

Legal Opinions in International Transactions

Fourth Edition

Michael Gruson
Stephan Hutter
Michael Kutschera



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International Bar Association



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the legal profession

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Michael Gruson
New York/Frankfurt

Stephan Hutter
New York/Frankfurt

Michael Kutschera
Vienna

Report of the Subcommittee on Legal Opinions
of the Committee on Banking Law of the Section on Business Law
of the International Bar Association



and
International Bar Association

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In its role as a dual membership organization, comprising 16,000 individual lawyers and 180 Bar Associations and Law Societies, the International Bar Association (IBA) influences the development of international law reform and helps shape the future of the legal profession. Its Member Organizations cover all continents and include the American Bar Association, the German Federal Bar, the Japan Federation of Bar Associations, the Law Society of Zimbabwe and the Mexican Bar Association.

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To find out more about the International Bar Association and its activities, please contact:

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Stephan Hutter has been a partner of Shearman & Sterling since 1995. Practicing in their New York and Frankfurt offices, he specializes in mergers and acquisitions, corporate finance and project finance transactions. Mr. Hutter has extensive experience in international equity offerings of German, Austrian and Swiss companies, including public offerings and private placements of securities in the United States. Mr. Hutter is a graduate of the University of Vienna Law School (Dr. jur. 1984) and the University of Illinois (Champaign-Urbana) Law School (LL.M. 1986, Fulbright Scholar). He has been a member of the New York Bar since 1987. Mr. Hutter was Chairman of the International Bar Association's Subcommittee E-1 (Legal Opinions). Mr. Hutter is a co-author (with Mr. Gruson) of *Acquisitions of Shares in a Foreign Country* (Graham & Trotman, 1993) and author of *Börsengang einer deutschen Aktiengesellschaft in den Vereinigten Staaten* (Semler/Volhard, Arbeitshandbuch für Unternehmensübernahmen, Sept. 2001), *Übernahmerecht in den USA* (DAI Schriften zum Kapitalmarkt, vol. 2, 1999), *Obligations of German Issuers in connection with Public Securities Offerings and Stock Exchange Listings in the United States* (DAI Schriften zum Kapitalmarkt, vol. 1, 1998) and 'The Corporate Opinion in International

Transactions', 1989 *Columbia Business Law Review* 427. Mr. Hutter frequently lectures at seminars on international equity offerings as well as Neuer Markt and dual listings by German companies.

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Michael Kutschera has been a partner of Binder Grösswang Rechtsanwälte since 1989 and is admitted to the bars of Vienna and New York. He is a graduate of the University of Vienna Law School (Mag. jur., Dr. jur. 1979) and New York University Law School (M.J.C. 1983, Fulbright Fellow). He specializes in mergers and acquisitions, corporate, commercial, banking and financing law, including projects in the Czech Republic and the Slovak Republic, arbitration, and international litigation. Mr. Kutschera has played a key role as advisor to major Austrian industrial companies in connection with the settlement of World War II-related issues involving Austria and the Austrian private sector. He is vice-chairman of Committee E (Banking Law) of the International Bar Association and a former chairman of the committee's Subcommittee on Legal Opinions. He is a member of the executive committee of the Vienna Bar. Mr. Kutschera is the Austrian contributor to Neate & McCormick (eds.), *Bank Confidentiality* (3d ed., Butterworths 2003) and (with Barbist) to Verloop (ed.), *Merger Control in the EU* (3d ed., Kluwer, 1999); and co-author of Gruson & Kutschera, 'Opinion of Counsel on Agreements Governed by Foreign Law', 19 *Vanderbilt Journal of Transnational Law* 515 (1986).

Preface

I am delighted to welcome the fourth edition of *Legal Opinions in International Transactions*. Since it was first published in 1987, this publication has been used extensively by international lawyers, and its proposals have been widely accepted. The publication has helped to substantially reduce the time and effort spent by lawyers discussing the proper wording of legal opinions and has prevented lawyers from giving wrong or inappropriate legal opinions. There can be no doubt that *Legal Opinions in International Transactions* reflects the customary practice for opinions in the transborder context.

One of the central conclusions of *Legal Opinions in International Transactions* is that a lawyer in country A cannot give an opinion that an agreement that is governed by the law of country B is valid and enforceable. The lawyer in country A can only give an opinion that the governing-law clause is valid under the conflict-of-laws rules of country A. In 1987 this was a novel suggestion. I am pleased to say that now the American Bar Association and the three bar associations in New York have recognized that this view is correct. (See p. 183).

Also, in other areas the US opinion practice has taken positions that have been proposed since 1987 by this Opinion Report. For instance, this Opinion Report has always warned of broad 'factual' opinions, such as an opinion that the agreement in question does not contravene any other agreements of the borrower (see p. 13). US bar association reports are now also taking the position that an opinion must be limited to described or narrowly defined agreements of the borrower. The TriBar Report of the New York bar associations has now adopted the view long proposed by this Opinion Report that the *pari passu* opinion should not only qualify the remedies opinions but also other opinions.

The fourth edition of *Legal Opinions in International Transactions* reflects numerous changes in the law of the countries covered. Furthermore, the influential TriBar Report that reflects the prevailing US practice on legal opinions was substantially revised in 1998. This fourth edition reflects the new version of the TriBar Report. Finally, this fourth edition adds a discussion on legal opinions on governing-law clauses that exclude the conflict-of-laws rules of the chosen law and a new chapter on legal opinions of inside counsel.

Legal Opinions in International Transactions is the result of the collaboration of prominent lawyers from 26 countries, and it is a good example of how the International Bar Association can be an excellent forum for such cooperative efforts to improve the smooth working of international business law.

Fernando Pelaez-Pier
Chair, Section on Business Law
International Bar Association
London

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Chapter 1

Introduction

I. THE OPINION PROJECT OF THE BANKING COMMITTEE OF THE IBA

At the 20th Biennial Conference of the International Bar Association (Vienna, 1984) Committee E (Banking) of the Section on Business Law of the International Bar Association (IBA) 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. A Subcommittee on Legal Opinions (E-1) of Committee E (Banking) was formed under the chairmanship of Michael Gruson (Shearman & Sterling) (who served in this position until 1995). The other initial officers were Pedro de Elizalde (Allende & Brea), Marcello Gioscia (Ughi & Nunziante), Francis Meyrier (then Shearman & Sterling), Francis W. Neate (Slaughter and May) and Hannes Schneider (Hengeler Müller Weitzel Wirtz). 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 of this Opinion Report was prepared for discussion at the 7th Conference of the IBA's Section on Business Law (Singapore, 1985). During the session of Committee E, a panel discussed various parts of the Exposure Draft 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.¹ This Opinion Report incorporates the discussions of Singapore, additional and updated Country Reactions,² as well as further reflections by the Reporters.

¹ The panel consisted of Marcello Gioscia (Ughi & Nunziante), Burkhardt Meister (Hengeler Müller Weitzel Wirtz), Francis Meyrier (then Shearman & Sterling), Michael Gruson (Shearman & Sterling), Patrick Balfour (Slaughter and May), Pedro de Elizalde (Allende & Brea), Paul Storm and Peter Verloop (both Nauta Dutilh).

² The following Country Reactions were submitted:

Argentina:	Pedro de Elizalde (Allende & Brea)
Australia:	Tony Browne (Arthur Robinson & Hedderwicks)
Austria:	Michael Binder and Michael Kutschera (Binder, Grösswang & Partner)

This Opinion 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 17 September 1986. Stephan Hutter had assisted in the preparation of the final version of this Opinion Report.

The Subcommittee on Legal Opinions 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 (Binder Grösswang Rechtsanwälte) and Claudio A.

(Continued)

Brazil:	Ruben Fonseca e Silva (Noronha-Advogados)
Canada:	John W. Teolis (Blake, Cassels & Graydon)
Denmark:	Henrik Lind (Gorissen Federspiel Kierkegaard)
England:	Martin Read (Slaughter and May)
Finland:	Matti S. Kurkela (Dittmar & Indrenius)
France:	Francis Meyrier (then Shearman & Sterling)
Germany:	Burkhardt Meister (Hengeler Müller Weitzel Wirtz)
Italy:	Marcello Gioscia (Ughi & Nunziante)
Japan:	Yusaku Ono (then Hamada & Matsumoto)
Korea:	Kyung Jae Park (Lee & Ko)
The Netherlands:	Peter Verloop (Nauta Dutilh)
Spain:	Javier Sans Roig (Bufete Roig Aran)
Switzerland:	Suzanne Wettenschwiler (Bär & Karrer)
Venezuela:	Francisco Paz Parra (Travieso Evans Hughes Arria Rengel & Paz).

Country Reactions covering the enforceability of foreign judgments (Chapter 9, section XVI of this Opinion Report), sovereign immunity (Chapter 9, section XVII of this Opinion Report), the exception to the remedies opinion based on executive powers affecting existing contracts (Chapter 9, section XX of this Opinion Report), the opinions referred to under Other Opinions (Chapter 9, section XIX of this Opinion Report), and 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 in the case of some countries submitted by other lawyers:

Brazil:	Antonio Mendes (Pinheiro Neto-Advogados)
Denmark:	Niels Walther-Rasmussen (Kromann & Munter)
France:	Emmanuel Gaillard (Shearman & Sterling)
Germany:	Hans-Michael Giesen (Bruckhaus Westrick Stegemann)
Japan:	Kenichi Fujinawa (Nagashima & Ohno)
Spain:	Fernando de las Cuevas (Gomez-Acebo & Pombo)
Switzerland:	Marco Jagmetti (Lenz & Staehelin)
Venezuela:	Leopoldo Olavarria C.,

except that 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 for the following countries by:

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

³ Stephan 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 and May)
France:	Gérard Mazet (Jeantet et Associés)