some cases expand upon the Uniform Act) and therefore the opinion must be customized.

- By referring to the exceptions as set forth in the sample language above, the opinion confirms that it does not cover the possible application of the exceptions in the future to a specific foreign judgment.

INTERNATIONAL ARBITRATION

Sample language:

[ASSUMES THE FOREIGN COUNTRY IN WHICH ARBITRATION IS TO BE CONDUCTED IS A SIGNATORY TO THE NEW YORK CONVENTION, IMPLEMENTED IN THE U.S. BY CHAPTER 2 OF THE FEDERAL ARBITRATION ACT] Under the federal laws of the United States, the Company’s submission to mandatory arbitration of disputes arising from or in connection with the Agreement or the performance by the Company of its obligations thereunder in [SPECIFY ARBITRAL TRIBUNAL OUTSIDE THE UNITED STATES] would be given effect, subject to the application of the exceptions to enforceability set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (the “FAA”).

- The principal goal of the NY Convention was to keep international disputes out of the national courts of signatory countries if the parties agree to arbitrate. This is a very strong policy that U.S. courts respect by taking a narrow view of their role when a party challenges its obligation to arbitrate a dispute.

- The NY Convention was implemented in Chapter 2 of the Federal Arbitration Act (“FAA/2”), which preempts state law. Most of the issues that have made case law at the
state level “interesting” on domestic arbitration under Chapter 1 of the FAA do not arise in the international arbitration context.

- FAA/2 applies only to arbitration agreements arising out of international contractual transactions:
  - a transaction is not international if it is entirely between U.S. citizens unless it otherwise involves international commerce (e.g., concerns property located outside the U.S. or a contract to be performed outside the U.S., or bears some other reasonable relationship to a foreign country).

- Reciprocity is required: FAA/2 only applies if arbitral award is made in a country that has signed the NY Convention.

- The Report points out that opinion givers should consider including an express assumption that arbitration will not take place in the U.S. (unless the agreement is extremely clear that could not happen or the “international” nature of the arbitration is clear from other aspects of the transaction).

- Adhering to a policy of promoting international arbitration as a cross-border dispute resolution mechanism, U.S. courts have consistently compelled arbitration in cross-border transactions and given great deference to the jurisdiction of the arbitrators.

- U.S. court may refuse to enforce an agreement to arbitrate if it finds that it is null and void, inoperative, or incapable of being performed:
  - Courts’ focus is on the arbitration clause itself, not the agreement in its entirety (doctrine of “separability,” -- i.e., courts try to separate the agreement to arbitrate from the “main” transaction)
  - unless a party was deceived into agreeing to arbitration, claims that the agreement as a whole is null and void are for the arbitrators to decide.

- There are five specific FAA/2 requirements:
  - a written agreement to arbitrate
  - the non-U.S. country involved must be a signatory to the NY Convention
  - the contract involves an international transaction
  - the relationship among the parties is “commercial” (see next bullet point) and
  - the subject matter of the transaction is “arbitrable” (see next bullet point).

- To give this opinion the opinion giver has to confirm that the five FAA/2 prerequisites above are satisfied:
  - “arbitrability:” it may seem like a scary issue, but in practice U.S. courts have held very few, limited categories of disputes “not arbitrable” under U.S. law
  - “commercial” relationship: the subject matter of cross-border transactions in which opinions are given is extremely unlikely not to be “commercial.”
ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Sample language:

[ASSUMES THE FOREIGN COUNTRY IS A SIGNATORY TO THE NEW YORK CONVENTION] Under the federal laws of the United States, an award rendered by [SPECIFY ARBITRAL TRIBUNAL OUTSIDE THE UNITED STATES] convened in accordance with Section ___ of the Agreement would be recognized as valid and enforced in accordance with the New York Convention and the FAA, subject to the application of the exceptions to enforceability set forth in the New York Convention and the FAA if a proceeding is properly brought in a United States federal court within three years after such arbitral award is made.

• Book-ends: at the “front end” of a dispute, the NY Convention-FAA/2 requires U.S. courts to defer to the jurisdiction of arbitrators. At the “back end,” they put the state’s enforcement powers behind an international arbitral award that has been properly rendered.

• The NY Convention-FAA/2 apply only to foreign arbitral awards, which are characterized by the following:
  o the award was made outside the US
  o the award is not considered a domestic award under Chapter 1 of the FAA because it covers an international contractual transaction – see above.

• If arbitration takes place in the U.S., even though it is pursuant to the arbitration clause of a cross-border transaction, Chapter 1 of the FAA (instead of Chapter 2) may apply. Judicial decisions on domestic arbitration have been less consistent than on international arbitration, and in some cases have raised doubts as to the enforceability of mandatory arbitration in certain situations (although the SCOTUS applying the FAA has repeatedly affirmed the validity of arbitration clauses). Many lawyers exclude the arbitration clause from a remedies opinion in the U.S. domestic context as a result of this inconsistency.

• As a result, see above paragraph on including an express assumption that arbitration will not take place in the U.S. (unless the agreement is extremely clear that could not happen).

• Under the NY Convention (and FAA/2 in the U.S.) courts in all signatory countries are required to recognize foreign arbitral awards without re-evaluating the merits of the plaintiff’s claim. A suit in U.S. courts after an award is rendered is not an opportunity to “appeal” the award, merely a mechanism to enforce it where the losing party has assets/operations. This is why the NY Convention (and FAA/2) set forth an exhaustive (not illustrative) list of grounds for refusing recognition and enforcement of a foreign arbitral award.

• Under FAA/2 there are seven grounds for refusing recognition and enforcement of a foreign arbitral award:
- incapacity of parties or invalidity of the arbitration agreement under governing law
- the arbitration proceedings lacked proper notice or due process
- the arbitrators lacked jurisdiction (e.g., the award relates to dispute not covered by arbitration clause or exceeds arbitrators’ authority)
- the arbitration failed to comply with procedural requirements (e.g., improper composition of the panel)
- the award is not binding, was set aside or has been suspended in the non-U.S. country where it was rendered
- the subject matter of the dispute was not arbitrable under U.S. law
- the award is contrary to U.S. public policy.

- Consistent with U.S. policy favoring international arbitration, U.S. courts generally have declined to refuse enforcement of foreign arbitral awards on the basis of these defenses (including public policy) to avoid disrupting arbitration as an efficient dispute resolution mechanism cross-border.

- Nonetheless, the opinion does not cover possible applicability of the seven defenses, whether or not the qualification is stated expressly.