LEGAL OPINIONS in International Transactions: Foreign Lawyers' Response to US Opinion Requests

SECOND EDITION

Michael Gruson
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Graham & Trotman
A member of the Kluwer Academic Publishers Group
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and
International Bar Association

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Foreign Lawyers' Response to US Opinion Requests

Second Edition

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New York
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of the Committee on Banking Law of the Section on Business Law
of the International Bar Association

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I INTRODUCTION

First Edition

At the 20th Biennial Conference of the International Bar Association (Vienna, 1984) Committee E (Banking) of the Section on Business Law presented a program on legal opinions in international business transactions. After the program it was suggested that the issues aired in Vienna should be further pursued and that an attempt should be made to reach an agreement on the interpretation of certain formulations commonly used in opinions requested in international transactions. An ad hoc subcommittee on legal opinions, initially consisting of Michael Gruson (Shearman & Sterling), Chairman, Pedro de Elizalde (Allende & Brea), Marcello Gioscia (Ughi & Nunziante), Francis Meyrier (Shearman & Sterling), Francis W. Neate (Slaughter & May) and Hannes Schneider (Müller, Weitzel, Weisner), was formed. This subcommittee produced a first draft report which was submitted to lawyers from various countries for comments. Based on these comments ('Country Reactions') an Exposure Draft was prepared for discussion at the 7th Conference of the IBA's Section on Business Law (Singapore, 1985). During the session of Committee E, Marcello Gioscia, Burkhardt Meister (Müller, Weitzel, Weisner), Francis Meyrier and Michael Gruson discussed various parts of the Exposure Draft. These presentations summarized the Country Reactions and analyzed a form of opinion which is customarily requested by US counsel from non-US counsel in connection with a credit agreement governed by New York law. A panel consisting of Patrick Balfour (Slaughter & May), Pedro de Elizalde, Paul Storm (Dutilh, van der Hoeven & Slager) and Peter Verloop (Nauta van Haersolte) commented on the Exposure Draft.

This Report incorporates the discussions of Singapore, additional and updated Country Reactions,[1] as well as further reflections by the Reporters. Since it is not the aim of this Report to cover opinion issues with respect to all jurisdictions, Country Reactions were solicited only from a limited number of countries. It should be possible for lawyers from other countries to develop a

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[1] The following Country Reactions were submitted:

Argentina:	Pedro de Elizalde (Allende & Brea)
Austria:	Michael Binder and Michael Kutschera (Binder, Grösswang & Partners)
Canada:	John W. Teolis (Blake, Cassels & Graydon)
England:	Martin Read (Slaughter & May)
France:	Francis Meyrier (Shearman & Sterling)
Germany:	Burkhardt Meister (Müller, Weitzel, Weisner)
Italy:	Marcello Gioscia (Ughi & Nunziante)
Japan:	Yusaku Ono (Hamada & Matsumoto)
The Netherlands:	Peter Verloop (Nauta van Haersolte)
Switzerland:	Suzanne Wettenschwiler (Bär & Karrer)

response to US opinion requests which is appropriate for their particular legal system on the basis of this Report and using by analogy or by way of example the principles set forth in the Country Reactions.

This Report was presented by Michael Gruson as Reporter and Michael Kutschera as Co-Reporter to Committee E at the occasion of the 21st Biennial Conference of the International Bar Association in New York on September 17, 1986.[2]

Second Edition

The first edition of this Report has been very well received by the legal profession and its suggestions have been widely accepted. The first edition sold out very quickly.

The Subcommittee on Legal Opinions of Committee E (Banking) continued its efforts to analyze various issues relating to legal opinions rendered in international transactions. At the 8th Conference of the IBA's Section on Business Law (London, 1987), Stephan Hutter (Shearman & Sterling) delivered a paper on the pari passu opinion. This opinion states that the obligations of a borrower to a specific lender rank at least pari passu with such borrower's other unsecured obligations.[3] Michael Kutschera and Claudio A. Onetto (Estudio Beccar Varela) delivered papers discussing the extent to which the public policy of the country of the lawyer rendering an opinion may limit the applicability of an otherwise validly chosen foreign law. At the 22nd Biennial Conference of the IBA (Buenos Aires, 1988) Michael Gruson reported on special issues raised by opinions on agreements entered into by New York branches or agencies of non-US banks.

The second edition of this Report incorporates additional Country Reactions[4] that address the same issues that were covered in the first edition of this Report,[5] and Country Reactions to several issues that were not covered in the first edition.[6] Furthermore, the Reporters amended and expanded in several instances their Reporters' Annotations.

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[2]The Reporters acknowledge with gratitude the help of Stephan Hutter (Austria, Member of the New York Bar) in the preparation of the final version of this Report.

[3]Mr. Hutter's paper was based on written contributions from the following countries:

Austria:	Christian Dorda (Dorda, Brugger & Jordis)
Canada:	John W. Teolis (Blake, Cassels & Graydon)
England:	Martin Read (Slaughter & May)
France:	Gérard Mazet (Jeantet et Associés)
Germany:	Hans-Michael Giesen (Westrick & Eckholdt)
Italy:	Francesco Novelli (Studio Avv. Ercole Graziadei)
The Netherlands:	Peter Verloop (Nauta van Haersolte)
Switzerland:	Suzanne Wettenschwiler (Bär & Karrer)

[4]The following additional Country Reactions were submitted:

Australia:	Tony Browne (Arthur Robinson & Hedderwicks)
Brazil:	Ruben Fonseca e Silva (Noronha-Advogados)
Denmark:	Henrik Lind (Gorrissen & Partners)
Finland:	Matti S. Kurkela (Heikki Haapaniemi Law Offices)
Korea:	Kyung Jae Park (Lee & Ko)
Spain:	Javier Sans Roig (Bufete Roig Aran)
Venezuela:	Francisco Paz Parra (Travieso Evans Hughes Arria Rengel Marquez & Paz)

[5]The original Country Reactions referred to in note 1 above and the Country Reactions referred to in note 4 above cover the subject matters discussed in Section VIII, Subsections 7, 8, 10, 11, 14 and 24 of this Report.

[6]Country Reactions covering the enforceability of foreign judgments (Section VIII, Subsection 16 of this Report), sovereign immunity (Section VIII, Subsection 17 of this Report), the exception to the remedies opinion based on executive powers affecting existing contracts (Section VIII, Subsection 20

In recent years it has become more frequent that in international transactions with US parties agreements are governed by a non-US law and that non-US counsel is requested to render a legal opinion on the agreement governed by his own law. In that case, non-US counsel would be in the role of 'Principal Counsel' and would have to call on a US lawyer to render a 'Foreign Counsel' opinion. (*See* Section III as to the role of Principal Counsel and Foreign Counsel). The Reporters have added Section XI setting forth a sample opinion that US counsel would be able to render on an agreement governed by a non-US law.

The comments by lawyers from various countries on the Sample Opinion which are published in this Report as 'Country Reactions' serve several purposes: they discuss both the validity of each opinion clause under the particular legal system of such lawyer and whether or not modifications of the opinion clause are advisable. Where appropriate, the comments also address the extent of investigation necessary to enable a lawyer to render that opinion.

The Country Reactions are not intended to be comprehensive treatises on the relevant laws. Foreign Counsel knows his own law, and the aim of this Report is to give US Principal Counsel an outline of the relevant principles of the foreign law to enable him to conduct a meaningful conversation with Foreign Counsel about the issues raised by the opinion.[7] The lawyers who submitted Country Reactions are responsible for the correctness and completeness of their Country Reactions.

The Reporters wish to express their great appreciation for the efforts and patience of their colleagues who submitted Country Reactions. In connection with the second edition of this Report, Michael Gruson was principally reponsible for the Reporters' Annotations and Section XI, and Stephan Hutter for the editing of the Country Reactions.

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of this Report), and the opinions referred to under Other Opinions (Section VIII, Subsection 19 of this Report) were submitted by:

Argentina:	Pedro de Elizalde (Allende & Brea)
Australia:	Tony Browne (Arthur Robinson & Hedderwicks)
Austria:	Michael Kutschera (Binder, Grösswang & Partners)
Brazil:	Antonio Mendes (Pinheiro Neto-Advogados)
Canada:	John W. Teolis (Blake, Cassels & Graydon)
Denmark:	Niels Walther-Rasmussen (Kromann & Münter)
England:	Martin Read (Slaughter & May)
Finland:	Matti S. Kurkela (Heikki Haapaniemi Law Offices)
France:	Emmanuel Gaillard (Shearman & Sterling)
Germany:	Hans-Michael Giesen (Westrick & Eckholdt)
Italy:	Marcello Gioscia (Ughi & Nunziante)
Japan:	Kenichi Fujinawa (Nagashima & Ohno)
Korea:	Kyung Jae Park (Lee & Ko)
The Netherlands:	Peter Verloop (Nauta van Haersolte)
Spain:	Fernando de las Cuevas (Gomez-Acebo & Pombo)
Switzerland:	Marco Jagmetti (Staehelin Hafter Jagmetti Lutz & Partners)
Venezuela:	Leopoldo Olavarría C.

Country Reactions covering the conflict-of-laws rules as to the effectiveness of governing-law clauses and their limitation by the public policy (ordre public) of the country of the lawyer rendering the opinion were submitted by the attorneys named above in this note 6 except for the following attorneys who submitted Country Reactions on this issue:

Argentina:	Claudio A. Onetto (Estudio Beccar Varela)
Switzerland:	Cyril Troyanov (Secretan, Troyanov, Terracina & Fiechter)
Venezuela:	Francisco Paz Parra (Travieso Evans Hughes Arria Rengel Marquez & Paz)

[7] *See* especially the discussions on corporate law matters in Section VIII and Subsections 12, 15 and 17 therof.

II ROLE OF LEGAL OPINIONS

In most important international business transactions, particularly where one of the parties has retained US lawyers, opinions of counsel are required as a condition precedent to the consummation or 'closing' of the transaction. In this context the term 'legal opinion' means a written opinion delivered by a lawyer at the request of his own client to the client himself or to another party to the transaction. Legal opinions of the kind discussed in this Report state conclusions of law but do not set forth the reasoning underlying such conclusions.[1]

The recipient of a legal opinion rendered in the context of a business transaction wishes to obtain counsel's professional judgment that the legal assumptions upon which the recipient is basing his decision on whether or not to go forward with the transaction are correct. An unqualified favorable opinion is a statement to the recipient that counsel has examined specified legal aspects of the transaction and found them in order. To the extent that counsel is unable to give an unqualified favorable opinion, the recipient is put on notice that the transaction involves certain legal risks which the recipient should evaluate.

Thus, in the case of each transaction, the parties and their counsel must determine the relevant legal issues which should be covered by opinions. The negotiations about the scope of opinions during the course of negotiating a transaction may uncover legal problems and uncertainties in connection with the proposed transaction. In some cases the parties will change the legal structure of the transaction in order to avoid such problems or uncertainties. In other cases the parties must decide whether to accept these problems and uncertainties as a business matter or to abandon the transaction.

The recipient of a legal opinion is expected to and actually will rely on the accuracy of the opinion in evaluating the legal risks of the transaction. The basis for this reliance is the ultimate sanction of legal liability in tort or contract of a lawyer who rendered a wrong opinion, or at least the threat of loss of or injury to his reputation. The lawyer's possible liability in contract for a wrong opinion arises out of the client-lawyer relationship on the basis of which the opinion was rendered.[2] This Report does not deal with questions of a lawyer's liability for an opinion to the lawyer's client or to third persons relying on that opinion.

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[1] The term 'opinion' sometimes denotes the whole letter from the opining lawyer to the opinion recipient and sometimes a particular conclusion of law contained in that letter.

[2] There have been instances in which a lawyer has requested the insertion of a governing-law clause or a jurisdiction clause or both in his opinion. This is wrong. A governing-law clause or a jurisdiction clause can only affect the contractual relationship between an opining lawyer and his client. The opinion itself does not constitute a contract between the opining lawyer and the recipient. It is a

Traditionally, a US party to an agreement requires a legal opinion from counsel to the *other* party to the agreement. This opinion usually covers the same subject matters as the representations relating to legal matters made by the other party in the agreement. The rationale for requiring an opinion from the other party's counsel is that such counsel is usually more familiar with the issues covered by the opinion and that his opinion reinforces his client's representations. For example, if a borrower is required by the lender to represent in the loan agreement that the agreement has been duly authorized by the borrower, the lender will require an opinion by the borrower's counsel to the same effect. The lender's counsel could give this opinion only after considerable investigation. In addition, it may be difficult for the borrower later to assert lack of authorization if his own counsel has given a legal opinion that the agreement has been duly authorized.

In addition to relying on an opinion of counsel to the other party, a party may require a legal opinion from its own counsel about certain issues arising in connection with the transaction. A party may desire an opinion from its own counsel because such party may feel that its counsel is more concerned about the protection of his client's interests than counsel to the other party and, in cases where counsel to the other party is an in-house counsel, such party may be of the opinion that its own counsel has more expertise in certain areas of the law covered by the opinion.

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statement of law rendered under a particular legal system pursuant to a contractual relationship between the opining lawyer and his client. A lawyer inserting a governing-law clause in his opinion probably intends to say that the opinion should be judged by, and read in the context of, the professional standards prevailing in the place where he is admitted to practice. This notion should already follow from the statement contained in each opinion that counsel is expressing an opinion only on the law of his country [Sample Opinion Item 21].

III ROLE OF 'PRINCIPAL COUNSEL' AND 'FOREIGN COUNSEL'

As stated above, parties to a business transaction usually ask for legal opinions in order to evaluate the legal risks which may be involved in the transaction. If the transaction takes place in an international setting it is likely that the laws of more than one country apply to such transaction. In that case, a party will primarily require an opinion from an attorney admitted to practice in the jurisdiction whose laws govern the most important agreement(s) relating to the transaction (the 'Governing Law'). For the purposes of this Report, this lawyer will be called 'Principal Counsel'.

A party to an international transaction, however, is concerned about all legal aspects relating to the transaction, including issues governed by law other than the Governing Law (the 'Foreign Law'). Issues of a Foreign Law may become relevant because the parties to or the subject matter of a transaction have contacts to the country of such Foreign Law, or because the foreseeable forum for the resolution of disputes is located in a jurisdiction other than the jurisdiction of the Governing Law. Principal Counsel himself cannot and will not render an opinion on issues governed by Foreign Law because he is not or not sufficiently familiar with the Foreign Law. Nevertheless, it will be the expectation of the opinion recipient that Principal Counsel will not limit himself to the Governing Law but will also make a diligent effort to uncover problems arising under the Foreign Law and to ensure that any such problems are addressed.

As far as Foreign Law issues are concerned, the most important element of Principal Counsel's obligation of diligence (whether Principal Counsel is counsel to the opinion recipient or not) is to obtain opinions of counsel with respect to relevant issues governed by Foreign Law.[1] The lawyer who is retained to advise and opine on issues of Foreign Law will be called in this Report 'Foreign Counsel'.

Principal Counsel is required to determine under the conflict-of-laws rules of the Governing Law which issues are governed by the Foreign Law and, therefore, should be addressed in Foreign Counsel's opinion.[2] The relationship between the opinion of Principal Counsel and the opinion of Foreign Counsel can be stated in the opinions in several ways. In many cases, Principal Counsel will carve out from his opinion the issues of Foreign Law, and the opinion

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[1] Principal Counsel's client and not Principal Counsel retains Foreign Counsel although such counsel frequently is suggested by the Principal Counsel and the latter will communicate with the former nearly exclusively.

[2] Principal Counsel depends on Foreign Counsel's expertise as to which issues of Foreign Law are relevant to the transaction by virtue of the conflict-of-laws rules of the Foreign Law (rather than by virtue of the conflict-of-laws rules of the Governing Law) and should be addressed in Foreign Counsel's opinion.

recipient is advised to look only to the opinion of Foreign Counsel with respect to such Foreign Law issues. This carve-out can be done by specific assumptions in Principal Counsel's opinion with respect to those legal conclusions under the Foreign Law which are conditions for the correctness of a legal conclusion under the Governing Law.[3] In other cases, Principal Counsel may give an opinion on a legal issue, expressly stating that his opinion does not cover issues governed by Foreign Law even though legal conclusions as to such Foreign Law issues are a condition for the correctness of his opinion under the Governing Law, and rely with respect to such Foreign Law issues on the opinion of Foreign Counsel. Where Principal Counsel states in his opinion specific assumptions as to Foreign Law, the opinion recipient knows exactly which issues should be addressed in Foreign Counsel's opinion. Where Principal Counsel relies on Foreign Counsel's opinion, the reliance is sometimes expressed with respect to specific legal issues, or with respect to specific opinion paragraphs, in other cases in rather general terms.[4] Even in the latter case, the opinion recipient will know by reading Foreign Counsel's opinion which issues, in the view of Principal Counsel, are governed by Foreign Law. Whether Foreign Law issues are addressed in Principal Counsel's opinion by way of assumption or by way of reliance depends mainly on the opinion recipient's preference and on Principal Counsel's style; the reliance approach does not increase Principal Counsel's responsibility for the issues of Foreign Law.

Sometimes Principal Counsel renders an opinion covering the entire transaction, including the Foreign Law issues, and Foreign Counsel also renders an opinion covering the entire transaction, including the Governing Law issues, and both counsel state that they rely on the opinion of the other counsel with respect to issues governed by that other counsel's law. In that case, the opinion recipient himself must sort out the conflict-of-laws question of which issues are governed by which law or involve conclusions of the other law. This approach is not satisfactory to an opinion recipient in most cases and does not represent good practice.

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[3]New York Principal Counsel might, for example, give the following opinion under the Governing Law (New York law) on an agreement governed by the Governing Law to which a foreign corporation is a party and which was executed and delivered in New York:

(a) Assuming Mr _____ is duly authorized under Foreign Law to execute and deliver the Agreement for and on behalf of the foreign corporation, the Agreement has been duly executed and delivered under the Governing Law.

(b) Assuming that under the Foreign Law (i) the foreign corporation was duly incorporated and organized and is validly existing, has the corporate power to execute and deliver the Agreement and to perform its obligations thereunder, and has duly authorized the Agreement by all necessary corporate action, and (ii) Mr _____ is duly authorized to execute and deliver the Agreement for and on behalf of the foreign corporation and has duly executed and delivered the Agreement, the Agreement constitutes the legal, valid and binding obligation of the foreign corporation, enforceable against the foreign corporation in accordance with its terms.

Note that the assumption in opinion (b) as to due execution and delivery relates only to execution and delivery under the Foreign Law. *See* Section VIII, Subsection 12 of this Report. An example for an opinion of Foreign Counsel containing assumptions as to the Governing Law is opinion (e)(iv) of the Sample Opinion (Item 14).

[4]The following is an example for a reliance paragraph in an opinion:

In giving the foregoing opinions [set forth in paragraphs (x), (y) and (z)], we have, with your approval, relied without independent investigation as to all matters governed by or involving conclusions under the Foreign Law upon the opinion (including the qualifications, assumptions and limitations expressed therein) of Foreign Counsel, dated _____, addressed to _____ [a copy of which is attached hereto].

It cannot be emphasized strongly enough that Principal Counsel does not discharge his duties to his client by simply obtaining some opinion from Foreign Counsel. Principal Counsel must make a diligent effort to uncover legal problems that might exist under the relevant Foreign Law and must ascertain that these problems have been addressed and resolved. Principal Counsel must ascertain that Foreign Counsel is familiar with the transaction and with the purpose and meaning of the proposed opinions. This requires close interaction between Principal Counsel and Foreign Counsel.

It is a challenging task for lawyers involved in an international transaction to develop a system of opinions rendered under the Governing Law and under all applicable Foreign Laws which together cover, to the extent possible, all legal issues arising in connection with such transaction.

IV PURPOSE OF THE STUDY

This Report explains what a US Principal Counsel and his client want to know from a non-US Foreign Counsel and suggests how Foreign Counsel can best respond to such request in an opinion rendered to Principal Counsel's client under Foreign Counsel's Foreign Law. This explanation is made on the basis of the Sample Opinion set forth below which covers all issues typically of concern to Principal Counsel's client in a loan transaction. This Report assumes that Principal Counsel who requests Foreign Counsel to render the Sample Opinion is a New York lawyer. The issues and legal terms of the Sample Opinion are chosen by such lawyer on the basis of New York law concepts and must be understood as common-law attorneys in New York understand them. A non-US lawyer serving as Foreign Counsel will be required to use in his opinion terminology chosen or approved by the New York Principal Counsel.

Unfortunately, not even within the US legal community exists unanimity about the meaning of certain of the formulations found in opinions typically requested from Foreign Counsel. Only during the last 15 years have experienced lawyers and bar associations begun to discuss the meaning of certain commonly used opinion formulations. Recently several bar associations in the United States have issued reports which attempt to reflect a consensus about the meaning of opinion terminology, suggesting that a certain degree of common understanding about legal opinions is beginning to emerge.

The first principal purpose of this Report is to improve the communication between US and non-US lawyers. Normally, such communication commences with the presentation to Foreign Counsel, the lawyer who is supposed to render the opinion, of an opinion request phrased in words chosen by Principal Counsel. Foreign Counsel will, in many instances, respond to the opinion request by explaining why he cannot give certain opinions and, perhaps, suggest alternatives. In order to be able to communicate rationally in this discussion about the opinion wording, Principal Counsel and Foreign Counsel, from whatever country he may come, must have a common understanding as to the meaning of the terminology used in the opinion. Eventually, they must be able to agree on an opinion formulation which (i) gives the opinion recipient sufficient comfort with respect to his legal assumptions and (ii) reflects the particularities of the legal system of Foreign Counsel.

It would be a major achievement of this Report if it contributed to the development of a common understanding among lawyers involved in international business transactions about the interpretation of certain frequently used opinion formulations.

The second principal purpose of this Report is to analyze the interdependence of the opinion of Foreign Counsel and the opinion of Principal Counsel rendered in connection with the same transaction. Where the laws of several countries apply to a transaction, the opinions of Principal Counsel and of one

or more Foreign Counsel must be put together like the pieces of a puzzle before the recipient can be certain that all relevant legal issues under all relevant legal systems have been fully addressed by the opinions in a seamless manner.

Some of the opinions rendered by Principal Counsel or by Foreign Counsel can be given and understood independently because the issues covered by such opinions are governed by the law of one country exclusively. An example of such opinion is the opinion on the due incorporation and valid existence of a corporation.

Other issues cannot be attributed to only one of the several legal systems relevant to a transaction, and an opinion on these issues requires analysis under the laws of several countries. For instance, a Foreign Counsel's opinion that a court in Foreign Counsel's country will give some remedy (in accordance with the terms of the agreement as construed under the chosen law) to an aggrieved party to a contract in the event of a breach of the contract requires (among other things) a determination by Foreign Counsel under the Foreign Law that the governing-law clause is valid, a determination by Principal Counsel under the Governing Law that the contract is legal, valid and binding, and a determination by Foreign Counsel that the terms of the contract do not violate the public policy of the country of Foreign Counsel or another principle or statute of Foreign Law limiting the application of a contractually chosen law (*see* Reporters' Annotations on pp 85-87 below). The opinion that a contract with a foreign corporation as a party is legal, valid and binding under the Governing Law presupposes that the officers or other agents of the foreign corporation which entered into the contract on behalf of such corporation had the authority to do so, a question which must be determined under Foreign Law.

Where the laws of several countries are applicable to different aspects of an issue, it is impossible to render an opinion under a particular law without regard to the other legal systems involved. Principal Counsel in order to be able to render his opinion must rely on the opinion of Foreign Counsel with respect to Foreign Law aspects of an issue or must make certain assumptions with respect to such Foreign Law aspects, and vice versa[1] (*see* Section III of this Report on pp 6-7 above). This interaction and mutual reliance of Principal Counsel and Foreign Counsel must be understood in order to determine the contents and limits of an opinion of Foreign Counsel. It will be seen that there are practical limitations to the attempt to cover with a seamless opinion web under all applicable legal systems all legal issues which might arise in an international transaction. Some gaps will remain, but the opinion recipient should understand these gaps.

[1]A mere statement in an opinion that it does not cover issues governed by the Foreign Law or the Governing Law, as the case may be, is usually not helpful to the opinion recipient where each of those laws applies to a different aspect of an issue. Such statement of exclusion may be advisable where an issue is governed exclusively by a law other than the law of the opining counsel.