LEGAL OPINIONS in International Transactions

Foreign Lawyers' Response to US Opinion Requests

LEGAL OPINIONS in International Transactions

Foreign Lawyers' Response to US Opinion Requests

MICHAEL GRUSON
New York
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

Graham & Trotman
A member of the Kluwer Academic Publishers Group
LONDON/DORDRECHT/BOSTON

and
International Bar Association

ISBN 1853 330213

British Library and Library of Congress CIP data
is available

International Bar Association
2 Harewood Place
Hanover Square
London W1R 9HB
England

Graham & Trotman Ltd
Sterling House
66 Wilton Road
London SW1V 1DE
England

and

101 Philip Drive
Assinippi Park
Norwell MA 02061
USA

Typeset by Spire Print Services Ltd., Salisbury, Wilts
Printed and bound in Great Britain by The Alden Press Ltd

Legal Opinions in International Transactions:

Foreign Lawyers' Response to US Opinion Requests

ABOUT THE IBA AND THE BANKING LAW COMMITTEE

The International Bar Association (IBA) is the world's foremost international association of lawyers, with a membership of some 11,000 individual lawyers in 120 countries, as well as 104 Bar Associations and Law Societies. Its principal aims and objectives are:

> To encourage the discussion of problems relating to professional organisation and status.
>
> To promote an exchange of information between legal associations worldwide.
>
> To support the independence of the judiciary and the right of lawyers to practise their profession without interference.
>
> To keep abreast of developments in the law, and help in improving and making new laws.

Above all, though, it seeks to provide a forum in which individual lawyers can contact, and exchange ideas with, other lawyers.

The IBA has three Sections of which the Section on Business Law is the largest with 8,000 members. This Section is divided into 24 specialist Committees with the Committee on Banking Law being the largest.

The Committee on Banking Law aims to study and discuss the legal and practical aspects, particularly from the international viewpoint, of issues related to banking and financing.

Members are typically partners of law firms practising in national and international banking matters (though usually not exclusively), or in-house lawyers of banks active in international financial transactions.

The Committee on Banking Law meets at least annually; organises Seminars, publishes a quarterly newsletter with latest developments in Banking Law worldwide to which members are invited to submit news items, and arranges regional meetings.

A subsidiary, and very successfully accomplished, aim is that of enabling Committee members to become personally acquainted with qualified colleagues in other countries, specialising in the same or similar areas, to whom they may turn for professional assistance in their own international practice.

The Committee on Banking Law has created a Subcommittee on Legal Opinions. The objective of the Subcommittee on Legal Opinions is the development of a better understanding among lawyers of various countries of the function of legal opinions in international business transactions, of the meaning of opinion formulations frequently used in legal opinions in such transactions, and of the interdependence of the opinions of counsel from different countries rendered in connection with the same transaction.

Further details of the IBA are available from:
2 Harewood Place, Hanover Square, London W1R 9HB.
Telephone: 01-629 1206 Telex: 8812664 INBAR G Fax: 01-409 0456

Subcommittee on Legal Opinions

Michael Gruson Chairman
Michael Kutschera Secretary
Pedro Elizalde Vice-Chairman
Marcello Gioscia Vice-Chairman
Burkhardt Meister Vice-Chairman
Peter Verloop Vice-Chairman

CONTENTS

I INTRODUCTION

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 response to US opinion requests which is appropriate for their particular legal

[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)

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]

[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.

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.

---

[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 statement of law rendered under a particular legal system pursuant to a contractual relationship between the opining lawyer and his client.

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 had 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.

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'). 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 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'.

The relationship between the opinion of Principal Counsel and the opinion of Foreign Counsel can be of two kinds. In some cases, Principal Counsel will carve out the issues of Foreign Law from his opinion,[2] and the opinion recipient is advised to look only to the opinion of Foreign Counsel with respect to the Foreign Law issues. In other cases Principal Counsel will render an opinion covering the entire transaction, including the Foreign Law issues, and will rely on the opinion of Foreign Counsel with respect to the Foreign Law issues.

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

[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] This is usually done by an express statement in the opinion that it does not cover issues governed by Foreign Law or by specific assumptions in the opinion with respect to those legal conclusions under the Foreign Law which are a condition for the correctness of the legal conclusions under the Governing Law.

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 is there unanimity about the meaning of certain of the formulations found in opinions typically requested from Foreign Counsel. Only during the last 13 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 they 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 can not 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 p 63 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] This interaction and mutual reliance of Principal 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.

V THE CONCEPT OF THE SAMPLE OPINION

The Sample Opinion on which the first draft of the Report and the Exposure Draft presented at the Singapore Conference were based was a form used by a major New York bank for opinions of counsel for the borrower (a foreign corporation) rendered in connection with an unsecured multi-bank loan agreement for US dollar borrowings governed by New York law. Following a thorough examination and extensive discussion of the traditionally used opinion formulations, the consensus at the Singapore Conference was that some of the traditional formulations used in opinions of Foreign Counsel do not accurately reflect their meaning. It appears preferable to use opinion formulations which mean what they say. Thus, the Sample Opinion contained in this Report uses some formulations not commonly used in the past. The most important example of a traditional opinion formulation which is an inaccurate expression of its meaning is the opinion that an agreement governed by a law other than the Foreign Law is legal, valid, binding and enforceable in accordance with its terms under the Foreign Law. This Report proposes a wording which accurately expresses the meaning of the traditional formulation. This new formulation is incorporated into the Sample Opinion ((e) (i) through (iv)) and is commented on extensively in the Reporters' Annotations to the Remedies Opinion (*see* p 62 below). This proposed opinion formulation already has begun to gain acceptance in the international legal community.

Another issue was extensively debated at the Singapore Conference. Many participants raised objections to certain opinions typically requested by lender's counsel which require the opining lawyer to become involved in burdensome factual questions. An example is the opinion that the execution and performance of an agreement does not violate any other agreements of the borrower or that there is no pending litigation adversely affecting the borrower (*see* Sample Opinion Addendum p 77 below). The concern was raised that the inclusion of such opinions in the Sample Opinion might be prejudicial to foreign lawyers who have resisted giving such opinions. In order to avoid any prejudicial effect, this Report has moved these opinions to a separate 'Sample Opinion Addendum'.

The purpose of this Report is not to suggest the exclusive use of certain opinion formulations by the international legal community, nor to set a standard for the kinds and types of opinions which may be requested. Rather, the purpose of this Report is to explain and give the rationale for the opinion formulations typically being used or requested.

As said before, an opinion request by a New York Principal Counsel will be based on New York law concepts. The Sample Opinion and Sample Opinion Addendum do not incorporate any changes which non-US Foreign Counsel may wish to make. The changes which may be necessary or advisable under the various non-US legal systems for which Country Reactions have been sub-