Cross-Border Closing Opinions of U.S. Counsel

By the Legal Opinions Committee, ABA Business Law Section

FOREWORD

This Report addresses a subject that has never before been the sole focus of a bar association report: third-party legal 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 often raise issues that differ from those presented in purely domestic U.S. transactions, particularly when the agreement entered into by the parties chooses the law of a jurisdiction outside the United States as its governing law. These issues and other factors, such as language barriers and differences in legal systems, customs, and expectations, often make giving opinions in cross-border transactions more difficult and costly than in domestic U.S. transactions.

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 jurisdiction whose law is covered by an opinion letter should govern the meaning of standard language used in it and the work opinion preparers are expected to perform in preparing it.

This Report points out that some opinions that are standard in domestic U.S. transactions present challenges in a cross-border setting, and offers practical ways to address those challenges. It also analyzes special issues raised by opinions that are normally given only in cross-border transactions and suggests how they could be worded. The Report notes that sometimes legal uncertainties exist for which the parties to a cross-border transaction cannot look to a third-party legal opinion as the solution; instead those uncertainties must be dealt with by the parties in other ways with advice from their own counsel.

The purpose of this Report is to promote a better understanding of opinion practice in cross-border transactions. We hope that U.S. lawyers who give cross-border opinions and lawyers, both U.S. and non-U.S., who advise the recipients of those opinions will find this Report helpful.

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As a condition to closing financial transactions in the United States, legal counsel for one party often delivers to the other party a letter expressing counsel’s opinion on various legal issues relating to its client and the transaction. That opinion letter is commonly referred to as a “third-party closing opinion” or simply a “closing opinion.” U.S. lawyers sometimes are asked to deliver closing opinions to non-U.S. parties in similar transactions that involve 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 on matters of U.S. law, are the subject of this Report.

I. INTRODUCTION

In the United States opinion givers and opinion recipients share a common conceptual framework for preparing and interpreting closing opinions. U.S. customary practice is well established with regard to many standard opinions, and

2. MICHAEL GRUSON, STEPHEN HUTTER & MICHAEL KUTSCHERA, LEGAL OPINIONS IN INTERNATIONAL TRANSACTIONS 10–11 (4th ed. 2003) [hereinafter IBA REPORT] (a project of the Subcommittee on Legal Opinions of the Committee on Banking Law of the Section on Business Law of the International Bar Association) (“The practice of asking counsel . . . for legal opinions originated in the U.S. 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.”).

3. The term “U.S. customary practice,” as used in this Report, refers to the practice of lawyers who regularly give, and lawyers who regularly advise opinion recipients regarding, opinions in transactions between U.S. parties. U.S. customary practice covers both the meaning of standard language used in opinion letters and the work U.S. opinion preparers are expected to perform in preparing them. See generally Comm. on Legal Ops., ABA Bus. Law Section, Legal Opinion Principles, 53 BUS. LAW. 831 (1998) [hereinafter ABA Principles]; Statement on the Role of Customary Practice in the Prep-
guidance on what specific opinions mean, and the work required to support them, is available in bar association reports and other materials. Applying this guidance in cross-border transactions, however, is not always straightforward, and in some cases what is appropriate in a domestic U.S. transaction is not appropriate in a similar cross-border transaction. Moreover, on many issues that arise in cross-border transactions little, if any, guidance is available.

The dearth of authoritative sources on cross-border opinion practice and the absence of a shared conceptual framework between U.S. opinion givers, on the one hand, and non-U.S. opinion recipients and their counsel, on the other, create the potential for misunderstanding over such matters as: (1) what opinions U.S. lawyers are in a position to give; (2) the meaning of opinions commonly given, and (3) the work U.S. lawyers are expected to perform to support the opinions they give. The risk of misunderstanding can be compounded by differences in legal systems, legal education, opinion practice, and languages (even when documents are in English or are translated into English), and a general lack of familiarity on the part of many non-U.S. recipients and their counsel with U.S. closing opinion practice. The potential for misunderstanding has grown as the number and type of participants in, and the complexity of, cross-border transactions have increased.

The goals of this Report are: (1) to describe what the parties in a cross-border transaction should consider when deciding whether to request a closing opinion from U.S. counsel and, if requested, which opinions are appropriate for U.S. counsel to give; (2) to clarify the application of U.S. customary practice to out-bound opinions; (3) to provide guidance on the special considerations that apply to opinions commonly given in domestic U.S. transactions when those opinions are requested in cross-border transactions; (4) to identify opinions U.S. lawyers should not be asked to give in cross-border transactions and to explain why; (5) to provide guidance on both the meaning of, and the work expected to be performed to support, opinions frequently given by U.S. lawyers in cross-border transactions but not in domestic U.S. transactions; and (6) to suggest guidelines for U.S. opinion givers and counsel for non-U.S. opinion recipients to facilitate cross-border opinion practice.

4. See Guide to the Questions to Be Addressed When Providing Opinion Letters on English Law in Financial Transactions, CITY LONDON L. SOCY 3 11 (Nov. 17, 2011), http://citysolicitors.org.uk [hereinafter CLLS Opinion Guide]. (“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 a significant difference of practice as between the United States 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.
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 weigh the benefit the recipient seeks from each opinion it is requesting against the difficulty and expense of preparing it, as well as the difficulty of understanding its meaning and what it covers and does not cover. In domestic U.S. transactions this cost/benefit analysis has led to requests for fewer and narrower opinions. Indeed, in some types of domestic U.S. transactions in which closing opinions were once routinely requested, closing opinions now are requested infrequently, if at all. In the cross-border setting a cost/benefit analysis is at least as important.

Many of the opinions U.S. lawyers are asked to give in cross-border transactions appear on their surface to be the same as in domestic U.S. transactions. Appearances, however, can be deceiving. For the reasons discussed in this Report, in cross-border transactions giving opinions commonly given in domestic U.S. transactions often is more difficult and costly; in some cases special assumptions, exceptions, or qualifications must be added to the opinion letter, and in other cases the opinion 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 to understand what particular opinions do and do not cover under U.S. customary practice can be burdensome and costly.

In light of the difficulties 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: (1) the


6. For a discussion of the cost-effectiveness of a third-party opinion on the enforceability of the agreement, see BUS. LAW SECTION, STATE BAR OF CAL., REPORT ON THIRD-PARTY REMEDIES OPINIONS: 2007 UPDATE app. 4, at 15 (2007). (“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.”).

7. See ABA Guidelines, supra note 5, at 877 (§ 2.1). (“Early in the negotiation of the transaction documents, counsel for the opinion recipient should specify the opinions the opinion recipient
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 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. In cross-border transactions in which U.S. lawyers are involved, however, they sometimes are the only lawyers who are asked to deliver a closing opinion even though no good reason exists for treating the U.S. lawyers differently from the non-U.S. lawyers involved in the transaction. This Committee recommends that, rather than automatically expecting U.S. lawyers to give opinions in cross-border transactions, non-U.S. parties and their counsel consider whether they 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 covers the meaning of words and phrases commonly used in closing opinions. Thus, it amplifies the meaning of standard language, supplies customarily understood limitations, and permits the opinion preparers to rely on many generally understood assumptions, exceptions, and qualifications without stating them expressly. U.S. customary practice also establishes the scope and nature of the work the opinion preparers are expected to perform in preparing specific opinions. Important sources of guidance on U.S. customary practice can

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.

Beginning discussions early is even more important in cross-border transactions because the non-U.S. lawyers representing the opinion recipient may not appreciate fully the work required for the U.S. lawyers to give the requested opinions. Also, before the U.S. lawyers can commit to giving an opinion, they may need time to understand how non-U.S. law affects their analysis even though their opinion letter only covers matters of U.S. law. U.S. counsel may be involved in some, but not all, aspects of the transaction and may need extra time to become familiar with relevant issues. Early discussions may lead the opinion preparers to conclude that they need to consult with non-U.S. counsel or lead the opinion recipient to conclude that it needs to consult with U.S. counsel.

8. If non-U.S. lawyers are also delivering closing opinions and in that connection 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.


10. See generally Statement on Customary Practice, supra note 3; see also Restatement (Third) of the Law Governing Lawyers § 51(2)(a) (2000) (lawyer owes duty of care to non-client when lawyer or client “invites the non-client to rely on the lawyer’s opinion”); id. § 95 cmt. c (stating 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”). For a general discussion of the duty of care of opinion givers and the relevance of U.S. customary practice, see Donald W. Glazer, Scott Fitzgerald, & Steven O. Weise, Glazer and Fitzgerald on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in Business Transactions § 1.6.1 (3d ed. 2008) [hereinafter Glazer Treatise].
be accessed through the Legal Opinion Resource Center maintained by the ABA
Legal Opinions Committee. 11

U.S. customary practice governs the preparation and interpretation of closing
opinions of U.S. lawyers, whether delivered in domestic U.S. or cross-border
transactions. In cross-border transactions, when giving opinions to non-U.S. re-
cipients on matters of U.S. law, U.S. lawyers are not expected to ascertain opin-
ion practices in the recipient’s country or any other countries connected with the
transaction, much less to conform their opinion letters to those practices. 12 They
also are not expected to determine how the opinions they are giving are being
interpreted by the non-U.S. recipient or its legal counsel.

When U.S. lawyers deliver closing opinions in cross-border transactions, they
necessarily rely on U.S. customary practice for the meaning and scope 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.
If that were not the case, opinions in cross-border transactions could not take
the same abbreviated form as domestic U.S. closing opinions and instead
would need to spell out—in what is probably impossible detail—all of the as-
sumptions, exceptions, and qualifications that as a matter of U.S. customary
practice are understood to be implicit. 13

When a non-U.S. opinion recipient is not represented by U.S. counsel and
neither the recipient nor its 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. 14 That risk increases when the opinion
request prepared by the recipient’s non-U.S. counsel uses terms not commonly

home.shtml (last visited Sept. 4, 2015); GLAZER TREATISE, supra note 10, apps.

12. In some countries a generally understood practice may not exist on which lawyers can rely for
the meaning and scope of their legal opinions in the same way U.S. opinion givers rely on U.S. cus-
tomary practice. See, e.g., CLLS Opinion Guide, supra note 4, at 13 (¶¶ 63–64) (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 that is easily intelligible
and for the letter to be clearly laid out, or the reader may fail to detect the true message or draw
the correct conclusion). Nevertheless, in England, at least, lawyers recognize that U.S. opinion givers
rely on customary practice rather than stating expressly matters that English lawyers usually state ex-
pressly in opinion letters on English law. See, e.g., CLLS Opinion Guide, supra note 4, at 12 (¶ 60)
(advising English lawyers on opinions given by U.S. lawyers in cross-border transactions).

13. U.S. closing opinions express legal conclusions in a streamlined manner and depend on U.S.
customary practice to supply many assumptions, exceptions, and qualifications that otherwise would
have to be stated expressly in every opinion letter. The ABA Legal Opinion Accord, a document of
almost seventy pages, illustrates the magnitude of the task of trying to spell out all of those assump-
tions, exceptions, and qualifications. See generally Comm. on Legal Ops., ABA Bus. Law Section,
Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law,

14. The same concerns apply to a U.S. recipient of an 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. The U.S.
recipient 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 used in the opinion. See
generally GLAZER TREATISE, supra note 10, § 5.3; IBA REPORT, supra note 2, at 19.
used in U.S. opinions and the U.S. opinion givers respond with an opinion letter that uses standard U.S. terminology.

To help reduce the risk of misunderstanding, this Committee recommends that opinion givers include in their third-party closing opinions an express statement that the opinions they are giving are intended to be interpreted in accordance with U.S. customary practice.15 That statement would: (1) alert non-U.S. recipients to the need for them to obtain informed advice regarding the meaning and scope of the opinions they are receiving; and (2) make clear, if a suit later is brought against the U.S. opinion giver in a court outside the United States, that the opinions are intended to be read, and supported by work done by the U.S. lawyers who give them, in accordance with U.S. customary practice.

Whether or not such a statement is included in an outbound opinion, U.S. customary practice necessarily governs the preparation and interpretation of closing opinions delivered by U.S. lawyers in cross-border transactions, just as it does for those delivered in domestic U.S. transactions. Not including such a statement (even if included in a draft but omitted 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 or to confirm that a non-U.S. recipient understands the meaning of and limitations on the opinions it is receiving. Non-U.S. opinion recipients are responsible for deciding what they need to do to understand the opinions they receive from U.S. lawyers, including, to the extent that they deem appropriate, consulting their own counsel on the application of U.S. customary practice.16 A U.S. opinion giver has no responsibility to counsel the opinion recipient because the opinion recipient is not the opinion giver's client.

15. The language could read as follows:

This opinion letter shall be interpreted in accordance with the Legal Opinion Principles prepared by the Legal Opinions Committee of the American Bar Association’s Business Law Section as published in 53 BUS. LAW. 831 (1998), a copy of which is attached to this opinion letter.

Instead of incorporating the ABA Principles expressly in their opinion letter, some U.S. lawyers refer to U.S. customary practice generally using language such as the following:

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

See, e.g., Donald W. Glazer & Stanley Keller, A Streamlined Form of Closing Opinion Based on the ABA Legal Opinion Principles, 61 BUS. LAW. 389, 393 (2005). If the ABA Principles are incorporated by reference, they may be attached to the opinion letter for greater clarity and easier access by a non-U.S. recipient. See ABA Principles, supra note 3.

16. Nevertheless, as stated in the ABA Guidelines, an opinion giver should not give an opinion that the opinion giver recognizes will mislead the recipient with regard to matters covered by the opinion. ABA Guidelines, supra note 5, at 877 (§ 1.5).
In many cross-border transactions the agreement between the parties chooses the law of a jurisdiction other than the United States as its governing law (the Chosen Law). Opinions given by U.S. counsel cover the law of a specified U.S. state (or states) and often federal U.S. law (the Covered Law). Because U.S. counsel’s opinions do not cover the non-U.S. Chosen Law, the opinion preparers necessarily must assume that each provision of the agreement (including its governing law clause) is valid, binding, and enforceable under the Chosen Law. The assumption covers the choice of law rules of the jurisdiction of the Chosen Law (the Chosen Law Country), the substantive and procedural law of the Chosen Law Country, and the procedural rules governing matters such as the jurisdiction of courts, venue, and service of process that a court in the Chosen Law Country or in another non-U.S. jurisdiction would apply if an action regarding the enforceability of the agreement were brought in that court. 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 outbound opinion letters. Even if the assumption is not stated, however, this Committee believes that it should be understood to apply because non-U.S. recipients cannot expect U.S. lawyers to give opinions without assuming matters covered by the assumption (or to confirm matters under foreign laws that their opinions do not cover).

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

We have assumed that the choice of the law of [FOREIGN COUNTRY] in the Agreement is valid and the Agreement and each of its provisions are valid, binding and enforceable under the law of [FOREIGN COUNTRY] and of any other jurisdiction whose law applies, other than law covered expressly in an opinion included in this opinion letter. [IF THE AGREEMENT CONTAINS A FORUM SELECTION CLAUSE, ADD—We also have assumed that, other than the courts of [COVERED LAW STATE] and United States federal courts, any court named in the forum selection clause of the Agreement will have jurisdiction over the parties and the subject matter of any action brought in that court under the Agreement.]

Because procedural matters ordinarily are governed by the law of the jurisdiction where a legal action is brought (commonly referred to as the lex fori), the third sentence of the illustrative language above covers both (i) the Chosen Law and (ii) if a court named in the forum selection clause is located in a jurisdiction outside the United States other than the Chosen Law Country, the law of that jurisdiction. See infra text accompanying note 123.

The Omnibus Cross-Border Assumption complements the statement traditionally included in an opinion letter regarding the law it is covering (the coverage limitation) because, as discussed in later sections of this Report, some of the legal conclusions the opinion preparers must reach under the Covered Law depend on assumptions as to matters governed by the Chosen Law or the lex fori even though neither one is covered by the opinion. If the opinion preparers expressly state that their opinions are to be interpreted in accordance with U.S. customary practice, for consistency they also ordinarily should state the Omnibus Cross-Border Assumption expressly. See supra note 16 and accompanying text.
III. OPINIONS FREQUENTLY REQUESTED IN CROSS-BORDER TRANSACTIONS AND THEIR RELATIONSHIP TO OPINIONS FREQUENTLY GIVEN IN DOMESTIC U.S. TRANSACTIONS

Some opinions 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 (these opinions are discussed in Parts III-1, -2, -6, -7, and -9). 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 (these opinions are discussed in Parts III-2, -3, and -4).

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. transactions the state whose law is covered by the closing opinion (the Covered Law State) may not be the state whose law is the Chosen Law. In that event, U.S. lawyers sometimes give an opinion on the enforceability of the agreement as if the Covered Law were the Chosen Law. In cross-border transactions, however, when the Chosen Law is the law of a jurisdiction outside the United States, U.S. lawyers ordinarily do not give “as if” enforceability opinions for the reasons discussed below.

To give an “as if” enforceability opinion, the opinion preparers must consider how the highest court of the Covered Law State, in deciding whether to enforce the agreement, would interpret the terms of the agreement under the Covered Law (rather than the Chosen Law). Differences in how the agreement would be interpreted under the Covered Law and under the Chosen Law normally pose a serious problem for the opinion preparers when the law governing the agreement is the law of a jurisdiction outside the United States, because the agreement may use terms from the Chosen Law having no counterparts under the Covered Law. Thus, the opinion preparers have no way to make a profes-

18. To make the opinions they are giving easier for non-U.S. recipients to understand, U.S. opinion preparers may choose to be somewhat more expansive in their cross-border opinion letters than in opinion letters they deliver in domestic U.S. transactions. For example, they may choose to spell out assumptions, exceptions, or qualifications that under U.S. customary practice are generally understood without being stated (even though they may not always spell them out in their domestic U.S. opinion letters), while at the same time making clear that the stated assumptions, exceptions, and qualifications are not intended to be exclusive.

19. That may be because the opinion giver’s client does not have local counsel in the Chosen Law State, or because the opinion recipient does not insist on receiving an opinion on the enforceability of the agreement under the Chosen Law (perhaps because it is receiving that opinion from its own counsel). See TriBar Op. Comm., Special Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions, 59 Bus. Law. 1483, 1497 n.70 (2004) [hereinafter TriBar Remedies Opinion Report] (discussing practice of rendering “as if” enforceability opinions).
sional judgment with the confidence needed to give an opinion as to how the highest court of the Covered Law State would interpret the agreement under the Covered Law.20 Applying the “as if” approach to agreements governed by non-U.S. law also can produce a meaningless opinion because provisions that do not appear in the agreement, such as so-called “non-derogable norms” of contract law in civil law countries, may be among a cross-border transaction’s most material terms, but the opinion preparers cannot be expected to be aware of them.21

Therefore, an “as if” opinion would be of no practical use to the recipient, particularly when one considers that the parties meant for the transaction to be governed by the non-U.S. Chosen Law both to the extent that terms are stated in the agreement and to the extent that provisions of the Chosen Law otherwise apply. The opinion recipient and its non-U.S. counsel presumably know how the agreement would be enforced in the Chosen Law Country. Conversely, neither the opinion recipient nor counsel for the U.S. party knows with any degree of confidence how a court in the Covered Law State that chose to apply the Covered Law, rather than the Chosen Law, might enforce a “hypothetical” agreement (i.e., the “as if” agreement rather than the actual agreement the parties entered into). Moreover, a court in the Covered Law State would likely see no reason to apply its own jurisdiction’s law rather than the law the parties chose and, were it to do so, it would likely have little, if any, precedent to guide it. Thus, rather than speculating about hypothetical scenarios that might make an “as if” opinion meaningful, the opinion recipient would be better served by focusing on whether a court in the Covered Law State, if asked to enforce the agreement, would do what the parties intended: apply the Chosen Law. That topic is discussed in the next section of this Report, which deals with choice-of-law opinions. If a court in the Covered Law State applies the Chosen Law, it will rely on

20. These interpretive issues are equally present when the agreement is drafted in English, or when the opinion preparers are allowed to rely on a translation of the agreement into English, because the problem is not simply language, but legal concepts and technical terms that do not always lend themselves to translation. Even if the parties approve dual versions of the agreement, one in a foreign language and one in English, the situation is not necessarily better and may in fact be worse if suit against the U.S. opinion giver is brought in a court of the Chosen Law Country and ambiguities or conflicts exist between the two versions, because the English version on which the opinion giver relied for the “as if” analysis may or may not be the version on which the court relies.

21. This is not the same issue addressed above (how a provision of the agreement would be interpreted by a court in the Covered Law State). Rather, because a U.S. lawyer willing to give an “as if” opinion is permitted to disregard the Chosen Law, the issue is whether that U.S. lawyer would, in applying the “as if” logic, be analyzing a set of terms that under the Covered Law are in fact different from the those to which the parties intended to agree as they are under the Chosen Law. This issue results from likely differences between the legal system on which the opinion is based and the legal system on which the agreement is based. In many civil law jurisdictions, for example, the parties do not have the same latitude they have in the United States, subject to limited exceptions, to negotiate whatever business terms they wish, which in U.S. practice ordinarily are spelled out in the agreement itself. By contrast, statutes in many code-based jurisdictions supply terms that need not be, and ordinarily are not, set forth expressly in the agreement, or require that agreements conform to a statutory scheme that permits limited deviations from the norm (i.e., a statute either supplements or overrides negotiated contract clauses). Similar problems may arise even when the Chosen Law Country is a common law country. See infra note 33.
testimony from experts knowledgeable about that law and practice in the Chosen Law Country. In so doing, the court will not engage in the exercise in which the preparers of an “as if” enforceability opinion would have to engage: pretending that the agreement is governed by a law (the Covered Law) that the parties did not choose.

These interpretive problems are inherent in giving an outbound “as if” enforceability opinion on an agreement governed by non-U.S. law and create the potential for misunderstanding by the opinion recipient in a cross-border transaction. In giving that opinion U.S. opinion preparers may interpret the 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 those interpretations are based on U.S. legal principles with which the recipient is not familiar. Moreover, as discussed above, the opinion preparers may not have considered material terms because, instead of appearing in the agreement itself, they are prescribed by a statute or other law of the Chosen Law Country. The non-U.S. recipient would have little or no way of knowing how the opinion preparers using the “as if” approach came to the conclusion that a court applying the Covered Law would enforce the agreement, and may not be aware that the opinion does not address what the recipient believes to be the “true” commercial bargain.

For these reasons, this Committee regards as well-advised the practice of U.S. lawyers not to give an “as if” enforceability opinion in cross-border transactions when the agreement is governed by the law of a jurisdiction outside the United States, and believes that insisting that U.S. lawyers give it normally is inappropriate.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, a non-U.S. party to a cross-border transaction may request an opinion from U.S. counsel for the U.S. party that, in an action relating to the parties’ agreement in a court of the Covered Law State, that court will give effect to the governing law clause and

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22. This position is consistent with the IBA Report’s conclusion regarding inbound “as if” enforceability opinions of non-U.S. counsel (“as if” formulation “makes no sense . . . where foreign countries are involved; . . . difference[s] in law and contract practice [make it] ludicrous to suggest to a lawyer from a civil law country or even from a non-U.S. common law jurisdiction that he read a New York law agreement as if it were governed by his law”). IBA REPORT, supra note 2, at 168. Sometimes, but infrequently, U.S. lawyers may be willing to give an “as if” opinion if they are satisfied that the agreement would be interpreted under the Covered Law in the same general way it would under the Chosen Law (for example because they also happen to have expertise in the Chosen Law Country’s law and practice with respect to agreements of the type on which they are giving the opinion). When giving the opinion, they often make clear in the opinion letter that the opinion (i) is based on a reading of the agreement within its four corners and as its provisions would be understood by a lawyer in the Covered Law State, which may be different in meaningful ways from how lawyers in the Chosen Law Country may understand them, and (ii) does not cover any substantive provisions of the non-U.S. Chosen Law that may be incorporated by reference in the agreement or supplied by the law of the Chosen Law Country. Some U.S. lawyers also add a statement to the effect that they are not qualified to interpret the terms of the agreement under the Chosen Law.
apply the Chosen Law.\textsuperscript{23} In the case of contracts, many states have choice-of-law rules based on section 187(2) of the American Law Institute’s Restatement (Second) of Conflict of Laws.\textsuperscript{24} Under section 187(2), a 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 governing law clause (the Default State), if the Default State has a materially greater interest in the issue than the Chosen Law State.\textsuperscript{25} This Report refers to the second exception under section 187(2)—as described in clause (2) above—as the “Second Prong of the Restatement Test.”

In domestic U.S. transactions, when U.S. lawyers give an opinion on the effectiveness of a governing law clause that chooses the law of another state\textsuperscript{26} and the

\textsuperscript{23} This opinion addresses the concern of the recipient that the Chosen Law will not be given effect should it choose to seek enforcement of the agreement in the courts of the Covered Law State (particularly when, as is often the case, the opinion giver’s client has significant operations there), rather than the courts of the Chosen Law Country. For example, in a cross-border loan, if the lender is located in Germany, the borrower is located in California, and the agreement chooses German law, the lender may ask a California lawyer for an opinion that the agreement’s choice of German law will be given effect under California law if the lender sues the borrower in the California courts. See IBA REPORT, supra note 2, at 250. Unlike the “as if” enforceability opinion discussed earlier in this Report (which would cover the agreement generally), the choice-of-law opinion only covers the specific issue whether, if a dispute relating to the agreement were litigated in a California court, the governing law clause would be given effect under California choice-of-law rules.

\textsuperscript{24} RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). This Report assumes that section 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 section 187(2). The first exception under section 187(2) applies when sufficient contacts are not present between the parties or the transaction and the state whose law is chosen. That may be a concern in cross-border transactions when the parties as a matter of convenience or for other reasons (for example, the chosen law’s being better developed for the type of the transaction) choose the governing law of a jurisdiction with which neither they nor the transaction have any relationship. 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 law regardless of whether contacts exist with that state. See, e.g., CAL. CIV. CODE § 1646.5 (West 2006 & Supp. 2011); DEL. CODE ANN. tit. 6, § 2708 (2011); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2010). Such statutes, however, typically do not address the enforceability of choice-of-law clauses 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 the law of a jurisdiction outside the United States as the law governing their agreement. Other states have enacted statutes that validate contractual provisions selecting the law of another jurisdiction, whether a different state or foreign county, if specified conditions are met. See, e.g., TEX. BUS. & COM. CODE §271.005 (West 2013). Some states, for example New York, have developed their own rules for enforcing choice-of-law clauses selecting the law of another jurisdiction. This Report only deals with choice-of-law rules based on section 187(2) of the Restatement.

\textsuperscript{25} RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2).

\textsuperscript{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 in Part III-1, “as if” enforceability opinions normally are not given. See supra text accompanying note 22.
choice-of-law rules of the Covered Law State follow the Restatement, many opinion preparers limit the opinion’s coverage of the Second Prong of the Restatement Test or avoid covering it altogether. They do so because of the difficulty U.S. lawyers have determining with the confidence needed to give an opinion (1) whether the Covered Law would govern in the absence of a governing law clause, (2) whether the state whose law would govern—i.e., the Default State—has a materially greater interest in the issue, and (3) whether giving effect to the agreement under the Chosen Law would violate a fundamental policy of the Default State. Covering the Second Prong of the Restatement Test is even more problematic in the cross-border context because foreign legal systems are involved and each of these three determinations calls for an analysis U.S. lawyers ordinarily are not in a position to make.

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, determining whether a fundamental policy of the Covered Law State would be violated requires the opinion preparers to have a full understanding of what the agreement provides and means under the Chosen Law. When, as this Report assumes, the Chosen Law is the law of a jurisdiction outside the United States, U.S. lawyers will not have that understanding because of their limited, if any, familiarity with that law. Thus, they are not in a position to determine whether giving effect to the agreement as interpreted under the Chosen Law would violate a fundamental policy of any jurisdiction, including one of the Covered Law State. Statutes or other laws in the Chosen Law Country may supply provisions that do not appear in the agreement or may override or modify provisions that do appear. In addition, terms in the agreement, some of which are likely to have no counterparts in U.S. law, may

27. See generally TriBar Op. Comm., Supplemental Report: Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws, 68 Bus. Law. 1161, 1168 & n.25 (2013) [hereinafter TriBar Supplemental Chosen-Law Report] (some lawyers are unwilling to give choice-of-law opinions; others treat the Covered Law State as if it were the Default State; others make clear opinion does not cover possibility that choice-of-law rules of Covered Law State might require consideration of fundamental policies of some other state, e.g., by expressly excluding fundamental policies of other states; and others expressly exclude coverage of fundamental policies of Covered Law State as well as other states).

28. See generally id. at 1163–64 & nn.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 confidence opinions require). In the cross-border context the facts needed to determine what jurisdiction is the Default State are even more complex than in the domestic U.S. context, and the analysis is harder because of the possible relevance of the laws of countries of which the opinion preparers have limited, if any, knowledge. For an example of the kind of fact-intensive inquiry needed for a proper application of the Second Prong of the Restatement Test, see Wise v. Zwicker & Associates, P.C., 780 F.3d 710 (6th Cir. 2014).

29. TriBar Supplemental Chosen-Law Report, supra note 27, at 1166 & n.14 (noting that Restatement requires that agreement be interpreted under the Chosen Law for purposes of determining whether giving effect to agreement will violate fundamental policy of the Default State; meaning of contractual provisions under Chosen Law may be different than under Covered Law and that possibility may prevent opinion preparers from giving choice-of-law opinion, depending on type of agreement, matters covered, and terminology used).

30. See supra note 21 and accompanying text (discussing this interpretive difficulty in context of as-if opinions).
have a meaning under the Chosen Law 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 problem. As a result, even when the terminology of the agreement looks 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.

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 jurisdiction outside the United States. Non-U.S. recipients, however, may request this opinion and regard it as important. This Committee believes that when the choice-of-law rules of the Covered Law State follow section 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 jurisdiction outside the United States, but, for the reasons discussed above, only if the opinion does not cover the Second Prong of the Restatement Test. Accordingly, this Committee recommends

31. The IBA Report recognizes 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 governing the agreement. Id. at 260. For the reasons discussed later in this Part, this Committee disagrees with these conclusions and recommends that the opinion expressly exclude coverage of the fundamental policies of any jurisdiction (whatever the Default State may be) that under the Second Prong of the Restatement Test might lead a court in the Covered Law State to decline to enforce the governing law clause. See infra note 33 and accompanying text.

32. 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.

33. The same problems can arise even when the agreement is in English and the language of the Chosen Law Country also is English. An example is the phrase “best efforts,” a phrase that U.S. opinion preparers would likely not know has a different meaning 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 obligation involved, no matter how onerous. In the United States, “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 using “best efforts” as interpreted under English law violates a fundamental policy of the Covered Law State against the imposition of a penalty if, for example, it requires a party to spend extravagant sums to cure 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 failure (albeit understandable) of U.S. opinion preparers to understand the English interpretation of “best efforts” might result in an erroneous opinion that the choice of English law will be given effect by the courts of the Covered Law State (even assuming that the Default State is the Covered Law State).

34. 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
that, when giving choice-of-law opinions in cross-border transactions in which the Chosen Law is the law of a jurisdiction outside the United States, U.S. lawyers exclude coverage of the Second Prong by making clear in the opinion letter, by means of an express exception or assumption, that the opinion does not cover the fundamental policies of the Covered Law State or any other state or country that may be the Default State. 35

An outbound choice-of-law opinion that does not cover fundamental policies under the Second Prong of the Restatement Test still covers 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) that would prevent a court in the Covered Law State from giving effect to the governing law clause; (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 against application of the Chosen Law by the courts of the Covered Law State. 36

When the Chosen Law is the law of a jurisdiction outside of the United States, the opinion preparers are entitled to base a choice-of-law opinion on an assumption 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.”.

35. The opinion could be worded as follows:

Under the law of [COVERED LAW STATE], the choice of the law of [FOREIGN COUNTRY] in the Agreement is valid except to the extent that giving effect to the law of [FOREIGN COUNTRY] would violate a fundamental policy of (i) the jurisdiction whose law is covered by this opinion letter or (ii) any other jurisdiction having a materially greater interest than [FOREIGN COUNTRY] in the determination of the issue, if the law of that jurisdiction would apply to the Agreement or any of its provisions in the absence of a governing law clause.

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 other jurisdictions whose law may apply. This Committee recommends against including such language because of the difficulty discussed earlier in this Part of establishing a reasonable basis for that belief and because statements regarding an opinion giver’s knowledge or belief should be limited to matters of fact, not law. See TriBar Op. Comm., Third-Party “Closing” Opinions: A Report of the TriBar Opinion Committee, 53 BUS. L.AW. 591, 619 n.59 (1998) [hereinafter TriBar 1998 Report].

36. These are some of the reasons why governing law clauses are not enforced in many countries. They explain why non-U.S. recipients ordinarily expect to receive choice-of-law opinions even though subject to “public policy” limitations. See IBA REPORT, supra note 2, at 165. Not all states apply choice-of-law rules based on section 187(2) of the Restatement, and even those that do may not follow the Restatement in all respects. See TriBar Supplemental Chosen-Law Report, supra note 27, at 1162 & n.2. When applying section 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 to assess what other determinations, if any, are required under the Covered Law. New York, for example, applies common law principles in determining whether to give effect to a choice-of-law clause choosing the law of another state. Id.
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.37

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 and to that end include in their agreements mandatory arbitration clauses.38 Arbitration clauses, however, would be of no value if courts were unwilling to compel the parties to arbitrate or to enforce arbitral awards made under them.39 Consequently, when an arbitration clause is included in an agreement in a cross-border transaction, a non-U.S. party may ask U.S. counsel for the U.S. party for an opinion that, under the Covered Law, (1) the agreement of the parties to arbitrate is an enforceable obligation of the U.S. party and (2) an arbitral award against the U.S. party made in accordance with the clause will be recognized and enforced by courts in the Covered Law State without a re-hearing on the merits.

The United States is a signatory to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which is commonly referred to as the New York Convention).40 As discussed in greater detail in Parts

37. See supra text accompanying note 17. Because the Chosen Law is the law of a jurisdiction outside the United States, the validity and binding effect of the agreement as a whole are not governed by the Covered Law. Often 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 168–72.

38. 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.

39. Although international arbitration is a private method of dispute resolution, it requires the support of a legal system if a party refuses to arbitrate or the losing party refuses to honor an arbitral award. See generally ALAN REDEFFER ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 328 (4th ed. 2004). The court asked to enforce an arbitral award often will not be located where the arbitration took place, but rather where the losing party has operations or assets. Because the law of any one country may not be sufficient to deal with international arbitration, countries have entered into treaties and conventions. These treaties and conventions have the force of law in all signatory countries and are applied by their national courts.

III-3.1 and III-3.2, if the New York Convention applies to the transaction, U.S. counsel for the U.S. party usually will have no difficulty giving an opinion that, subject to the exceptions provided in the New York Convention, the agreement to arbitrate is enforceable under U.S. federal law against the U.S. party and an arbitral award made in accordance with the clause will be recognized and enforced in the United States. This opinion does no more than confirm that the prerequisites for application of the New York Convention have been satisfied. It does not cover the applicability of any of the exceptions provided in the New York Convention, whether in the context of a suit to compel arbitration or a suit to have an arbitral award recognized and enforced.

Chapter 2 of the Federal Arbitration Act (the FAA) brings the provisions of the New York Convention into the framework of the U.S. legal system. 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


41. See infra notes 54–71 and accompanying text.

42. The New York Convention in the form ratified by the United States is not applicable to agreements to arbitrate in countries that are not signatories. See infra note 48. While this Report only deals with arbitration clauses subject to the New York Convention, if another international treaty to which the United States is a party applies to the arbitration clause, the ability of a U.S. lawyer to give an opinion on its enforceability will depend on the wording of the treaty and practice in its application. In the absence of a governing international treaty, the opinion preparers often will be unable to give an opinion on the arbitration clause because of the cost of doing the legal analysis and the difficulty of making the necessary determinations.

43. See infra text accompanying notes 56, 65–66. As a practical matter, the opinion preparers cannot address whether a U.S. court will determine that an exception provided in the New York Convention applies to a future dispute because that determination will depend on the specific claims made and the legal issues raised when a suit actually is brought.

44. See 9 U.S.C. §§ 201–208 (2012). Sections 203–205 of the FAA give U.S. federal courts non-exclusive jurisdiction over actions to enforce international arbitration agreements and awards, regardless of the amount in controversy, and allow defendants to remove actions brought in state court to federal court. See id. §§ 203–205. 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. See id. §§ 206–207. Domestic, rather than international, arbitration clauses are covered by Chapter 1 of the FAA, not Chapter 2.

45. That is the case for both domestic arbitration in interstate U.S. commerce and international arbitration. This Report does not address how opinion preparers deal with arbitration clauses in closing opinions delivered in domestic U.S. transactions, where practice is not uniform. While beyond the scope of this Report, opinion preparers should be aware that the case law dealing with domestic U.S. arbitration clauses has not always been consistent when state law and Chapter 1 of the FAA do not line up precisely. Some aspects of state law also may apply to international arbitration, so long as they do not conflict with the New York Convention. Depending on the state, therefore, the opinion preparers may have to consider state law on arbitration in addition to Chapter 2 of the FAA.

46. For example, the United States is a party to the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 [hereinafter Panama Convention], which Congress has implemented in Chapter 3 of the FAA. See generally 9 U.S.C. §§ 301–307 (2012). Chapter 3 of the FAA incorporates by reference sections 202–207 of the FAA. See id. § 302. As a result, implementation of the Panama Convention tracks closely that of the New York Convention. Under both the
the most important. This Report covers only opinions on arbitration clauses subject to the New York Convention. If the arbitration clause is not subject to the New York Convention and related provisions of the FAA, this Report does not address whether an opinion can be given.

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 United States, the contract is to be performed outside the United States, or the transaction bears some other reasonable relationship to a foreign country. In addition, in the United States the New York Convention is subject to two important reservations: (1) a reciprocity requirement that limits its application to awards made in other countries that are parties to the Convention; and (2) a requirement that limits its application to transactions considered “commercial.” Neither the New York Convention nor the FAA defines the term “commercial,” leaving that issue to the courts.

New York Convention (as implemented by the United States) and the Panama Convention, U.S. courts will only recognize and enforce arbitral awards made in arbitrations conducted 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. See id. § 305. In all other cases the New York Convention applies.

47. The New York Convention has more signatories than any other convention relating to arbitration. See generally New York Convention Status, supra note 40. 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.

48. These reservations were adopted by the United States through a 1970 instrument of accession. See New York Convention Status, supra note 40.

49. U.S. courts have interpreted reciprocity as a formal requirement, not as a substantive issue. 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).

50. The New York Convention allows signatory countries to declare, as the United States 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 40. 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 (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 40. When U.S. courts have considered whether particular activities are “commercial” under the New York Convention and the FAA, they often have treated “commercial” in the international context as encompassing 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 55 & 60.
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 the country where recognition and enforcement of the award are sought.\(^\text{51}\) As discussed later in this Part, 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 United States or is silent as to the location of the arbitration.\(^\text{52}\)

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 arbitral awards, and construed narrowly the grounds for judicial review of arbitral awards.\(^\text{53}\)

51. New York Convention, \textit{supra} note 40, 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. \textit{See generally} Paolo Contini, \textit{International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards}, 8 Am. J. Comp. L. 283, 293–94 (1959). Application of the first part of the definition of foreign arbitral award is purely mechanical. Application of the second part, however, requires a facts-and-circumstances analysis because, if an arbitral award regarding a cross-border transaction is made in the United States, the New York Convention may or may not apply depending on whether U.S. law considers the award a “domestic” or “non-domestic” award. The New York Convention leaves it to signatory countries to define “non-domestic” awards. The United States has not adopted a statutory definition, leaving the term for the courts to define. \textit{See} Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983) (award made in New York involving Norwegian and Swiss parties a “foreign” award because award made within the legal framework of another country, e.g., under foreign law or involving non-U.S. parties, is not considered domestic).

52. 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 New York Convention clearly applies to: (1) arbitral awards made outside the United States, because they satisfy the “territorial” part of the definition discussed earlier in this Part so long as the transaction itself has a foreign nexus; and (2) arbitral awards made in the United States if the parties are all non-U.S. parties. What is not as clear under the Convention and cases interpreting it, however, is whether and when an award made in the United States involving a transaction between a U.S. party and a non-U.S. party will be held under U.S. law to be a “domestic” award rather than a “foreign” award. \textit{See, e.g.}, Yusuf Ahmed Alghanim & Sons, W.L.L. 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 the 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 Mére, 51 F.3d 686 (7th Cir. 1995) (arbitration dispute between French and Indian parties governed by French law clearly within Chapter 2 of the FAA, but where agreement failed to specify a location for arbitration U.S. district court had same power under Chapter 1 of the FAA to compel arbitration in its own U.S. district as it would for domestic arbitration), \textit{cert. denied}, 516 U.S. 914 (1995). In those situations the opinion preparers may need to assume expressly that the transaction and the dispute subject to arbitration have a foreign nexus sufficient to satisfy the second part of the definition of “foreign arbitral award” in the New York Convention or that the arbitration will take place outside the United States so as to satisfy the first part of that definition. \textit{See infra} text following notes 55 & 63.

53. The New York Convention imposes two principal requirements on U.S. courts: first, it requires them to defer to the jurisdiction of arbitrators when actions are brought concerning matters covered by arbitration agreements; and second, it requires them to enforce foreign arbitral awards.
agreements to arbitrate outside the United States are discussed in Part III-3.1. Outbound opinions on the recognition and enforcement in the United States of future foreign arbitral awards are discussed in Part III-3.2.

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”\(^{54}\) 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.”\(^{55}\) Giving an opinion in reliance on the

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\(^{54}\) 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. New York Convention, supra note 40, art. II.2. The New York Convention does not prescribe the precise form of the agreement to arbitrate, however, 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, e.g., Chloe Z Fishing Co. v. Odyssey 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); see generally Asken & Dorman, supra note 53. The requirement that an agreement be in writing rarely is a problem for the opinion preparers because closing opinions ordinarily are given only 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 its governing law, they should decline to give an opinion if the agreement to arbitrate is not in an agreement signed by both parties, unless they are willing to deal with issues such as whether an exchange of e-mails satisfies the requirement that an arbitration agreement be in writing.

\(^{55}\) See New York Convention, supra note 40, 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 the jurisdiction in which the court is located. Redfern et al., supra note 39, 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 50, 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). Courts in the United States generally presume that disputes in cross-border transactions are capable of settlement by arbitration and show significant deference to arbitrators’ decisions regarding threshold arbitration issues. See, e.g., BG Grp. Plc v. Republic of Argentina, 134 S. Ct. 1198 (2014); see generally Redfern et al., supra note 39, at 172. Accordingly, while arbitrability is a requirement for the application of the New York Convention, it normally will not prevent U.S. lawyers from giving an opinion that an agreement to arbitrate is enforceable under the Covered Law because arbitrability is rarely an issue in the types of cross-border transactions on which opinions are requested.

The term “arbitrability” is sometimes used to refer to the separate issue of whether the parties to an agreement intended that a particular dispute be arbitrated. See, e.g., Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (party cannot be required to submit to arbitration a dispute it
New York Convention on the enforceability of an agreement to arbitrate requires the opinion preparers to determine that the New York Convention applies. If the agreement to arbitrate is silent or ambiguous as to whether arbitration must take place outside the United States, or expressly allows arbitration to take place either in the United States or elsewhere, the New York Convention may not apply because an award made in an arbitration conducted pursuant to that type of agreement may not qualify as a foreign arbitral award. In those situations many opinion givers include in their opinions an express assumption that arbitration will take place outside the United States. Alternatively, they may base the opinion on an express assumption that the transaction and the dispute subject to arbitration have a sufficient foreign nexus to satisfy the second part of the definition of a “foreign arbitral award” in the New York Convention.

A court may refuse to enforce an agreement to arbitrate to which the New 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

has not agreed to submit); Opalinski v. Robert Half Int'l, Inc., 761 F.3d 326, 334 (3d Cir. 2014) (arbitrability a “gateway” issue for judicial determination unless parties unmistakably provide otherwise; court to decide whether arbitration clause applies to a particular type of controversy); see generally Parker, supra note 50, at 111 & n.41 (suggesting that American courts’ increasing use of “arbitrability” interchangeably with “jurisdiction” is regrettable since it blurs distinction between refusing to compel arbitration because of parties’ drafting choice and refusing to compel because non-waivable legal rules prohibit arbitrator from considering subject matter). Lack of intent to arbitrate a particular matter is one of the defenses the New York Convention provides a party resisting enforcement. Unlike subject matter arbitrability, however, the intent of the parties to arbitrate a particular dispute cannot be determined (if it can at all) until after an actual dispute arises and, therefore, is not covered by an opinion on the validity of an arbitration clause. Moreover, as discussed later in this Report, the applicability of specific defenses or exceptions under the Convention is not covered by the opinion. See infra notes 59–60. Consistent with international practice, this Report uses the term “arbitrability” only as described in the preceding paragraph.

56. 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 deciding whether an arbitration clause that is part of a broader agreement (as opposed to a stand-alone agreement) is invalid under this exception, a court theoretically could approach “validity” in one of two ways: it could consider the validity of the broader agreement of which the clause is part, or it could consider only the validity of the arbitration clause itself. Courts in the United States generally have chosen not to focus on whether the broader 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,” New York Convention, supra note 40, art. II(3), they refer the parties to arbitration and leave the validity of the broader agreement, as well as any other disputed issues raised by the parties, for 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 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 arbitral forum and rules so as to give effect to the parties’ intent that disputes between them be resolved outside of the courts. This authority, however, is used rarely.
arbitration agreement can ask a court to compel the other party to arbitrate.\textsuperscript{57} Second, if a party to an 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 subject to the New York Convention requiring arbitration outside the United States of future disputes arising in connection with a cross-border transaction is enforceable under U.S. federal law,\textsuperscript{58} subject to the exceptions in the New York Convention.\textsuperscript{59} 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 (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

\textsuperscript{57} Commentators have pointed out that enforcing an agreement to arbitrate is different from enforcing other commercial agreements. See, e.g., Redfern et al., supra note 39, at 8. 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, 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 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.

\textsuperscript{58} This opinion addresses a federal statute (the FAA). Thus, to reduce the risk of misunderstanding, the opinion letter should cover U.S. federal law expressly, at least for purposes of this opinion.

\textsuperscript{59} The opinion could be worded as follows:

\begin{quote}
The arbitration clause in Section ___ of the Agreement is valid and enforceable under the federal law of the United States and the law of [COVERED LAW STATE], except to the extent that an exception set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Federal Arbitration Act, 9 U.S.C. §§ 201–208, applies.
\end{quote}

Some opinion givers choose to be specific about the scope of the arbitration clause in the agreement (instead of just referring to it as an “arbitration clause”) to make it clear that the agreement to arbitrate must fall within the coverage of the New York Convention and the FAA by using language such as the following:

\begin{quote}
The Company’s covenant in Section ___ of the Agreement to submit to mandatory arbitration in [ARBITRAL TRIBUNAL OUTSIDE THE UNITED STATES] is valid and enforceable under the federal law of the United States and the law of [COVERED LAW STATE] to the extent that the arbitration relates to contract claims arising under the Agreement, except to the extent that an exception set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Federal Arbitration Act, 9 U.S.C. §§ 201–208, applies.
\end{quote}

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, inoperable, or incapable of being performed. New York Convention, supra note 40, art. II(3); see also supra note 56 and accompanying text.
first three requirements are primarily matters of form. The “commercial” and “arbitrable” prerequisites require the opinion preparers to reach substantive legal conclusions that will rarely be a problem in the kind of cross-border transactions in which outbound opinions are requested. When the agreement

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60. For a general discussion of subject matter arbitrability, see supra note 55. Although many cases decided under the FAA discuss which matters are arbitrable, cases discussing the meaning of “commercial” are 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 statute. See Joseph T. 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., 500 U.S. 20 (1991) (finding claim for discrimination under Age Discrimination in Employment Act of 1967 arbitrable); Rodriguez de Quijas v. Shearson/Amp. Express, Inc., 490 U.S. 477 (1989) (finding claims under Securities Act of 1933 arbitrable); Shearson/Amp. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (finding claims under Securities Exchange Act of 1934 and RICO arbitrable); Mitsubishi Motors Corp. v. Soled 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, 517 (1974) (upholding compulsory arbitration of fraud-based claims where subject matter of transaction was sale of securities in case involving international commerce to prevent “damage [to] the fabric of international commerce and trade,” even though subject matter may not have been arbitrable in domestic transactions). Lower courts often cite the U.S. Supreme Court’s statement in Mitsubishi that “international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes” compel them to enforce arbitration. See Mitsubishi Motors, 473 U.S. at 629.

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 insolvency. McLaughlin, supra, at 936, 937; see, e.g., Mitsubishi Motors, 473 U.S. at 629; 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); Societe Nationale Algerienne Pour La Recherche, La Production, Le Transport, La Transformation et La Commercialisation des Hydrocarbures v. Distriegas Corp., 80 B.R. 606, 613–14 (Bankr. D. Mass. 1987) (bankruptcy stay modified to allow international arbitration).

Licenses of intellectual property commonly include arbitration clauses. Although at one time arbitrability sometimes was an issue when the subject of a dispute was 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) (federal patent and trademark protections considered matters reserved for the courts)), in 1982 Congress expressly provided for the arbitration of patent-related issues (see 35 U.S.C. § 294 (2012)), and courts have found that U.S. law does not forbid arbitration of disputes relating to copyrights and trademarks even in the absence of a specific federal statute. 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. See 42 U.S.C. § 12212 (2012) (Americans with Disabilities Act); id. § 1981 (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 ordinarily should decline to give the opinion because courts may be reluctant to sever claims involving non-arbitrable matters from other claims if they all arise under the same 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. Chosen Law. For this purpose they are entitled to rely without so stating on the Omnibus Cross-Border Assumption. ⁶¹

III-3.2 Recognition and Enforcement of Foreign Arbitral Awards in the United States

If the losing party refuses to honor a foreign arbitral award, the winner typically will seek to enforce it in the courts of a jurisdiction where the losing party has operations or assets. ⁶² 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. ⁶³

Giving an opinion on the recognition and enforcement in the United States of a foreign arbitral award against a U.S. party requires a determination by the opinion preparers that the New York Convention applies. This is the same issue the opinion preparers are required to address when giving an opinion on the enforceability of an agreement to arbitrate, as discussed earlier in this Report.

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 United States established its procedures in Chapter 2 of the FAA. ⁶⁴

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⁶¹ See supra note 17 and accompanying text. Typically non-U.S. parties will request an opinion from U.S. counsel that the U.S. party has the corporate power to enter into the agreement containing the arbitration clause and that it has duly authorized, executed, and delivered the agreement. See infra text accompanying notes 168–72.

⁶² 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 arbitral 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).

⁶³ See generally New York Convention, supra note 40. Both recognition and enforcement of an arbitral award deal with giving effect to the decision of the arbitrators, as opposed to compelling the parties to submit their dispute to the arbitrators for a decision. 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 treat an arbitral award as a defense or counterclaim if the losing party brings a suit relating to a dispute that was the subject of the arbitration in which the award was made.

⁶⁴ See 9 U.S.C. §§ 201–208 (2012). 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 an 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,
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 in which enforcement is sought. The New York Convention lists seven grounds for refusing recognition and enforcement of an arbitral award and provides that the list is exhaustive, not illustrative.

Only the party resisting enforcement (not the court) may assert five of the seven grounds for refusing recognition and enforcement under the New York Convention: (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 the U.S. policy of favoring enforcement of foreign arbitral awards, U.S. courts generally have applied these grounds narrowly so as not to undermine the reliability of international arbitration for resolving disputes.65

Either the party resisting enforcement or the court on its own motion may raise the remaining two grounds for refusing recognition and enforcement under the New York Convention: (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 jurisdiction. As noted above, U.S. courts have rarely held disputes arising under cross-border agreements to be non-arbitrable.66 While the
claim that recognition and enforcement of the award would be contrary to public policy is raised frequently, U.S. courts generally have construed that defense narrowly out of concern that refusing to give effect to an award on public policy grounds would disrupt the reliance many parties to cross-border agreements place on arbitration as a dispute resolution mechanism. 67

An opinion normally can be given that a foreign arbitral award made pursuant to an arbitration clause to which the New York Convention applies will be recognized and enforced in the United States under federal law, 68 subject to the exceptions set forth in the New York Convention. 69 To give the opinion, the opinion preparers need to satisfy themselves that the New York Convention and the FAA will apply to the award by determining that the Five Arbitration Prerequisites

an award is different. To give an opinion that an agreement to arbitrate is enforceable, the opinion preparers must consider the broader issue of whether the subject matter of the agreement can be included in a pre-dispute agreement to arbitrate. See supra notes 55 & 60 and accompanying text. To give an opinion that a future arbitral award will be recognized and enforced, however, the opinion preparers do not have to consider arbitrability because it is one of seven exceptions in the New York Convention and the opinion does not cover their possible application to awards made after an opinion is given. See 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 50, 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 made to protect public interest, though second look might open door to rehearing on merits).

67. The language first used by the court in Parsons & Whittemore Overseas Co. v. Société Générale de l’Industrie du Papier (RAKTA) 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.” 508 F.2d at 974; see also Park, supra note 50, at 128, see generally Gillies, supra note 53.

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

69. The opinion could be worded as follows:

Except to the extent that an exception 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”), applies, an arbitral award made under Section __ of the Agreement will be recognized and enforced under the New York Convention and the FAA, if a proceeding to enforce the award is properly brought in a United States federal court within three years after the arbitral award is made.

Some lawyers choose to make clear that the arbitral award must be a “foreign” award under the New York Convention and the FAA by using language such as the following:

Except to the extent that an exception 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”), applies, an arbitral award made by [ARBITRAL TRIBUNAL OUTSIDE THE UNITED STATES] in accordance with the requirements of Section __ of the Agreement will be recognized and enforced under the New York Convention and the FAA to the extent that the arbitration relates to contract claims arising under the Agreement, if a proceeding to enforce the award is properly brought in a United States federal court within three years after the arbitral award is made.

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 40, art. V.2; see also supra notes 66–67 and accompanying text.
discussed in Part III-3.1 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 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 or public policy. Therefore, an opinion that a foreign arbitral award will be recognized and enforced in the United States 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, many opinion givers make clear in the opinion letter that they are not covering those exceptions, and this Committee endorses that approach.

III-4 Litigation in the Cross-Border Context

Although the parties to cross-border agreements often choose arbitration as the method for resolving disputes (in part because arbitration is governed by a network of international treaties), they also often leave disputes for the courts to decide. When they do, to avoid having to litigate in unfamiliar courts under unfamiliar laws, they often include a clause naming the courts of one or more countries as the forum for resolving disputes relating to the agreement, as well as a choice-of-law clause, opinions on which are discussed in Part III-2. Taken together, these clauses are intended to determine both the court or courts in which suit will be brought and the law to be applied. A court named expressly in a forum selection clause is referred to in this Report as a “named court.”

When a forum selection clause is included in a cross-border agreement, the non-U.S. party may request 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 Part III-4.1, provides comfort to the non-U.S. party that courts in the Covered Law State will defer to the parties’ choice of courts when deciding whether to consider the merits of a dispute. In domestic U.S. transactions separate opinions are rarely requested or given on the enforceability of forum selection clauses.

Non-U.S. parties to cross-border agreements that do not provide for arbitration but name a non-U.S. court as the forum for resolving disputes also may request an opinion that courts in the Covered Law State will recognize and enforce


71. See supra note 69 and accompanying text.

72. The courts of all the jurisdictions involved in a cross-border transaction ordinarily can claim jurisdiction over a dispute between the parties. Therefore, the parties often specify in the agreement the courts they want to resolve disputes under the agreement. The desire to establish a uniform international framework for doing so with assurance of a consistent outcome was the impetus behind the Hague Convention on Choice of Courts Agreements (the Hague Convention). See infra Part III-4.3 and text accompanying notes 141–56.

73. See infra text accompanying note 74.
a foreign judgment rendered by the named court. This opinion, which is discussed in Part III-4.2, provides comfort to the non-U.S. party that, if it prevails in litigation before a court located in a jurisdiction outside the United States, it will be able to enforce that court’s judgment against the U.S. party in a court in the Covered Law State without a rehearing on the merits. This opinion typically is not requested in domestic U.S. transactions principally because the Full Faith and Credit Clause of the U.S. Constitution requires that a judgment obtained in any U.S. state be enforced in all other U.S. states.

Cross-border agreements often specify how process can be served on parties in different countries. Non-U.S. parties sometimes request an opinion from U.S. counsel that service on the U.S. party it represents in the manner specified in the agreement will be given effect in the courts of the Covered Law State. This opinion is discussed in Part III-4.4.

III-4.1 Forum Selection

This Part deals primarily with opinions on forum selection clauses that name non-U.S. courts as the forum for resolving disputes under the agreement (referred to in this Report as “outbound forum selection clauses”). This Part also deals with opinions on forum selection clauses that name courts in the Covered Law State (referred to in this Report as “inbound forum selection clauses”). Opinions on inbound forum selection clauses are not unusual when cross-border agreements name U.S. courts (often federal courts) as an alternative to non-U.S. courts.

In domestic U.S. transactions in which the agreement includes a forum selection clause a separate opinion ordinarily is not given on the effectiveness of that clause. Instead, unless expressly excluded, the enforceability of the forum selection clause usually is covered by an opinion on the enforceability under the Covered Law of the agreement of which the clause is a part.74 Similarly, in cross-border transactions in which the Covered Law is the Chosen Law (for example New York law is chosen and New York courts are named), an opinion on the enforceability of the agreement under New York law covers the effectiveness of the inbound forum selection clause unless coverage of that clause is expressly excluded from the opinion.75

This Report, however, focuses on cross-border transactions in which the agreement chooses the law of a jurisdiction outside the United States as the governing law. When that is the case, U.S. lawyers are not in a position, as noted earlier, to give an opinion on the enforceability of the agreement as a whole.

74. See generally TriBar Remedies Opinion Report, supra note 19, at 1498 & n.72 (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 name the courts of the Covered Law State, which often is the case in cross-border agreements choosing non-U.S. law as their governing law, where often the courts of the Chosen Law Country are named.
75. See generally IBA REPORT, supra note 2, at 192–95.
As a result, non-U.S. parties may ask U.S. counsel for a separate opinion that addresses whether a court in the Covered Law State applying the Covered Law would give effect to the forum selection clause specifically.\textsuperscript{76} The opinion does not address the related, but different, matter of venue selection (i.e., designation in the agreement of a specific federal district court or a specific court of the Covered Law State as the only one in which suit may be brought).\textsuperscript{77}

\textbf{III-4.1.1 Permissive and Mandatory Forum Selection Clauses}

A forum selection clause can be either permissive or mandatory. A permissive clause, often described also as a “consent to jurisdiction clause,” typically permits the parties to bring suit in courts of a specified state or country, but does not prohibit the parties from bringing suit elsewhere.\textsuperscript{78} A mandatory clause requires

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\textsuperscript{76} As discussed in Parts II-4.1.3 and II-4.1.4, the opinion is worded differently depending on the type of forum selection clause and is subject to different assumptions, exceptions, and qualifications, which may be stated or unstated.

\textsuperscript{77} As a matter of U.S. customary practice, if the agreement contains an inbound forum selection clause the opinion is understood to be based on an assumption, which may be stated or unstated, that an action brought in a named court in the United States will meet applicable federal or state venue requirements. Some U.S. lawyers choose to include an express exception for venue requirements, particularly when the agreement names a specific federal district court, because of the wide discretion federal courts have exercised under 28 U.S.C. § 1404(a) to transfer venue from one federal district to another. \textit{But see infra} note 129.

Opinions specifically covering venue selection are rarely requested or given because of the inability to know whether venue requirements will be satisfied when an action is actually brought. Depending on the law of the Covered Law State, state courts may have discretion to decide the proper venue, without necessarily according significant deference to the parties’ choice. Federal venue generally is governed by 28 U.S.C. § 1391, which provides three alternative grounds for establishing whether venue is proper: (1) if all parties reside in the state where the court is located, a federal district where any defendant resides; (2) a federal district where the events occurred or the property is located; or (3) any federal district in which the court has personal jurisdiction over the defendant. Ordinarily the opinion preparers have no way of knowing whether the first or second ground will be satisfied, and in cross-border transactions often they will not be satisfied. The third ground ordinarily should be satisfied if the forum selection clause includes an express consent of the parties to be sued in the federal district court named in the agreement; in some circumstances, however, that may not be so, for example when neither the parties nor the transaction has any connection with the United States. If venue is improper, the case must be dismissed or transferred under 28 U.S.C. § 1406(a) or Federal Rule of Civil Procedure 12(b)(3). \textit{See, e.g., Richards v. Lloyd’s of London, 135 F. 3d 1289, 1295 (9th Cir. 1998) (dismissing for improper venue under Rule 12(b)(3)); Jones v. Weibrecht, 901 F. 2d 17, 19 (2d Cir. 1990) (dismissing claim covered by mandatory forum selection clause for improper venue under Rule 12(b)(3)); \textit{cf.} Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (valid forum selection clause given controlling weight in all but the most exceptional cases); Lambert v. Kysar, 983 F. 2d 1110, 1112 n.1 (1st Cir. 1993) (applying Rule 12(b)(6)).}

\textsuperscript{78} 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 personal jurisdiction over the other party. \textit{See Michael Gruson, Forum Selection Clauses in International and Interstate Commercial Agreements, 1982 U. Ill. L. Rev. 133, 192–205 [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 a U.S. state where the U.S. party has assets or operations. \textit{See infra} notes 97–108 and accompanying text.

Permissive clauses often are accompanied by a waiver of the right to assert the doctrine of \textit{forum non conveniens} in suits brought in courts 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
the parties to bring suit only in the courts of the specified state or country to the exclusion of all others. Both permissive and mandatory forum selection clauses typically include the voluntary consent by the parties 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 cross-border agreement either: (1) permits the parties to bring suit in courts in the U.S. state 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”), or (2) requires the parties to bring suit only in a specified court in the United States (referred to in this Report as a “mandatory inbound forum selection clause”).  

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 named 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. 

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 a court named in the clause, the party being sued cannot claim that a different court would be more convenient.

79. Even if the consent is not expressed, U.S. courts ordinarily deem it implicit in the clause. See infra note 104 and accompanying text. But see Global Packaging Inc. v. Superior Court of Orange Cty., 196 Cal. App. 4th 1623 (2011) (if parties mean forum selection clause to include consent to jurisdiction, they should not leave it to implication because courts should not be called upon to function as a backstop for sloppy contract drafting).


81. This Part focuses on the typical situation in which the courts selected in the forum selection clause are those of the Chosen Law Country.

82. 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. See infra note 103 and accompanying text.

83. When an agreement chooses non-U.S. law as its governing law, a forum selection clause ordinarily will not require that suit be brought only in the United States. When it does, it rarely requires that suit be brought only in a state court in the United States. It is more common that the agreement requires that suit be brought only in a federal court in the United States. Some agreements simply refer to “courts in the State of _________,” which could be interpreted to mean either that state’s courts or U.S. federal courts sitting in that state.

84. See infra text accompanying note 100; see also infra note 136 and accompanying text (discussing 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).
An opinion that a permissive inbound forum selection clause naming the courts of the Covered Law State will be given effect under the Covered Law 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 an agreement containing a forum selection clause naming the courts of the Covered Law State in a domestic U.S. transaction, 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 named in the clause.

An opinion on a mandatory outbound forum selection clause requires the opinion preparers to conclude that courts in the Covered Law State applying the Covered Law would grant the request of the non-U.S. opinion recipient to refuse to hear the case on its merits, and therefore would dismiss it, if the opinion giver’s client, contrary to the agreement, sues the non-U.S. party in those courts. This dismissal is sometimes referred to as an “ouster” of the case to the courts of the Chosen Law Country named in the agreement.

An opinion on a mandatory inbound forum selection clause requires the opinion preparers to conclude that, under the Covered Law, the parties’ choice of the named state or federal court would be given effect.

The work required to give an opinion on a permissive forum selection clause (discussed in Part III-4.1.3) is different from that required for a mandatory forum selection clause (discussed in Part III-4.1.4). 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.

As discussed later in this Part, courts in the Covered Law State may look to the non-U.S. Chosen Law when deciding whether a particular forum selection clause

85. See TriBar Remedies Opinion Report, supra note 19, at 1500 & 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); see also infra text accompanying notes 104–08.

86. 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 of law in most cases. See, e.g., Global Seafood Inc. v. Bantry Bay Mussels Ltd., 659 F.3d 221 (2d Cir. 2011) (clause held permissive because it contained no specific language of exclusion depriving U.S. court of jurisdiction); Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987). In the United States, forum selection clauses usually are presumed to be permissive unless the parties clearly provide that they are mandatory. See, e.g., New Moon Shipping Co. 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).

Outside the United States, forum selection clauses often are presumed to be mandatory unless the parties clearly provide that they are permissive. See, e.g., Council Regulation (EC) 44/2001 of 22 December 2000, art. 23, 2001 O.J. (L 12) 8 (Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) [hereinafter Brussels Regulation]; TH Agric. & Nutrition, LLC v. Ace European Grp. Ltd. (TH Agric. II), 488 F.3d 1282 (10th Cir. 2007) (same clause found to be permissive under Kansas law, mandatory under Dutch law).
is permissive or mandatory. The opinion preparers, on the other hand, would read the clause as it would be interpreted under the Covered Law in deciding whether it is permissive or mandatory. In the event the two readings produce different results, the opinion preparers, to clarify for the recipient the manner in which they are analyzing the forum selection clause for purposes of the opinion, should consider including in the opinion letter language making clear whether they are treating the clause as permissive or mandatory. If the opinion preparers choose not to do so, an alternative approach is for them to analyze the clause
both ways—i.e., as both permissive and mandatory. That approach, however, will require them to do additional work and that work likely will be difficult to justify on a cost-benefit basis. Moreover, depending on the Covered Law, it may not be possible to give the opinion if the clause is analyzed as both mandatory and permissive, while the opinion could have been given had the clause been treated only as permissive.

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 named non-U.S. court (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 Chosen Law Country. The

90. An opinion that does not characterize the forum selection clause as permissive or mandatory could be worded as follows:

The forum selection clause in Section __ of the Agreement is valid and enforceable under the law of [COVERED LAW STATE] for actions relating to contract claims arising under the Agreement.

Analyzing the clause as both permissive and mandatory may allow the opinion preparers to give the opinion even if they have been unable to decide with the confidence needed to give an opinion whether a court of the Covered Law State would find the provision to be permissive or mandatory. When the Covered Law is not the Chosen Law, the opinion recipient should seek advice from its own counsel whether the forum selection clause will be interpreted as permissive or mandatory under the Chosen Law. An opinion giver is not responsible for providing the recipient, who is not its client, legal advice. If a court in the Covered Law State, for example, interpreted the clause under the Covered Law as permissive and declined a request by the opinion recipient (who had intended to negotiate for a mandatory outbound forum selection clause) to dismiss an action brought in that court by the opinion giver’s client, the opinion would be correct even though under the Chosen Law the clause would have been interpreted as mandatory. See infra notes 95 and 96 and accompanying text regarding the law a U.S. court would apply to the interpretation of a forum selection clause contained in an agreement that chooses non-U.S. law as the governing law.

91. See, for example, infra text accompanying notes 110–17 regarding states that have not adopted the so-called modern view. In addition, other issues discussed later in this Report bear on the opinion preparers’ ability to conclude that a forum selection clause would be given effect under the Covered Law.

92. If the clause names a U.S. federal court, federal law, including the Federal Rules of Civil Procedure, will apply. See infra text accompanying note 103; see also supra text accompanying note 77 (regarding venue). If the agreement containing the forum selection clause does not contain a governing law clause, the opinion preparers may be able to give an opinion on the enforceability of the forum selection clause under the Covered Law even though they cannot determine which law a named court would apply. The Omnibus Cross-Border Assumption permits the opinion preparers to assume that the agreement containing the clause is enforceable under whatever foreign law may govern the agreement. See supra note 17 and accompanying text. Some commentators, particularly outside the United States, maintain that in the absence of an explicit choice-of-law clause the substantive law of the jurisdiction where the named court is located should always be regarded as the governing law because it was implicitly chosen by the parties when they named a court for the resolution of disputes.

93. When this is not the case, for example if Germany is the Chosen Law Country, but French courts are named in the forum selection clause, a French court could be expected to apply French law to procedural issues and German law to substantive issues, but also may apply French law to some substantive issues. Effective January 10, 2015, the Brussels Regulation was amended to clarify
issues a court 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; (v) whether the forum selection clause is permissive or mandatory; and (vi) whether it covers the dispute in question. Prior to 2006 U.S. courts generally applied the law of the state where they were located to all these issues, even when the agreement selected non-U.S. law as its governing law.\footnote{Jason Webb Yackee, Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Clauses: Whose Law Applies?, 9 UCLA J. INT’L L. & FOREIGN AFF. 43, 46, 63, 67 (2004) (criticizing tendency of U.S. courts considering the validity of forum selection clauses to reflexively apply their own law (the \textit{lex fori})); see generally J. Zachary Courson, Survey, Yavuz v. 61 MM, Ltd.: A New Federal Standard—Applying Contracting Parties’ Choice of Law to the Analysis of Forum Selection Agreements, 85 DEN. U. L. REV. 597, 601, 604–07, 610 (2008).}

Starting with a decision by the U.S. Court of Appeals for the Tenth Circuit in 2006, however, a trend has developed of applying the Chosen Contract Law to questions relating to the validity and interpretation of forum selection clauses in cross-border agreements.\footnote{Yavuz v. 61 MM, Ltd., 465 F.3d 418 (10th Cir. 2006). The \textit{Yavuz} court, citing Professor Yackee’s article (see \textit{supra} note 94) and the Restatement (Second) of Conflict of Laws § 187 cmt. 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. The court found no reason why a U.S. court should apply to the forum selection clause a law different from the law governing other clauses, noting that international commerce requires the security parties derive from knowing that their contractual choices will be respected. Id. at 428–31 (“if parties agree on forum selection clause that has particular meaning under the law of a specific jurisdiction, and also agree that the contract is to be interpreted under the 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 Martinez v. Bloomberg LP, 740 F.3d 211 (2d Cir. 2014) (Chosen Contract Law (English law) applied to determine whether forum selection clause is permissive or mandatory and claim subject to clause, even though federal U.S. law ultimately must govern enforceability of clause); Phillips v. Audio Active Ltd., 494 F.3d 378 (2d Cir. 2007) (citing \textit{Yavuz}, court should not single out forum selection clause for interpretation under law other than the law chosen to govern contract as a whole). The holding in \textit{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 Jacobson v. Mailboxes Etc. USA, Inc., 646 N.E.2d 741, 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).}
While this view has gained widespread acceptance, its acceptance is not universal.\textsuperscript{96}

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 jurisdiction outside the United States 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, depending on the state and the wording of the agreement. The result, as discussed in detail in Part III-4.1.3 for permissive forum selection clauses and Part III-4.1.4 for mandatory forum selection clauses, is that in giving an opinion that a clause naming non-U.S. courts will be given effect under the Covered Law, the opinion preparers need to rely on assumptions regarding issues governed by non-U.S. law (such as the formation, validity, and interpretation of the contract and personal and subject matter jurisdiction of the named court), which they can do by relying on the Omnibus Cross-Border Assumption.

\textit{III-4.1.3 Opinions Addressing Permissive Forum Selection Clauses}

The purpose of a permissive forum selection clause is to give a party wishing to bring a legal action the ability to bring it in any of the courts named in the clause. Thus, a clause may provide a non-U.S. party 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 by naming both courts. While the same flexibility might be provided by not having a forum selection clause in the agreement, having a permissive clause, particularly one stating the consent of all parties to being sued in the named courts helps ensure that the named courts will have personal jurisdiction over the parties when they otherwise might not.

An opinion that a permissive forum selection clause will be given effect under the Covered Law confirms the right of the recipient to bring suit against the U.S. party in the named courts of a jurisdiction that is named in the clause. A permissive clause does not prohibit the parties, either expressly or implicitly, from bringing suit in courts in other jurisdictions (which thus include courts in the Covered Law State if they are not named). If, however, a permissive forum selec-
tion clause does not name courts in the Covered Law State, the opinion does not address whether those courts will hear the case if suit is brought there.

Whether a clause is permissive outbound or permissive inbound, as discussed below, an opinion on its effectiveness only covers issues governed by the Covered Law. The effectiveness of a forum selection clause, however, also depends on matters that are governed by non-U.S. law, for example formation of the contract and validity of the forum selection clause under the Chosen Law.97 To the extent that these matters are not governed by the Covered Law, the opinion preparers are entitled to assume that the agreement generally and the forum selection clause specifically are valid, binding, and enforceable under the Chosen Law, which they can do by relying, without so stating, on the Omnibus Cross-Border Assumption.98

III-4.1.3.1 PERMISSIVE CLAUSES NAMING COURTS OUTSIDE THE UNITED STATES

A U.S. lawyer 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 named court in a non-U.S. jurisdiction named in a cross-border agreement.99 The opinion means that the Covered Law does not prohibit a U.S. party represented by the opinion giver from consenting to the jurisdiction of the named court and that conditions imposed by the Covered Law are met.

97. See generally Yackee, supra note 94, 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 United States. See, e.g., Brussels Regulation, supra note 86 (establishing four specific “forms” in which forum selection agreements must be made, which the European Court of Justice has suggested should be strictly construed); CODE DE PROCEDURE CIVILE [C.P.C.][CIVIL PROCEDURE CODE] art. 48 (Fr.) (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”); Cour de cassation [Cass.] [supreme court for judicial matters] 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] [Federal Court of Justice] Feb. 22, 2001 (Ger.) (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 jurisdictions may provide that forum selection clauses are unenforceable in principle or valid only under limited circumstances. In addition, in some civil law countries to be valid certain categories of contracts must be executed in the presence of a notary public acting, depending on the circumstances, as a witness or as a public official.

98. See supra text accompanying note 17. In particular, the opinion does not address whether a court outside the Covered Law State, whether in another U.S. state or in a jurisdiction outside the United States, would have personal or subject matter jurisdiction, because those issues would not be governed by the Covered Law. Non-U.S. parties may request an opinion that a U.S. party has the corporate power to agree to a forum selection clause choosing a court outside the United States and that the agreement has been duly authorized, executed, and delivered by the U.S. party. See infra text accompanying notes 168–71.

99. The opinion could be worded as follows:

The Company’s agreement in Section __ of the Agreement to submit to the non-exclusive jurisdiction of the courts of [FOREIGN LAW COUNTRY] is valid and enforceable under the law of [COVERED LAW STATE] for actions relating to contract claims arising under the Agreement.

If a forum selection clause names U.S. federal courts, the opinion letter should cover U.S. federal law expressly, at least for the purposes of this opinion.
Law, if any, on the U.S. party’s agreement to be sued in the named non-U.S. jurisdiction have been met. The opinion does not mean that a court in the Covered Law State would be bound by a decision of a named non-U.S. court if the non-U.S. party later brings an action in the Covered Law State to have a foreign judgment enforced. 100

As a matter of U.S. customary practice, the opinion is understood not to cover specialized federal or state statutes, rules, or regulations that may prohibit or restrict commerce with jurisdictions outside the United States in which a named court is located, unless they are addressed expressly. 101 The opinion also 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, which are covered by the Omnibus Cross-Border Assumption. Thus, the opinion provides a non-U.S. recipient comfort only on the narrow legal issue that the Covered Law does not shield the opinion giver’s client from its agreement to be sued by the recipient in a named court located outside the United States.

III-4.1.3.2 PERMISSIVE CLAUSES NAMING COURTS IN THE UNITED STATES

A U.S. lawyer ordinarily will be able to give an opinion that under the Covered Law a court in the Covered Law State will give effect to a permissive forum selection clause naming courts in the Covered Law State. The opinion means that the clause is enforceable against the parties because they submitted voluntarily to the jurisdiction of courts in the Covered Law State, even though the agreement requires those courts to apply the law of another country in resolving the dispute. 102 If the clause names a U.S. federal court as one of the courts where the parties may bring suit, the opinion means that the named federal court

100. See infra notes 136–37 and accompanying text. Opinions on the recognition and enforcement of foreign judgments are discussed in Part III-4.2. Grounds on which a U.S. court can refuse to recognize and enforce a foreign judgment include the foreign judicial system’s not providing for impartial tribunals or having procedures incompatible with basic due process of law and questionable integrity of the court rendering the judgment in the specific case. The opinion preparers cannot make a professional judgment regarding any of these matters. See also IBA REPORT, supra note 2, at 194, 279.

101. See infra text accompanying notes 185–95. A number of U.S. statutes, rules, and regulations, mostly federal, that rarely apply to domestic U.S. transactions apply to similar cross-border transactions because non-U.S. parties are involved or because performance is to occur 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.), and other similar statutes (see, e.g., OFAC regulations regarding Syria, 31 C.F.R. pt. 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).

102. The opinion could be worded as follows:

The Company’s agreement in Section ___ of the Agreement to submit to the non-exclusive jurisdiction of the courts of [COVERED LAW STATE] [and United States federal courts] is valid and enforceable under the law of [COVERED LAW STATE] [and the federal law of the United States] for actions relating to contract claims arising under the Agreement.

If a forum selection clause names U.S. federal courts, the opinion letter should cover U.S. federal law expressly, at least for the purposes of this opinion.
also will give the clause effect under the Federal Rules of Civil Procedure. While many opinion givers do not take an exception for the possible lack of federal subject matter jurisdiction, some do.\textsuperscript{103}

Giving an opinion on the enforceability of a permissive inbound forum selection clause in an agreement choosing the law of a jurisdiction outside the United States as its governing law requires the opinion preparers to be satisfied that under the Covered Law the named courts of the Covered Law State would have personal jurisdiction over the parties and subject matter jurisdiction over the matters covered by the clause.\textsuperscript{104} The opinion preparers also must be satisfied that the Covered Law does not prevent the opinion recipient, by reason of its status as a non-U.S. person, from bringing suit in the named court in the Covered Law State as a procedural matter.\textsuperscript{105} The opinion does not, however, cover

\textsuperscript{103}. See generally TriBar Remedies Opinion Report, supra note 19, at 1499 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 77 for a discussion of venue.

\textsuperscript{104}. See TriBar Remedies Opinion Report, supra note 19, at 1499. The personal and subject matter jurisdiction of a named court of the Covered Law State is governed by the Covered Law not the Chosen Law. Therefore, the analysis the opinion preparers are required to conduct is the same as the analysis required to give an opinion on the enforceability of an agreement governed by the Covered Law that contains a permissive forum selection clause (unless coverage of the clause is excluded from that opinion). The opinion is based on the facts as of the date of the opinion letter, and the opinion letter need not point out that the jurisdictional requirements may no longer be satisfied when suit actually is brought. TriBar Remedies Opinion Report, supra note 19, at 1499 & n.76; see also GLAZER TREATISE, supra note 10, at 387; Gruson, Forum Selection, supra note 78, at 136–37.

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. Some states, however, require the parties or the transaction to have sufficient contacts with that state. See, e.g., McRae v. J.D./M.D., Inc., 511 So. 2d 540 (Fla. 1987) (forum selection clause alone not sufficient to establish personal jurisdiction absent some minimum contacts or long-arm statute). In those states the opinion preparers must either expressly assume or satisfy themselves that there are sufficient contacts for the named court to take the case. That may be a concern in cross-border transactions if the parties choose the named state court even though neither they nor the transaction have any relationship with that state.

Normally, the requirement of subject matter jurisdiction is satisfied if the named state court is a court of general jurisdiction. TriBar Remedies Opinion Report, supra note 19, at 1499 & n.78 (if a clause specifies a particular type of court, such as, for example, the Delaware Chancery Court, the opinion preparers must determine whether the disputes covered by the clause are within that court's subject matter jurisdiction, because the parties cannot by contract confer subject matter jurisdiction on a specialized court).

Some states, such as New York and California, have enacted statutes expressly validating forum selection clauses for transactions above a specified size if the clause selects the courts of that state as the forum for resolving disputes and the agreement containing the clause chooses the law of that state as its governing law. Some statutes also provide that the parties are deemed to have waived the right to assert the doctrine of forum non conveniens. Such statutes, however, do not apply to an agreement that chooses the law of another state or country as its governing law.

\textsuperscript{105}. 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 would be the case, for example, in countries whose law prohibits private parties from voluntarily electing to sue or be sued in their courts. The Covered Law State also may have other requirements that the opinion recipient must satisfy to bring suit there, such as, for example, being qualified to do business in the state. If those requirements relate to the opinion recipient, the opinion does not cover them.
issues other than jurisdiction that may impair the ability of the recipient to maintain an action in the Covered Law State, such as a failure to qualify to do business there when otherwise required to initiate suit.\textsuperscript{106} If the agreement includes a waiver of the doctrine of \textit{forum non conveniens}, the opinion also covers the effectiveness of the waiver, 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.\textsuperscript{107}

When an agreement contains a permissive forum selection clause, different parties may bring suit in different courts over the same disputed matter. An opinion on a permissive forum selection clause does not address whether a court in 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 regard to the same disputed matter in another court.\textsuperscript{108}

\textbf{III-4.1.4 Opinions Addressing Mandatory Forum Selection Clauses}

\textbf{III-4.1.4.1 Mandatory Clauses Naming Courts Outside the United States}

To give an opinion on the effectiveness under the Covered Law of a mandatory forum selection clause naming a non-U.S. court as the exclusive forum for resolving disputes, the opinion preparers need to satisfy themselves that, if the U.S. party they represent sues the other party in a court in the Covered Law State in violation of the agreement, the court will decline to consider the merits of the case.\textsuperscript{109} 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 the state.\textsuperscript{110} Some U.S. states, however, adhere to an older view that courts are gen-

\textsuperscript{106} See, e.g., Credit Suisse Int’l v. Urbi, DeSarrollos Urbanos, S.A.B. de C.V., 971 N.Y.S.2d 177 (Sup. Ct. 2013) (foreign corporation doing business in New York without qualifying to do so prohibited from bringing suit there even if New York law prevents the defendant, who agreed to inbound forum selection clause, from asserting that New York courts are inconvenient or lack jurisdiction).

\textsuperscript{107} TriBar Remedies Opinion Report, supra note 19, at 1501 (permissive clause does not foreclose suit elsewhere or prevent application of doctrine of \textit{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 grounds that it is an inconvenient forum.

\textsuperscript{108} Whether the court would grant the motion may depend on which suit was brought first (\textit{lis alibi pendens} rule), the convenience of the parties, witnesses, or the court (absent a waiver of \textit{forum non conveniens}), or other priority/ordering considerations that cannot be known by the opinion preparers when they give the opinion.

\textsuperscript{109} 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 named court.

\textsuperscript{110} See TriBar Remedies Opinion Report, supra note 19, at 1501 & 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”).
erally free to determine for themselves whether to take jurisdiction over cases brought before them based on a variety of discretionary factors, without giving 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, GmbH v. Zapata Off-Shore Co.* In *Bremen* the Court held that a forum selection clause is presumptively 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.

111. 407 U.S. 1 (1972). Prior to 1972 U.S. courts considered agreements selecting foreign courts as the exclusive forum for resolving disputes involving a U.S. party 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 over forty years since the *Bremen* decision have witnessed a sea change in the willingness of U.S. courts to enforce mandatory forum selection clauses in cross-border agreements. See generally Yackee, supra note 94, at 47–50, 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.” See *Bremen*, 407 U.S. at 9, 14. In *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383–84 (2d Cir. 2007), the U.S. Court of Appeals for the Second Circuit adopted a four-part analysis for determining 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? Some aspects of the *Bremen* exception are factual in nature, for example whether consent was coerced or otherwise invalid. Others are legal or equitable, for example, whether a strong public policy is implicated.

112. Although *Bremen* was decided under federal admiralty and maritime jurisdiction, it expresses the prevailing view in the United States on the issue of ouster. Recently the U.S. Supreme Court held, in a diversity jurisdiction case, that clauses choosing a particular federal court as the exclusive forum for resolving disputes are presumptively enforceable under the Federal Rules of Civil Procedure. *Atlantic Marine Constr. Co. v. U.S. Dist. Court for the W.D. of Texas*, 134 S. Ct. 568, 581 (2013) (when an agreement contains a forum selection clause and an action is brought in federal court, in all but the most unusual cases the interest of justice is served by holding parties to their choice of forum). When a mandatory forum selection clause names the courts of a particular state and an action is brought in those courts, those courts will apply their state’s law in determining the enforceability of the forum selection clause. Many state courts follow *Bremen*.

113. The public policy ground only comes into play when the court considering whether to enforce a mandatory forum selection clause is not a named court. Thus, it applies when a court that is not named is asked to dismiss a suit brought in that court in violation of the forum selection clause. In *Atlantic Marine* the Court held that when a party to an agreement has violated a contractual obligation by filing suit in a court other than the one named in a valid mandatory forum selection clause, “[that court’s] dismissal would work no injustice on the plaintiff” even though, as a result of the running of a statute of limitations or otherwise, the plaintiff is unable to pursue its action in the named court. *Id.* at 582–84. The court noted that claiming that a suit was brought in violation of a mandatory forum selection clause is different from claiming *forum non conveniens*, where the burden is on the
refers to these grounds collectively as the “Bremen exception.” To protect identified classes of contracting parties from exploitative contractual terms, some states have adopted statutes codifying specific non-waivable public policy rules that the courts of those states often treat as exceptions to the enforceability of mandatory forum selection clauses naming courts in other states or countries.114

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 jurisdiction outside the United States as its governing law115 and names a court in that or another jurisdiction outside the United States as the exclusive forum for resolving disputes.116 Different states, however, have
adopted different versions of the modern view, and some versions may lead the opinion preparers to question whether the state whose law they are covering has, in fact, adopted the modern view. Thus, the opinion preparers need to tailor their opinion to the specifics of the Covered Law. Even if the opinion does not expressly refer to the Bremen exception, an opinion on the effectiveness of a mandatory forum selection clause, whether or not it names a U.S. court, is understood as a matter of U.S. customary practice not to cover the possibility that a court, applying the Bremen exception, will decline to give the clause effect.\(^\text{117}\)

When giving an opinion on the effectiveness of a mandatory outbound forum selection clause, the opinion preparers need to consider whether to refer expressly to the Bremen exception. In domestic U.S. transactions, the forum selection clause, which normally names a court in the Covered Law State, is covered by an opinion on the enforceability of the entire agreement under the Covered Law (which also is the Chosen Law when an enforceability opinion is given on the entire agreement).\(^\text{118}\) In cross-border transactions, however, a forum selection clause often names the courts of a jurisdiction other than the Covered Law State when it is included in an agreement that does not choose the Covered Law State, a U.S. court may be unwilling to defer to the parties' choice of forum for 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 (3d Cir. 1983) (pleading of alternative non-contractual theories of liability does not prevent enforcement of forum selection clause when relationship is contractual), overruled on other grounds, 490 U.S. 495 (1989); Ashall Homes Ltd. v. Rok Entm't Grp., Inc., 992 A.2d 1239, 1248 (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). Depending on the law of the specific state, when tort claims are involved a U.S. court may decide that the law of the place where the claim arose, e.g., where the wrongful conduct took place or harm occurred, must be applied by a court in that jurisdiction, rather than deferring to the parties' agreement as to a different governing law and forum. In some states, courts may focus instead on the intent of the parties with respect to the scope of the forum selection clause, thus being willing to broadly enforce the clause in a manner similar to what the Rome II Regulation requires if, for example, the language of the agreement provides that "all disputes arising out of or relating to the contract or the relationships formed thereby, including statutory claims and related tort claims," are covered by the clause.

117. A court will apply the various prongs of the Bremen exception based on the nature of the claims made by the parties and the facts and circumstances at the time of the dispute, none of which the opinion preparers can ascertain when the opinion is given.

118. While the analysis is the same in domestic U.S. transactions as in cross-border transactions, the limited impact in domestic U.S. transactions of the Bremen exception is so well understood that many U.S. lawyers do not expressly refer to it when giving enforceability opinions. See TriBar Remedies Opinion Report, supra note 19, at 1501 & n.87, 1502 & nn.88–89. The TriBar report, however, only addresses opinions on the enforceability of agreements, including forum selection clauses in those agreements, that choose as their governing law the law covered by the opinion. The TriBar report does not address an opinion that is directed specifically at the effectiveness under the Covered Law of a forum selection clause in an agreement that is not governed by the Covered Law. The TriBar report therefore does not consider the desirability of including in that opinion an express reference to the Bremen exception. It also points out that the practice of not referring to the Bremen exception even in the opinions it does address is not universal, with some lawyers pointing out the possible application of the Bremen exception.
Law as its governing law. When the named court is not in the Covered Law State and the Chosen Law is not the Covered Law, a court applying the Covered Law may decline to give a mandatory forum selection clause effect not only on the basis of the first two prongs of the *Bremen* exception, but also on the basis of the third—strong public policy—prong. Nevertheless, as in domestic U.S. transactions, 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 possibility that a court will decline to give the clause effect on the basis of the third prong of the *Bremen* exception as well as the first two. Because of the greater likelihood that the *Bremen* exception, particularly the public policy prong, will apply in cross-border transactions and because non-U.S. recipients are less likely than U.S. recipients to be familiar with the *Bremen* exception, this Committee recommends that an express reference to the *Bremen* exception be included in opinion letters containing opinions on mandatory forum selection clauses naming courts outside the United States.

While the opinion only covers issues governed by the Covered Law, the effectiveness of a mandatory forum selection clause also depends on matters governed by the non-U.S. Chosen Law such as the validity of the agreement as a whole and

119. As a practical matter the opinion preparers cannot be expected to determine whether a U.S. court will decline to give effect to a mandatory outbound forum selection clause on the basis of the third prong of the *Bremen* exception because that determination requires knowledge they cannot be expected to have of how the named court would go about enforcing each obligation of the opinion giver’s client in the agreement containing the clause.

120. See supra text accompanying note 113. The reference could be worded as follows:

*The opinion in numbered paragraph __ is limited to the extent that a court may decline to give effect to the forum selection clause in Section __ of the Agreement because enforcement would be unreasonable or unjust under the principles enunciated in the decision of the U.S. Supreme Court in *M/S Bremen & Unterweser Reederl, GmbH v. Zapata Off-Shore Co.*, 402 U.S. 1 (1972) and in related cases, including that it would contravene a strong public policy of [COVERED LAW STATE].*

If the opinion letter contains an opinion on the enforceability of the forum selection clause but not of the governing law clause, the opinion preparers should consider including in the opinion letter an express assumption that the choice of non-U.S. law as the governing law of the agreement will be given effect under the Covered Law. One could argue that the assumption is technically unnecessary because, if the forum selection clause is mandatory, it names a non-U.S. court, and a court in the Covered Law State gives the clause effect, no court in the Covered Law State would have the opportunity to consider independently the merits of the case and, therefore, to reach the choice-of-law issue. See, e.g., Gruson, *Forum Selection*, supra note 78, at 191 (once parties to agreement validly agree that foreign forum should adjudicate 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, 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 Chosen Law Country’s law in the agreement. See supra notes 93–96 and accompanying text. Absent a choice-of-law opinion, assuming that a court in the Covered Law State would give effect to the choice-of-law clause will eliminate any risk that an opinion on the effectiveness of a forum selection clause naming courts in the Chosen Law Country could be interpreted as including 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. Not all U.S. lawyers see a need to include this assumption, instead wording the Omnibus Cross-Border Assumption in a way that addresses the choice-of-law issue. See supra note 17 and accompanying text.
the enforceability of the clause itself. These matters, however, are covered by the Omnibus Cross-Border Assumption, whether stated or not, and, therefore, need not be addressed specifically in the opinion letter.

A court in the Covered Law State may only be willing to decline jurisdiction over the case if it is satisfied that the named non-U.S. court will give effect to the parties’ choice of forum and hear the case if suit is brought in that court; otherwise the parties might not have any forum in which to resolve their dispute. These and other procedural matters ordinarily will be governed by the law of the jurisdiction where the named court is located (lex fori). Therefore, an opinion on a mandatory forum selection clause naming a court outside the United States must be based on an assumption that the named court will recognize the parties’ submission to its jurisdiction and decide the merits of the claims being made. As with other issues governed by non-U.S. law, such as the formation, validity, and interpretation of the contract, the personal and subject matter jurisdiction of the named court is covered by the Omnibus Cross-Border Assumption.

To conclude, an opinion on the effectiveness of a mandatory forum selection clause naming a court outside the United States provides comfort to the non-U.S. recipient that courts in the Covered Law State will defer to the parties’ choice of the named court as the exclusive forum for resolving disputes. This deference is particularly important for non-U.S. parties who want not only the Chosen Law to govern but also the courts of the Chosen Law Country to be the only courts that can resolve disputes relating to the agreement (for example because of their

121. This is the same as for opinions on the effectiveness of permissive forum selection clauses. See supra text accompanying notes 99–101.

122. See supra text accompanying note 17. Typically a non-U.S. party will want comfort from a U.S. lawyer that a U.S. party has the corporate power to agree that a non-U.S. court will be the exclusive forum under the agreement. That issue is covered by the standard opinion on due authorization, execution, and delivery of the agreement under the Covered Law. See infra text accompanying notes 168–72.

123. See supra note 17. The last sentence of the illustrative Omnibus Cross-Border Assumption covers this issue not only under the Chosen Law but also under the lex fori so as to address the possibility that the court named in the forum selection clause is in a jurisdiction other than the Chosen Law Country.

124. This conclusion is consistent with the modern view, which requires a court to give substantial weight to the parties’ choice of courts. A non-U.S. recipient whose goal is not to be exposed to the risk of litigation in U.S. courts often seeks comfort on this issue because in many countries, instead of deferring to the parties’ choice of forum, a court decides whether to take a 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, and the convenience of the parties or the witnesses. See generally Haver, supra note 96, at 2–3. The opinion also gives a non-U.S. recipient comfort that, in drafting the forum selection clause, it does not have to satisfy special form requirements imposed by the Covered Law, such as capitalized, special, or bold-face type, a specific placement within the agreement, or special signing formalities. If the Chosen Law imposes such form requirements, the Omnibus Cross-Border Assumption covers them. 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 non-U.S. court may be relevant to the enforcement of the clause by the named non-U.S. court. See generally Michael Gruson, Controlling Site of Litigation, in SOVEREIGN LENDING: MANAGING LEGAL RISK 29, 35–36 (Michael Gruson & Ralph Reisner eds., 1984). The opinion also supports a conclusion that a judgment obtained in the named non-U.S. court will be recognized and enforced by courts in the Covered Law State, as discussed in Part III-4.2.
expertise in applying the Chosen Law). As discussed above, a U.S. lawyer usually will be able to give the opinion when the Covered Law State has adopted the modern view, but, whether or not the opinion letter so states expressly, the opinion is subject to the *Bremen* exception and the Omnibus Cross-Border Assumption.

**III-4.1.4.3 Mandatory Clauses Naming Courts in the United States**

In the unusual case in which a cross-border agreement that does not choose U.S. law as its governing law selects courts in the Covered Law State as the exclusive forum for resolving disputes relating to the agreement, a U.S. lawyer ordinarily can give an opinion that under the Covered Law the mandatory inbound forum selection clause will be given effect. The opinion means that the clause is enforceable against the parties because they submitted voluntarily to the jurisdiction of the named courts in the Covered Law State, even though those courts will be applying the law of another country in resolving the dispute.

The opinion does not cover issues other than jurisdiction that may prevent the recipient from maintaining an action in the named courts of the Covered Law State, such as the opinion recipient’s failure to qualify to do business in the Covered Law State when otherwise required. The opinion does not cover venue.

Prior to 2013, federal law was unclear as to how much deference a U.S. federal court was required to give a mandatory forum selection clause if suit was brought in a federal court other than the named court. The U.S. Supreme Court clarified the law in *Atlantic Marine*, holding that, so long as the federal court is the named forum, a U.S. federal court will have venue over the action under 28 U.S.C. § 1391 by reason of the parties’ express consent to be sued there; if an action is commenced in a federal district court other than the named federal district court and that other court does not have venue under § 1391, pursuant to 28 U.S.C. § 1406 the case can be transferred to the named court; and if an action is commenced in a federal district court other than the named federal district court, even if that other court has venue under § 1391 a party can request transfer of the case to the named court in reliance on the U.S. Supreme Court’s holding in *Atlantic Marine* that “§ 1404 permits transfer to any district where venue is also proper . . . or to any other district to which the parties have agreed by contract [. . . because] the federal venue statute is not the right set of rules to deal with...
courts have jurisdiction under federal law, federal courts are required to give controlling weight to the parties’ choice of the named court as the exclusive forum in all but the most exceptional cases.129

III-4.2 Recognition and Enforcement of Foreign Judgments in the United States

Because the non-U.S. parties to a cross-border agreement may obtain a judgment for breach of the agreement outside the United States but then have to enforce the judgment in the United States (where the U.S. party’s assets are located),130 they may request an opinion that courts in the Covered Law State will recognize and enforce131 judgments obtained in non-U.S. courts without a rehearing on the merits of the case.132 As discussed below, a U.S. lawyer usu-
ally can give this opinion when the Covered Law State has a statute in effect that provides for the enforceability of foreign judgments.\textsuperscript{133}

Many U.S. states have adopted a version of the Uniform Foreign-Country Money Judgments Recognition Act (the Uniform Act).\textsuperscript{134} 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,\textsuperscript{135} 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

\textsuperscript{133} The opinion could be worded as follows:

\begin{quote}
To the extent that it relates to contract claims arising under the Agreement, 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 that is enforceable in [FOREIGN COUNTRY] will be recognized as valid and enforced under the law of [COVERED LAW STATE] by the courts of [COVERED LAW STATE] or by United States federal courts having 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 enforcement set forth in the Uniform Foreign-Money-Judgments Recognition Act as adopted in [COVERED LAW STATE] (the “Act”) \[IF OPINION GIVER WISHES TO REFER TO PARTICULAR EXCEPTIONS FROM THE STATUTE, ADD —, which include, but are not limited to, __________________] and (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. \[IF APPLICABLE IN THE COVERED LAW STATE, ADD—This opinion is based on the assumption that the law of [FOREIGN COUNTRY] requires a court of competent jurisdiction in [FOREIGN COUNTRY], in a reciprocal manner, to recognize and enforce a final and conclusive judgment of a court of [COVERED LAW STATE] without reconsideration of the merits.]\end{quote}

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)).

\textsuperscript{134} UNIF. FOREIGN-COUNTRY MONEY JUDGMENT RECOGNITION ACT (UNIF. LAW COMM’N 2005) [hereinafter Uniform Act]. While establishing minimum standards under which state courts are required to enforce foreign judgments, the Uniform Act leaves courts free to recognize foreign judgments for other reasons applying widely accepted principles of comity. The Uniform Act does not apply to judgments enforcing foreign arbitral awards, because arbitral awards are covered by the FAA. See supra notes 40 & 44–46 and accompanying text. Approximately thirty-five states (including California, Delaware, Florida, Illinois, Massachusetts, New York, and Texas) have adopted the Uniform Act (or a prior version with largely similar rules and procedures—the Uniform Foreign Money Judgment Recognition Act of 1962). In other states the case law may or may not provide the opinion preparers a basis for reaching conclusions with the confidence needed to give an unqualified opinion.

\textsuperscript{135} 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 (UNIF. LAW COMM’N 1989) [hereinafter Foreign-Money Claims Act]). 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. In deciding how a foreign judgment should be satisfied, courts normally apply 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), but alternatively sometimes apply other rules (such as the “breach day rule” or the “judgment day rule”). The 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. An opinion on the recognition and enforcement of foreign judgments under the Uniform Act does not cover currency conversion and related issues.
Uniform Act provides three mandatory grounds for nonrecognition\textsuperscript{136} and eight discretionary grounds.\textsuperscript{137} With the exception of reciprocity as a condition for recognition of a foreign judgment,\textsuperscript{138} the Uniform Act codifies general common law rules of comity.

In states that have adopted a version of the Uniform Act, U.S. lawyers normally can give an opinion that a foreign judgment against the U.S. party they represent will be recognized and enforced by a court applying the Covered Law subject to the prerequisites and exceptions set forth in the version of the Uniform Act enacted in the Covered Law State. Some opinion givers choose to spell out the precise statutory prerequisites or grounds for nonrecognition under the statute, while others limit the opinion’s coverage by incorporating the statutory prerequisites and exceptions by reference in the opinion without restating or summarizing them.\textsuperscript{139} Whether the opinion so states or not, the opinion does not cover compliance with statutory prerequisites because that determination can be made only after a foreign judgment has actually been rendered.

In states that have not adopted the Uniform Act or a statute to similar effect, the law of comity normally governs the recognition and enforcement of foreign judgments. Depending on the case law in their state, lawyers in those states may or may not be able to give an opinion under the law they are covering that a

\textsuperscript{136} 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. \textit{Uniform Act}, supra note 134, §§ 4(b), 5.

\textsuperscript{137} 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 United States (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 exclusive forum selection or arbitration clause; (6) judgment was rendered by the foreign court solely on the basis of personal service and the forum court believes that the original action should have been dismissed on grounds of \textit{forum non conveniens}; (7) substantial doubt exists regarding the impartiality or integrity of the specific court that rendered the judgment (such as corruption of the judge); or (8) the specific proceeding leading to the judgment (as opposed to the entire judicial system in the foreign country) was incompatible with the due process of law. \textit{Uniform Act}, \textit{supra} note 134, § 4(c).

\textsuperscript{138} 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.” \textit{Uniform Act}, \textit{supra} note 134, prefatory note.

\textsuperscript{139} See \textit{supra} note 133.
judgment by a foreign court will be recognized and enforced in the Covered Law State.140 As a condition of enforcement, some states require that the courts of the foreign country where the judgment was obtained recognize and enforce, in a reciprocal manner, judgments by their state 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, a U.S. lawyer who is willing to give an opinion may need to rely on an express assumption to that effect.

III-4.3 2005 Hague Convention on Choice of Court Agreements

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.141 The Hague Convention was signed by the United States (subject to Senate consent) on January 19, 2009, and was also signed by Singapore on March 25, 2015, the European Community on April 1, 2009, and Mexico on September 26, 2007.142 It is expected to be signed in the near future by Argentina, Australia, and Canada, among others. The Hague Convention

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

141. Convention on Choice of Court Agreements, HAGUE CONF. ON PRIV. INT'L L. (June 30, 2005), http://www.hcch.net/upload/conventions/txt37en.pdf [hereinafter Hague Convention]. This was the culmination of a twenty-five-year process promoted by the United States with the goal of creating a multilateral treaty that would allow litigants to obtain and enforce judgments internationally on a scale comparable to that of the Full Faith and Credit Clause of the U.S. Constitution. Currently parties to cross-border agreements have no assurance that a judgment they obtain in one country will be recognized as final and legally binding by courts in other countries. As discussed in Part III-4.2, U.S. courts generally recognize and enforce foreign judgments under the Uniform Act or principles of comity, typically without a reciprocity requirement. See supra text accompanying notes 134–38. The same is not always true for the enforcement of U.S. judgments abroad. See Matthew H. Adler & Michele Crimaldi Zarychta, The Hague Convention on Choice of Court Agreements: The United States Joins the Judgment Enforcement Band, 27 NW. J. INT'L L. & BUS. 1 (2007). In the absence of treaties between the United States and other countries on the enforcement of judgments, U.S. judgment creditors must seek enforcement abroad under non-treaty rules, which can be slow, procedurally complex, and uncertain. Moreover courts in some countries may have reservations about fully recognizing and enforcing U.S. judgments because of discomfort with U.S. notions of expansive jurisdiction and some aspects of U.S.-style litigation such as jury verdicts, pre-trial discovery, class actions, contingent fees, and punitive or multiple damages. Id. at 7 n.24; see Comm. on Foreign & Comparative Law, N.Y. City Bar Ass'n, Survey of Foreign Recognition of U.S. Money Judgments, 56 REC. ASS'N B. CITY N.Y. 378 (2001), discussed in Richard W. Hulbert, Some Thoughts on Judgments, Reciprocity and the Seeming Paradox of International Commercial Arbitration, 29 U. PA. J. INT'L L. 641, 647 (2008). The Hague Convention will give commercial parties greater certainty as to the effectiveness of mandatory forum selection clauses and the enforceability of judgments in signatory countries. HAGUE CONFERENCE ON PRIVATE INT'L LAW, OUTLINE—HAGUE CHOICE OF COURT CONVENTION (2008) [hereinafter Hague Conference Outline], available at http://www.hcch.net/upload/outline37e.pdf.

came into effect on October 1, 2015. Although commentators expect the U.S. Senate to consent to its becoming effective in the United States, full ratification by the United States likely will be delayed until implementing legislation has been enacted (as was the case with U.S. accession to the New York Convention).

For the Hague Convention to apply to a forum selection clause, the clause must: (1) be agreed to by at least two parties, (2) be in writing or expressed in another 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 only to mandatory forum selection clauses, but it permits a signatory country to declare that it also will apply to permissive forum selection clauses meeting its other prerequisites. The Hague Convention provides that: (i) the named 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 named court’s country; and (ii) if a party to the agreement commences an action in a court other

143. The European Union had exclusive authority to ratify the Hague Convention, which does not have to be signed by individual member countries, except for Denmark, to be binding on them. When the European Union gave its approval on June 1, 2015, enough countries had ratified the Hague Convention for it to become effective for European Union members (other than Denmark) and Mexico. When additional countries will sign and ratify the Hague Convention to make it meaningful for cross-border transactions remains an open question. See Hague Conference Outline, supra note 141, at 2.

144. The State Department is working with Congress to determine the best way to implement the Hague Convention. On January 19, 2013, the State Department recommended implementing the Hague Convention in a memorandum that included draft implementing legislation. The memorandum recommended that implementing legislation take the form of a combination of federal and state statutes in what has been referred to as a “cooperative federalism” approach, under which a state could opt out of the federal implementing law and instead enact its version of a uniform act. Although the objective would be for the federal implementing law and the uniform state act to be as similar as possible to ensure consistency throughout the United States, the precise balance between federal and state law on issues the Hague Convention leaves to be determined under the law of each signatory country remains an open question.

145. Under the Hague Convention a case is not “international” 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 named court, involve only that country. Hague Convention, supra note 141, art. 1(2). Entities are resident where they were formed, have their statutory seat, or have their headquarters or other principal place of business. Hague Convention, supra note 141, art. 4(2).

146. Hague Convention, supra note 141, art. 22. The Hague Convention applies to permissive forum selection clauses only if both the country of the named court that issued the judgment and the country of the court being asked to enforce it have made the optional declaration (reciprocity requirement). If they have, judgments by a court named in a permissive 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 also was permitted to hear the case. Hague Convention, supra note 141, art. 22. 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 forum selection clauses in cross-border agreements often name multiple courts on a non-exclusive basis.

147. Hague Convention, supra note 141, art. 5(1). In particular, the named 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 another court (lis alibi pendens). The jurisdictional rules
than the named court, that court must dismiss the case if the complaint relates to matters covered by the mandatory forum selection clause, unless one of five exceptions 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.

III-4.3.1 Effectiveness of Forum Selection Clause Under the Hague Convention

If it is signed and ratified by enough countries, the Hague Convention should achieve a meaningful degree of harmonization of legal standards that are currently a source of uncertainty, as discussed earlier in this Report. 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 court that is not named in a forum selection clause as to whether an agreement is null and void must be made under the law of the jurisdiction in which the named court is located. On some of these topics U.S. courts currently are divided, and differences between their interpretation of U.S. law and the law of other countries can be meaningful. The Hague Convention also allows a court that is not named in the forum selection clause to apply, at least in part, the law of the jurisdiction where it is located (as opposed to the Choosing Contract Law or the Selected Forum Law) to some issues that bear upon the enforcement of the clause. For example, Article 6 of the Convention provides that grounds for not enforcing a forum selection clause include lack of capacity to enter

of the Hague Convention do not affect signatory countries’ internal rules as to the named court’s subject matter jurisdiction, minimum value of the claim, or venue, although the Hague Convention recommends that when the named court has discretion on these issues it give due consideration to the contractual choice of the parties. Hague Convention, supra note 141, art. 5(3)(b). The named court also may refuse jurisdiction if it determines that the country in which it is located has no connection with the defendant or the claim because the Hague Convention discourages “random” forum shopping. Hague Convention, supra note 141, art. 19.

148. Those exceptions are: (1) the forum selection clause is null and void under the law of the jurisdiction in which the named court is located, including its conflict-of-law rules, (2) a party lacked the capacity to enter into the forum selection clause under the law of the country in which the court asked to enforce the agreement is located, (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 named court has declined to hear the case. Hague Convention, supra note 141, art. 6.

149. Hague Convention, supra note 141, art. 2. Other subjects excluded are: status and legal capacity of natural persons; spousal and child support obligations; family law; will and succession; insolvency; common carriers, both of passengers and goods; most maritime matters; antitrust and competition law; nuclear damage; personal injury; tort claims for damage to property not arising out of a contractual relationship; real property and tenancies; public registers; and arbitration. Hague Convention, supra note 141, art. 2.
into the agreement, manifest injustice, or violation of public policy, in each case as
determined under the law of the jurisdiction where the court being asked to en-
force a mandatory forum selection clause naming a court in another jurisdiction is
located.

Assuming that the Hague Convention is ratified by the United States 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 se-
lection clause that satisfies the Four Hague Prerequisites and names the courts of
a jurisdiction outside the United States 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 Pre-
requisites are satisfied. Because the Hague Convention provides that exceptions
similar to the Bremen exception can be invoked by a court not named in a man-
datory forum selection clause to deny enforcement of the clause, the discussion
in Part III-4.1.4.2 regarding the Bremen exception would apply to opinions
under the Convention.

If a mandatory forum selection clause names a court outside the United States
and the agreement containing the clause chooses non-U.S. law as its governing
law, the opinion would not cover the threshold issue of whether the clause is
valid under either the Chosen Contract Law or the law of the jurisdiction outside
the United States where the named court is located. Because these matters
are not governed by the Covered Law, the opinion preparers are entitled to as-
sume that both the agreement generally and the forum selection clause specifi-
cally are valid, binding, and enforceable under all applicable non-U.S laws.
For this purpose, the opinion preparers may rely without so stating on the
Omnibus Cross-Border Assumption.

III-4.3.2 Recognition and Enforcement of Judgments Under the
Hague Convention

The Hague Convention provides that, if a court named in a mandatory forum
selection clause satisfying the Four Hague Prerequisites renders a judgment on
the merits of a case and that court is in a signatory country, the courts of
all other signatory countries must recognize and enforce that judgment without

150. Because the matters addressed by the opinion would be governed by a treaty to which the
United States is a party and, therefore, are a matter of federal law, the opinion letter should cover
U.S. federal law expressly, at least for purposes of this opinion.
151. See supra text accompanying notes 117–18.
152. See supra note 17 and accompanying text. 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 resolv-
ing disputes. This opinion is generally subsumed in the typical opinion that a U.S. party has duly
authorized, executed, and delivered the agreement. See infra text accompanying notes 168–71.
153. 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 of interim protective measures, such as preliminary injunctions, by a court
that is not named, and does not require a named court to abide by them, if granted. Hague Conven-
tion, supra note 141, art. 7. The Hague Convention requires that settlements approved by the named
court that have the force of judgments under the law of the jurisdiction in which it is located be rec-
reviewing the merits, unless the judgment falls within one of the exceptions established by the Hague Convention. 154 Except for the right to review the named court’s decision to determine whether one of the exceptions set forth in the Hague Convention applies, the courts of signatory countries will be bound by the findings of fact and decisions of law of the named 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 named court is reviewing the case or the time limits to seek review of that court’s decision have not expired.

Assuming that the Hague Convention is ratified by the United States without additional qualifications, U.S. opinion givers normally should be able to give an opinion that a judgment by a court named in a mandatory 155 forum selection clause that is located in a country that is a signatory to the Hague Convention will be recognized and enforced in the United States, subject to the exceptions set forth in the Hague Convention. 156 To give the opinion, the opinion preparers would need to determine that the forum selection clause satisfies the Four Hague Prerequisites on the date of the opinion letter. Because the Hague Convention provides that a violation of the public policy of the country where enforcement

154. 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 named court based its jurisdiction; (2) the judgment does not have effect or is subject to review in the country in which the named court is located; (3) the agreement was null and void under the law of the country in which the named court is located, including its conflict-of-law rules, unless the named court has determined that the agreement is valid; (4) a party lacked the capacity to conclude the agreement under the law of the country in which the court being asked to enforce the judgment is located; (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 named court without contesting lack of notice, or (ii) was notified of the complaint in the country in which the court being asked to enforce the judgment is located 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 in which the court being asked to enforce the judgment is located, including because the specific proceedings leading to the named 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 countries in which the named court and the court being asked to enforce the judgment are located) 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. Hague Convention, supra note 141, arts. 8–9.

155. If the United States makes the declaration discussed earlier in this Report, see supra note 146 and accompanying text, the opinion also could be given when a non-U.S. court is named in a permissive forum selection clause if the country where that court is located also has made the declaration.

156. Because the matters addressed by the opinion would be governed by a treaty to which the United States is a party and, therefore, a matter of federal law, to help reduce the risk of misunderstanding, the opinion letter should cover U.S. federal law expressly, at least for the purposes of this opinion.
is sought is one of the grounds for refusing recognition and enforcement of a foreign judgment, U.S. opinion preparers should not have to include an express public policy exception in their opinion letters (although to help reduce the risk of misunderstanding 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 parties such as international lenders 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 party being sued is not in the same country as the party bringing suit.157 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 the U.S. party in the manner specified in the agreement will be effective under the Covered Law. This opinion addresses the non-U.S. party’s concern that a court in the Covered Law State would find service in the manner specified in the agreement inadequate to establish jurisdiction over the opinion giver’s client.

III-4.4.1 Service of Process for Suits in Named Courts Outside the United States

When the agreement contains an outbound forum selection clause naming a court outside the United States and the agreement does not choose U.S. law 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

157. The principal treaty is the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 68 U.N.T.S. 164 [hereinafter 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. That channel relies on governmental authorities in both countries involved. The Hague Service Convention also provides for four alternative channels involving 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 provide substantive rules on actual service of process in signatory countries. Instead, those rules are provided by the internal law of each country. Depending on which channel of transmission is chosen, the country in which service of process is made may require that additional steps be taken (not governed by the Hague Service Convention) for service of process to be effective. Some countries allow service to be made using channels provided in the Hague Service Convention without acceptance by the addressee (service with compulsion), while other countries require voluntary acceptance of service by the addressee.

The Hague Service Convention also has provisions protecting a defendant, both prior to and after a judgment by default, that operate differently depending on which channel is used and legal requirements in the destination country. Among other things, 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.
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 grounds that the service made on the opinion giver’s client was inadequate. 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 court outside the United States. These matters, which are not governed by U.S. law, 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 later asked to enforce a judgment of the named non-U.S. court against the U.S. party, the law of the Covered Law State will determine whether the method used to serve process for purposes of bringing suit in the named court outside the United States 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 the named non-U.S. court’s procedural rules it had personal jurisdiction over the U.S. party against whom the judgment was rendered and (ii) under the Chosen Contract Law the forum selection clause was valid. Giving the opinion should present no difficulty if under the Covered Law the non-U.S. party seeking to have a judgment of a court outside the United States 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 (assuming for this purpose that bringing suit in the Covered Law State is permitted under the agreement).

Ordinarily what those methods are will be obvious from a review of the agreement. Sometimes, however, that will not be the case, for example, because the service of process provision refers to methods of service under non-U.S. law. In that event the opinion preparers may decide 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).

158. See supra text accompanying notes 130–40 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 137. 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 140. The Hague Convention (which is discussed in Part III-4.3) 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 jurisdiction in which the court being asked to enforce the judgment is located. See supra text accompanying note 154.

159. See supra note 17 and accompanying text.

160. See IBA REPORT, supra note 2, at 195.

161. The opinion could be worded as follows:

The methods for service of process set forth in Section __ of the Agreement are valid under the law of [COVERED LAW STATE].
If the Covered Law does not clearly permit the methods for service of process specified in the agreement to be used 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 by those methods would be grounds for a court in the Covered Law State to refuse to recognize a judgment of a court outside the United States. 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 against it. Depending on the method 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 United States

If a forum selection clause in a cross-border agreement choosing 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 under the Covered Law 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 those courts. The opinion also provides the non-U.S. party comfort that under the Covered Law the methods for serving process specified in the agreement will be effective if, after obtaining a judgment from a court outside the United States, the non-U.S. party sues the U.S. party in a court in the Covered Law State to enforce that judgment.

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 adopted statutes or rules of court specifying which methods of service of process are permissible, while others have left that matter for the parties to cross-border agreements in transactions in which closing opinions are delivered usually choose methods on which an opinion can be given. An opinion on service of process does not cover other provisions often included in an agreement, such as (i) an express consent to be sued in a particular court, (ii) a waiver of procedural or substantive defenses, or (iii) a covenant not to claim that service of process was ineffective.

163. If the agreement provides for alternative methods of service of process, the opinion preparers will have to consider whether each method is permissible under the law of the Covered Law State and take an exception for methods they find problematic. If the agreement provides for service on one party by a particular method but not on the other or otherwise treats different parties differently under comparable circumstances (for example a non-U.S. lender may bring suit against a U.S. borrower in a particular way or court, but not vice versa), the opinion preparers also will have to consider whether the Covered Law permits such an agreement.

164. In either case, the Covered Law alone governs the adequacy of service of process for commencing a suit. In the case of enforcement of a foreign judgment, as discussed earlier in this Part, the opinion preparers also need to consider whether the method used to serve process in the non-U.S. court was permissible under the Covered Law. As a practical matter, if, as discussed earlier in this Part, an opinion can be given that all methods specified in the agreement for service of process to bring suit in the non-U.S. court are permissible under the Covered Law, this opinion also can be given.
courts to decide. 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 United States

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 to the U.S. party and service of process to be made on the U.S. party through that agent. The non-U.S. party to a cross-border agreement sometimes requests an opinion of U.S. counsel that the agent has been duly and validly appointed by the U.S. party. State law in the United States generally permits the appointment of agents for service of process. If the creation and scope of the agency are governed by the Covered Law, the requested opinion normally can be given.

The non-U.S. party sometimes requests an additional opinion that under the Covered Law it is permitted to serve the U.S. party through the U.S. party’s appointed agent in the manner specified in the agreement. Giving this opinion should present no difficulty if an opinion could be given that (i) the agent was duly appointed and (ii) as discussed earlier in this Part, the methods of service of process specified in the agreement are permissible under the Covered Law. 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 may assume the validity of the agent’s appointment under the governing non-U.S. law by relying, without so stating, on the Omnibus Cross-Border Assumption. The opinion in that event would mean that under the Covered Law the U.S. party duly authorized, executed, and delivered the document appointing the agent, 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, and service can be made on the U.S. party by serving the agent.

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 perform its obligations under the agreement or its authorization, execution, and delivery of the agreement. Closing opinions typically cover these matters in domestic U.S. transactions, and the non-U.S. parties to cross-border agreements ordinarily request opinions on these matters from U.S. counsel. The wording of these opinions and the work the opinion preparers

165. If the agent is appointed in the agreement itself, this opinion would be subsumed in the opinion discussed earlier in this Part on the status under the Covered Law of the methods of service of process. See generally IBA REPORT, supra note 2, at 276–77.
166. See supra note 17 and accompanying text.
167. See infra text accompanying notes 168–71.
are expected to perform to support them are the same in cross-border transac-
tions and domestic U.S. transactions because the law governing them is the
same—i.e., the law of the state of the U.S. party’s organization.¹⁶⁸

In deciding whether they can give an opinion 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 client’s power
under its organizational documents or the law under which it was formed.¹⁶⁹
To give the opinion, however, the opinion preparers do not have to consider
every provision of the agreement. Rather, all they need to understand is the na-
ture of the business activities covered by, and the general scope of their client’s
undertakings in, the agreement. Ordinarily, as in domestic U.S. transactions, the
activities a client 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, are readily apparent based on the opinion preparers’ familiarity
with the client, transaction, and agreement. When those activities are not obvi-
ous, however, for example because an agreement governed by non-U.S. law uses
concepts or terminology having no counterpart in the Covered Law, the opinion
preparers may wish to seek clarification.¹⁷⁰

In the cross-border context, some aspects of due execution and delivery, such
as authentication by a notary, attestation by witnesses, or special form require-
ments 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 de-
livered.¹⁷¹ Because due execution and delivery are required for an agreement to

¹⁶⁹. For example, the business activities a corporation has the power to engage in may be re-
stricted by its charter or, in the case of banking and insurance activities, by the corporation law
under which it was incorporated. See TriBar 1998 Report, supra note 35, at 653 & nn.142–44
(§ 6.3), 654 & n.146 (§ 6.4); see also Glazer Treatise, supra note 10, at 236–44, 264–80. In addition,
the applicable corporation law and the corporation’s charter and bylaws will determine which matters
may be approved by directors and officers and which require shareholder approval. As a matter of
U.S. customary practice the power and authority opinion is understood to address only restrictions
on the entity’s power that derive from the statute under which the entity was formed or its governing
documents, and not restrictions that derive from other statutes, rules, or regulations such as those
requiring licenses or permits to engage in specific activities.
¹⁷⁰. Depending on the circumstances, reliance on the client’s representations regarding the busi-
ness activities it is undertaking in the agreement may be sufficient. Alternatively or in addition, the
opinion preparers may consult with non-U.S. counsel on aspects of the transaction or non-U.S. law
that bear on their analysis of their client’s power to enter into and perform its obligations under the
agreement (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).
¹⁷¹. See IBA REPORT, supra note 2, at 146 (under most countries’ choice-of-law rules, the law of the
place where the agreement was executed, as well as the law chosen in the agreement, the law of
the entity’s home jurisdiction, or possibly some other law may apply, so that advice from counsel
in each jurisdiction as to proper execution and delivery may be appropriate on matters such as proper
evidence of corporate authority, witness attestation, notarization requirements, signing procedures,
sworn affidavit requirements, etc.).
be an enforceable obligation, the opinion preparers are permitted to rely, without so stating, on the Omnibus Cross-Border Assumption to the extent that they are not governed by the Covered Law. 172

III-6 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 contracts to which the opinion giver’s client is a party. 173 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 the agreement tortiously interferes with an existing contract of the U.S. party.

When a cross-border agreement chooses 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. That is because the opinion requires an understanding of the specific contractual obligations the opinion preparers’ client is undertaking (not just the transaction’s general scope and structure as is required to give a power and authority opinion) and the opinion preparers cannot be expected to have expertise in the non-U.S. law governing those obligations. Nevertheless, giving a no breach or default opinion may be possible to the extent that the opinion preparers do not need a complete understanding of every obligation their client is undertaking but instead only of those obligations being undertaken by the client pursuant to the agreement that could result in a breach of or default under the particular contracts to which the client is already a party that the opinion preparers specify they are covering in the opinion. 174 What those obligations are in a particular situation, and therefore whether the opinion can be given, will depend on: (1) the nature of the transaction and (2) the terms of the contracts being covered.

172. This is the same as in domestic U.S. transactions when the Chosen Law is not the Covered Law. In states that follow the Restatement (Second) of Conflict of Laws, the Chosen Law normally governs at least some of the formalities required to execute and deliver a contract. For example, a “duly executed” opinion for a Delaware corporation means that persons having the actual authority to bind the corporation 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 chooses as its governing law the law of a jurisdiction other than Delaware, an opinion whose coverage is limited to Delaware law would not cover the legal requirements for execution and delivery to the extent that the law of that other jurisdiction governs those matters.

173. See generally TriBar 1998 Report, supra note 35, at 654–61 (§ 6.5) (no breach or default). 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.

174. Normally, those contracts will be specifically identified. See infra note 177.
by the opinion. For example, for U.S. counsel to give a no breach or default opinion in a cross-border loan transaction in which the loan agreement is governed by German law, the opinion preparers need not have the level of understanding of the agreement they would need when giving an enforceability opinion on behalf of the U.S. borrower in a comparable domestic U.S. transaction on a loan agreement choosing the Covered Law as its governing law. Instead, all the opinion preparers need is an understanding of those provisions of the loan agreement (for example the granting of a security interest) that may cause other contracts to which the borrower is already a party to be breached.

Recognizing that they may not fully understand each and every obligation their client is undertaking under an agreement governed by non-U.S. law, the opinion preparers nevertheless may decide, depending on the nature of the agreement, its complexity, and other factors, that they can give a no breach or default opinion based on their general familiarity with the client, the transaction, and the agreement. In making that decision, the opinion preparers may choose to seek additional clarification about the client’s obligations from their client or from counsel knowledgeable about the Chosen Law.

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 are to be covered by the opinion and consider the practicality of doing the work needed to address them. 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. transactions, when a contract covered

175. In many transactions in which non-U.S. law is the governing law and a closing opinion of U.S. counsel is requested, the U.S. party will have retained non-U.S. counsel to work with U.S. counsel on the structure of the transaction and the terms of the agreement. Depending on their respective roles, U.S. counsel may be able to look to non-U.S. counsel for help in gaining the understanding needed to give a no breach or default opinion. The type of business the client engages in, the nature and complexity of the transaction, and other circumstances will all affect what the opinion preparers do in order to be able to give the opinion.

176. The client, for example, may be able to provide sufficient clarification about the commercial terms of the transaction and the business activities to be performed under the agreement. If the opinion preparers conclude that further clarification is necessary, for example because the agreement refers to foreign statutes or uses concepts under non-U.S. law with which the opinion preparers are not familiar, they may decide they need to consult with non-U.S. counsel for guidance on what the agreement means. In some circumstances, however, the cost of consulting non-U.S. counsel may not be justified by the benefit of the opinion to the recipient, or the transaction may be too complex or the governing non-U.S. law may be too intricate for U.S. counsel to give an unqualified opinion. If the opinion preparers receive advice from non-U.S. counsel, they may choose to state their reliance on that advice in the opinion letter.

In some cases, the opinion preparers may choose to describe in the opinion letter their understanding of those aspects of the transaction or agreement on which they have based their analysis or to rely on express assumptions about specific matters that are governed by non-U.S. law. A combination of these steps may be needed before U.S. counsel can give a no breach or default opinion in a cross-border transaction, and in some circumstances U.S. counsel may conclude that it does not have a sufficient understanding to give the opinion.

177. See ABA Guidelines, supra note 5, at 879 ($ 3.4). Practice has shifted away from covering contracts “known to counsel” and toward limiting the coverage of the opinion to specific contracts listed on a schedule, which may be part of the agreement or some other existing document, or may be prepared specifically for the opinion letter.
by a no breach or default opinion chooses as its governing law the law of another U.S. state, U.S. customary practice permits the opinion preparers to interpret that contract as lawyers in the Covered Law State would understand it. This approach applies whether or not stated, but to help reduce the risk of misunderstanding, some U.S. lawyers spell it out in their opinion letters.

When a no breach or default opinion covers contracts governed by the law of a U.S. state other than the Covered Law State, the same approach works as well for cross-border transactions as it does for domestic U.S. transactions. That approach does not, however, work well if the opinion preparers are asked to give a no breach or default opinion covering contracts governed by the law of a jurisdiction other than a U.S. state. 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 depend on legal concepts that do not have counterparts in U.S. law. Foreign contracts also may incorporate (with or without explicit reference) provisions supplied by statutes in the non-U.S. jurisdictions whose law they choose as their governing law. Thus, foreign contracts may have a meaning that is materially different from what the opinion preparers would think if they based their analysis on the approach permitted by U.S. customary practice for interpreting contracts governed by the laws of U.S. states other than the Covered Law State. Therefore, U.S. lawyers giving no breach or default opinions should not be expected to cover contracts that are governed by the law of jurisdictions outside the United States.

In addition to a no breach or default opinion, non-U.S. opinion recipients (like opinion recipients in domestic U.S. transactions) sometimes request an opinion that the execution, delivery, and performance of the agreement will not violate judgments, injunctions, orders, or decrees to which the opinion giver's client is subject. The analysis discussed above for giving a no breach or default opinion in a cross-border transaction also applies to giving this opinion. As they do when identifying contracts to be covered by a no breach or default opinion, the parties and their counsel should discuss early in the transaction whether judgments, injunctions, orders, or decrees are to be covered and, if so, how they should be identified in the opinion letter.

179. The wording could be as follows:

We have interpreted the provisions of the contracts addressed by the opinion in numbered paragraph __ as those provisions would be understood in [COVERED LAW STATE] whether they are governed by the law of [COVERED LAW STATE] or by the law of another jurisdiction.

180. The CLLS Opinion Guide reaches a similar conclusion. CLLS Opinion Guide, supra note 4, at 10 (¶ 45) (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 also Part III-1, which discusses similar reasons why, when an agreement is governed by non-U.S. law, U.S. lawyers ordinarily will not give an “as if” opinion on its enforceability.
III-7 NO VIOLATION OF U.S. STATUTES, RULES, OR REGULATIONS; 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.\(^{181}\) This opinion covers statutes, rules, and regulations that, if violated, will subject the company to a fine, penalty, or other governmental sanction.\(^{182}\)

Despite its apparent breadth, a no violation 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\(^{183}\) 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.\(^{184}\) 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.\(^{185}\)

\(^{181}\) See generally TriBar 1998 Report, supra note 35, at 661–62 (§ 6.6) (violation of law). Whether the opinion is cast in the present or future tense, it covers not only violations 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 the agreement. TriBar 1998 Report, supra note 35, at 657–58, 662. 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 speculate about future facts or to take into account the possibility of changes in statutes, rules, or regulations after the date of the opinion letter (except for changes then enacted but not yet in effect). TriBar 1998 Report, supra note 35, at 658 & nn.155–56. 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.” In most, if not all, situations, this more limited opinion should strike the right balance between the benefit of the opinion to the recipient and its cost. If the recipient also wants an opinion on particular aspects of the company’s future performance, it should request that those aspects be specifically addressed.

\(^{182}\) A statute might, for example, make the export of certain types of goods illegal and impose sanctions ranging from a fine to an order prohibiting the company’s performance of its contractual obligations to deliver the goods (e.g., technology with military applications). In domestic U.S. transactions the no violation opinion complements the remedies opinion because statutes, rules, or regulations that, if violated, may subject the company to fines, penalties, or governmental sanctions may not render the agreement unenforceable as against the company and thus not require an exception to an opinion on the agreement’s enforceability. See TriBar 1998 Report, supra note 35, at 661. The no violation opinion does not address the enforceability of the agreement under the Covered Law (even though enforceability will not be addressed at all by U.S. counsel when the agreement chooses non-U.S. law as its governing law).

\(^{183}\) The no violation opinion does not cover ordinances or regulations adopted by political subdivisions below the federal and state level. See TriBar 1998 Report, supra note 35, at 661–62 & nn.164–65 (§ 6.6).

\(^{184}\) See ABA Principles, supra note 3, at 832 (¶ II.B); see also TriBar 1998 Report, supra note 35, 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).

\(^{185}\) Which statutes, rules, and regulations are understood not to be covered depends on the parties and the transaction. See, e.g., TriBar 1998 Report, supra note 35, at 628 & n.81 (while federal securities
A no violation opinion in a cross-border transaction raises the same issues as its counterpart 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 not to be covered unless they are addressed expressly. The answers to these questions are not always clear in domestic U.S. transactions; they are even less clear in cross-border transactions because of the absence of a consensus over which statutes, rules, or regulations among those specifically applicable to cross-border transactions should be understood to be covered. In addition, the answers may differ from transaction to transaction. As a result, although practice varies, in cross-border transactions many opinion givers include a non-exclusive list of statutes, rules, and regulations that may apply but that they nonetheless are not covering.

As a technical matter a U.S. party’s execution, delivery, or performance of its obligations under the agreement may not “violate” some U.S. statutes, rules, and regulations relating to cross-border transactions. 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 reviewing 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). Thus, if a pre-
closing filing is not being made, many U.S. lawyers expressly exclude CFIUS review from the coverage of their no violation opinions. 188

One way opinion givers can help reduce the risk of misunderstanding about the coverage of a no violation opinion in a cross-border transaction is for them to include in the opinion letter: (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. statutes, rules, and regulations affecting cross-border transactions that might be applicable but nevertheless are not covered. 189 Many specialized statutes, rules, and regulations (mostly federal) that rarely apply to domestic U.S. transactions apply to similar cross-border transactions because non-U.S. parties are involved or performance is to occur outside the United States. 190 Whether these laws apply to a particular cross-border transaction often depends on many factors, including the national-

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188. An alternative to an exception is 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.

189. The opinion could be worded as follows:

Except as set forth below, the execution and delivery of the Agreement by the Company and consummation by the Company of the transactions contemplated by the Agreement do not result in any violation by the Company of statutes of the United States or [COVERED LAW STATE], or rules or regulations thereunder, that, subject to the limitations in the following sentence, we would reasonably be expected to recognize as being applicable to an entity, transaction or agreement to which this opinion letter relates. The opinion in this paragraph does not cover, without limitation, the following statutes, 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 of excluded statutes, rules, and regulations with wording such as the following:

[. . . ], or other statutes, rules, or regulations customarily understood to be excluded even though they are not expressly stated to be excluded.

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

190. 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 Acts; (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 USA PATRIOT Act and other anti-money laundering (AML) laws and regulations; (viii) a variety of U.S. executive orders (such as Executive Order 13224: Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit or Support Terrorism, 66 Fed. Reg. 49079 (Sept. 24, 2001)); and (ix) the Foreign Corrupt Practices Act. 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.
ity 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 confidence needed to give an opinion. 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 they grant to the agencies of the U.S. federal government charged with their interpretation and enforcement. A non-exclusive list of statutes, rules, and regulations not covered by a no violation opinion on a cross-border agreement, if tailored thoughtfully to the circumstances, will make the opinion clearer and help reduce the cost of its preparation.

In many cross-border transactions, in the course of advising their clients the parties’ own counsel identify particular U.S. statutes, rules, and regulations that may be applicable to the entity, transaction, or agreement, and then help their clients structure the transaction to comply with those statutes, rules, and regulations, or to take advantage of available exemptions. When the opinion preparers are willing to cover those statutes, rules, or regulations in a no violation opinion, for example because they have done the work to ensure compliance, they can reduce the risk of misunderstanding over the opinion’s coverage by referring expressly in the opinion letter to the particular statutes, rules, and regulations they are covering.

Because customary practice for no violation opinions in cross-border transactions is continuing to evolve, 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 those discussions, each side should be guided (as in domestic U.S. transactions) by the practicality of addressing particular statutes, rules, or regulations, considering such matters as the degree of

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191. For example, a statute or regulation may apply to a transaction if it involves a party from a “black-listed” jurisdiction. The facts necessary to establish with the confidence needed to give an opinion the true “provenance” of parties involved in the transaction whom the opinion preparers may not even represent, as well as their direct and indirect affiliates, often are not ascertainable by U.S. counsel.

192. For example, in recent years CFIUS’s authority to scrutinize the effect on U.S. national security of foreign investments that could result in foreign control (evaluated functionally) of U.S. businesses has been extended to an ever broader range of transactions. The term “national security” is not defined by statute or regulation, and, while the statute under which CFIUS was established (50 App. U.S.C.A. § 2170) does list some factors CFIUS may consider and while CFIUS has provided some guidance about the types of national security considerations it has reviewed, those factors (such as “critical infrastructure” or “critical technologies”) are non-exclusive and general in nature.

193. This is often the case when failure to comply with particular statutes, rules, or regulations could result in serious governmental sanctions rather than a small fine or penalty.

194. This could be as simple as adding at the end of the first sentence in the italicized opinion language in note 189 above “including, without limitation, [. . .].” See generally TriBar 1998 Report, supra note 35, at 627–30, 662 (noting that 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 statutes, rules, and regulations that may bear on an agreement, including among others antitrust laws and Exon-Florio).
certainty that is possible, the significance of specific statutes, rules, or regulations 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 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 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 in this Part III-7 also applies to no approvals or filings opinions in cross-border transactions. If specific approvals or filings are to be covered, they should be identified in a similar manner early in the transaction.  

If the agreement chooses non-U.S. law as its governing law, to give either a no violation or no approvals or filings opinion, the opinion preparers need to have a general understanding of the transaction and the obligations the parties are undertaking in the agreement as interpreted under the Chosen Law. What they need to do to gain that understanding and to conduct the necessary legal analysis under the Covered Law will depend on the statutes, rules, and regulations to be covered and may require advice from others about the transaction or agreement. In many cases an understanding comparable to that required to give a no breach or default opinion (which is discussed in Part III-6) may suffice. When, however, the opinion covers specialized statutes, rules, or regulations specifically affecting cross-border transactions, giving the opinion may require a more in-depth understanding of matters covered by the Chosen Law, such as the legal status 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 gain a sufficient understanding to give an opinion.

195. See TriBar 1998 Report, supra note 35, at 627–28, 662 & n.166 (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 opinion. Id. at 661. Delaying a discussion with the opinion recipient regarding the coverage of the no violation opinion may have the practical effect of limiting what the opinion preparers can analyze in the available time and may prevent them from addressing some statutes, rules, or regulations they might otherwise have been willing to cover in the opinion.  

196. See generally TriBar 1998 Report, supra note 35, at 664–65 (§ 6.7) (opinion on approvals and filings overlaps considerably with no violation opinion).  

197. 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).  

198. See supra notes 175–76 and accompanying text.
III-8 SOVEREIGN IMMUNITY

Depending on the circumstances, 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 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 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

199. See generally IBA REPORT, supra note 2, at 211. Dating back centuries, sovereign immunity has been recognized as a legal principle in most legal systems, either as a procedural matter (one cannot sue the king in the courts he created) or as a substantive matter (the king can do no wrong).

200. In many jurisdictions the legal doctrine that traditionally has shielded state and local governments, as well as their instrumentalities, from litigation consists of two elements: (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, e.g., Fernald Corp. v. Governor, 31 N.E.3d 47 (Mass. 2015) (history and character of corporation materially different from those characteristic of state agencies); see generally RESTATEMENT (SECOND) OF TORTS § 895B(1) (1979)); 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., Evans v. Bd. of Cty. Comm’rs of El Paso Cty., 482 P.2d 968 (Colo. 1971); Bd. of Educ. of Prince George’s Cty. v. Mayor & Common Council of Town of Riverdale, 578 A.2d 207 (Md. 1990); Tilton v. Dougherty, 493 A.2d 442 (N.H. 1985); Tilli v. Northampton Cty., 370 F. Supp. 459 (E.D. Pa. 1974) (Pennsylvania law)). 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, unless waived, shield states and political subdivisions from judicial authority. 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. See 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 a 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 rather 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 replaced by statutes taking 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 a particular body based on a wide variety of tests and factors. See, e.g., Ky. Ctr. for Arts Corp. v. Berns, 801 S.W.2d 327 (Ky. 1990); Rucker v. Hartford Cty., 558 A.2d 399 (Md. 1989); Ohio Valley Contractors v. Bd. of Educ. of Wetzel Cty., 293 S.E.2d 437 (W. Va. 1982). Statutory provisions, and in particular nomenclature like “agency,” “department,” or “division,” can affect a court’s determination whether a particular body has immunity. Statutes, however, are not always dispositive. Other questions courts often ask are: Was the body 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 body operate statewide? Examples of governmental bodies 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 some non-governmental business functions, state universities, and local school districts. In the absence of statutory provisions that grant immunity for specific bodies or functions or types of claims, counties and municipal corporations may be subject to suit to the same extent as private parties. See, e.g., Fernald Corp., 31 N.E.3d 47 (suit to clarify title to land does not implicate concerns that support finding of sovereign immunity).
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 under federal law or the law of the Covered Law State. This opinion typically deals with both aspects of sovereign immunity: the absence of immunity from the jurisdiction of courts in the Covered Law State (including legal process required to commence a suit or to enforce a foreign judgment).

Identification and application of the rules on sovereign immunity and governmental immunity may be straightforward in some situations and not in others.

201. The sovereign immunity of the U.S. government 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); Christensen v. Ward, 916 F.2d 1462 (10th Cir. 1990); Williamson v. U.S. Dep’t of Agric., 815 F.2d 368 (5th Cir. 1987). 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., Drake v. Panama Canal Comm’n, 907 F.2d 532 (5th Cir. 1990); Kozena v. Spirito, 723 F.2d 1003 (1st Cir. 1983). Congress has the power to grant immunity to governmental corporations even though they have functions that are comparable to private entities and may not inherently possess sovereign immunity. See, e.g., Edmond v. Fed. 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. See United States v. Mitchell, 463 U.S. 206 (1983). Congress alone has authority to enact legislation waiving immunity and giving consent to suit. United States v. Testan, 424 U.S. 392 (1976). Congress’s authority includes the power to place conditions and limitations on a waiver (Honda v. Clark, 386 U.S. 484 (1967); United States v. Sherwood, 312 U.S. 584 (1941)) and to withdraw a waiver at any time it deems proper (Maricopa Cty., Ariz. v. Valley Nat’l Bank of Phoenix, 318 U.S. 357 (1943)).

Statutes creating federal administrative agencies and corporations often contain clauses permitting them to sue and be sued. These clauses have been construed as waiving sovereign immunity broadly for the entity. See, e.g., Roche v. Am. Red Cross, 680 F. Supp. 449 (D. Mass. 1988). General “sue and be sued” provisions are liberally construed because the U.S. Supreme Court has stated that, when Congress authorizes federal corporations to engage in commercial and business transactions with the public, those corporations, to establish they are entitled to sovereign immunity, must clearly show that implied restrictions on the ability of a plaintiff to sue them are necessary to avoid grave interference with their performance of a governmental function or that Congress plainly intended that the “sue and be sued” clause be read narrowly. See, e.g., Franchise Tax Bd. of Cal. v. U.S. Postal Serv., 467 U.S. 512 (1984); Fed. Hous. Admin., Region No. 4 v. Burr, 309 U.S. 242 (1940).

202. 28 U.S.C. §§ 1330, 1332(a)(2)–(a)(4), 1391(f), 1441(d), 1602–1611 (2012). Native American tribes are technically “foreign” sovereigns in the United States and as such they, as well as tribal corporations and in some cases their agents and counsel, are entitled to sovereign immunity under federal law. The sources of the law applicable to a particular tribe may include, in addition to federal statutes, regulations, and case law, treaties between the United States and the tribe, as well as tribal law and administrative ordinances of tribal courts. The resulting complexity can make the legal analysis required to give an opinion in a transaction involving an entity controlled by a Native American tribe challenging.

203. 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 most cross-border transactions in which opinions are given involve private parties.
judgment in those courts) and the absence of immunity from attachment of assets (which a plaintiff may seek before or after obtaining a judgment). Normally U.S. lawyers can give this opinion either because (1) 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) the U.S. party has legally waived sovereign immunity.

When the U.S. party is a private business and the opinion recipient knows that the U.S. party is neither a U.S. sovereign nor controlled by one, the U.S. party’s 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 not be requested. Nevertheless, should an opinion be requested and given, to satisfy themselves that their client is a private business not under the control of a U.S. sovereign, the opinion preparers may rely on express factual assumptions or a certificate from an officer of the client regarding the client’s owners and the absence of voting or other arrangements that would subject it to the control of a U.S. sovereign.

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 depending on the circumstances of the specific transaction and applicable federal and state law. For example, U.S. sovereigns generally are not immune when they engage in commercial activities or enter into or perform agreements involving commercial activities. Generally, however, the opinion preparers will start with a presumption that, if their client is a state or the federal government, a state or federal agency or instrumentality, or a political subdivision of a state such as a county or municipality, it is entitled to immunity absent a clear provision to the contrary in the Covered Law. Determining with confidence that a U.S. sovereign is engaging in a commercial transaction and is not therefore entitled to sovereign immunity under the Covered Law with respect to the agreement covered by the opinion often is difficult and, therefore, giving an unqualified opinion to that effect may be impossible. That, however, ordinarily is not an opinion problem because despite the possible, or even likely, availability of an exception from sovereign immunity for the commercial activities of a U.S. sovereign (or of some other exception under the Covered Law), the non-U.S. party ordinarily will insist on including in the agreement a provision that unconditionally and irrevocably waives the U.S. party’s sovereign immunity with respect to its obligations under the agreement. In the absence of such a waiver, U.S. lawyers ordinarily are unwilling to give an opinion that a U.S. sovereign is not immune or at the most will give only a qualified, reasoned opinion.

When an opinion on sovereign immunity is based on a contractual waiver, it means that, under the Covered Law: (i) the U.S. party’s constituent documents

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204. The opinion could be worded as follows:

Neither [U.S. PARTY] nor its assets are immune on grounds of sovereign immunity from (i) suit in connection with the Agreement in the courts in [COVERED LAW STATE] [or United States federal courts] or (ii) related legal process, including service of process, attachment of assets, or enforcement by those courts of a judgment against the Company related to the Agreement.
and any enabling legislation and implementing regulations give the U.S. party the power (corporate or governmental) to grant the waiver,\(^{205}\) (ii) the U.S. party has taken all action (corporate or governmental) required to waive sovereign immunity,\(^{206}\) 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.\(^{207}\)

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 obtained in such a suit, and to attach the assets of the U.S. party pursuant to such a judgment.\(^{208}\)

If the agreement containing the waiver chooses non-U.S. law as its governing law, the opinion may be based, without so stating, on the Omnibus Cross-Border Assumption to the extent that the waiver's effectiveness depends on the Chosen Law or some other non-U.S. law.\(^{209}\)

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205. Even if a U.S. sovereign waives its immunity, a creditor may be unable to attach assets the U.S. sovereign needs to fulfill a 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). As a matter of U.S. customary practice the opinion is understood not to cover limitations, including but not limited to public interest, public policy, or equity, on the ability of a judgment creditor to exercise ordinary remedies with respect to properties of a U.S. sovereign that are integral to its governmental or non-commercial function. If, however, the opinion preparers are aware of a specific provision of the Covered Law that places onerous limits on the effectiveness of a waiver of sovereign immunity, they should consider taking a specific exception.

206. The action required may include approval not only by the U.S. party's governing body or authorized officers but also by specific government agencies or officials with oversight authority over the U.S. party.

207. This assumes that the opinion letter covers the statutes, rules, and regulations governing the U.S. party's status and power 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 status as a sovereign, or its power to waive sovereign immunity, and the judicial decisions that interpret them. If the opinion preparers cannot make the necessary legal determinations with sufficient confidence, 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. Because giving that opinion would not require the opinion preparers to make any different or additional determinations than are required to give a typical sovereign immunity opinion (see supra note 204), a separate opinion on the effectiveness of the waiver adds nothing and therefore should not be requested.

208. 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, is exempt from taxation, and is 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 the agency's privileges and exemptions under all laws.

209. See supra text accompanying note 17. If, for example, the Chosen Law Country has a statute like the FSIA governing the immunity of sovereigns of other countries when they engage in transactions in that country (see infra text accompanying notes 202–12), it may include requirements for a
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 United States sometimes is asked for an opinion that, under the FSIA, the foreign sovereign is not entitled to sovereign immunity in the United States with respect to the transaction. Under the FSIA, (1) a foreign sovereign is immune from suit in federal and state courts in the United States, and (2) property in the United States of a foreign sovereign is immune from attachment and execution, except as otherwise specifically provided in the FSIA. The FSIA provides seven specific exceptions from immunity, one of which is a waiver of immunity by a foreign sovereign.

In the absence of a waiver, the exception most often applicable in the types of transactions in which a closing opinion typically is requested is for activities of a foreign sovereign that are commercial in nature and that either are carried on in the United States or are the direct effect in the United States of a foreign sovereign’s commercial activity elsewhere. Other exceptions may be available in the absence of a waiver of immunity. The Omnibus Cross-Border Assumption also would cover compliance with that statute.

210. See 28 U.S.C. §§ 1604, 1609 (2012). The FSIA defines a “foreign state” to include a political subdivision of a foreign state and an agency or instrumentality of a foreign state. The FSIA defines an agency or instrumentality 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 incorporated in it is a “foreign state” within the meaning of the FSIA. Examples of when 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 a veto over specified matters. See generally GSS Grp. Ltd. v. Nat’l Port Auth., 680 F.3d 805, 811 (D.C. Cir. 2012); Gang Chen v. China Cent. Television, 320 F. App’x 71, 72–73 (2d Cir. 2009); Globe Nuclear Servs. & Supply, Ltd. v. AO Teshnabexport, 376 F.3d 282, 285 (4th Cir. 2004); Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. The M/T Respect, 89 F.3d 650 (9th Cir. 1996) (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. 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).

211. 28 U.S.C. §§ 1605(a)(2), 1603(d) (2012). The legislative history of the FSIA indicates, for example, that a foreign state’s borrowing of money from U.S. commercial banks is “commercial” in nature and that a foreign state’s incurrence of indebtedness in the United States (if the loan agreement is negotiated and executed in the United States) is a commercial activity carried out in the United States. See, e.g., Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (foreign state engages in commercial activity when it acts not as a regulator of a market, but in the manner of a private player within it). For other examples of commercial activities, see Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int’l & Foreign Courts, 727 F.3d 10 (1St Cir. 2013); Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991); Eckert Int’l, Inc. v. Gov’t of Sovereign Democratic Republic 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 United States, sometimes with surprising results. See, e.g., EM Ltd. v. Republic of Argentina, 389 F. App’x 38, 44 (2d Cir. 2010) (securities held by Argentine law trust in New York banks on behalf of foreign state for investment and eventual sale is “the kind of activity that a private player in the market would carry on for profit and, therefore, a commercial activity in the U.S. under the FSIA”); see also Birch Shipping Corp. v. Embassy of Republic of Tanzania, 507 F. Supp. 311 (D.D.C. 1980).
specific circumstances. However, rather than relying 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.

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, however, would not cover matters not governed by the Covered Law such as: (i) the 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; (iii) effectiveness of the waiver under the law chosen to govern the agreement (if not the Covered

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212. For example, the FSIA contains an exception for the judicial enforcement of an agreement to arbitrate to which a foreign sovereign is a party, whether in an action to compel arbitration or an action to confirm an arbitral award. 28 U.S.C. § 1605(a)(6) (2012). This exception is consistent with section 15 of the FAA, which provides that the enforcement of arbitration agreements and the recognition and enforcement of arbitral awards cannot be avoided by a foreign sovereign’s claiming the act of state doctrine (which states that every sovereign nation is bound to respect the independence of every other sovereign nation) if they are otherwise covered by the New York Convention.

213. 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 agreement the parties are entering into in connection with the transaction and that expressly (i) covers immunity from suit, immunity from execution upon a judgment, and immunity from attachment prior to or after a judgment; and (ii) provides that it remains in effect notwithstanding any attempt to revoke or withdraw it. See generally Capital Ventures Int’l v. Republic of Argentina, 552 F.3d 289 (2d Cir. 2009); Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A., 875 F.2d 1174, 1177 (5th Cir. 1989), cert. denied, 493 U.S. 1075 (1990); Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela, S.A., 760 F.2d 390, 393 (2d Cir. 1985); Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47 (2d Cir. 1982); ICC Chem. Corp. v. Indus. & Commercial Bank of China, 886 F. Supp. 1 (S.D.N.Y. 1995).

Determining how far a waiver extends under the FSIA may not be straightforward. In First National City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 627 (1983) (Bancoc), the U.S. Supreme Court held that duly created instrumentalities of a foreign state are to be accorded a presumption of independent status, such that the property of an instrumentality that has not waived immunity cannot be used to satisfy a judgment against another that has. This presumption, however, can be overcome if the instrumentality is so extensively controlled by its owner that a relationship of principal and agent is created or if recognizing the instrumentality’s separate juridical status would work fraud or injustice. See generally EM Ltd., 473 F.3d at 476–80. Courts have been unwilling, however, to take the Bancoc analysis too far. See, e.g., EM Ltd. v. Banco Central de la Republica Argentina, No. 13-3819, slip op. at 24 (2d Cir. Aug. 31, 2015) (“both Bancoc and the FSIA legislative history caution against too easily overcoming the presumption of separateness”); NML Capital, Ltd. v. Banco Central de la Republica Argentina, 652 F.3d 172, 195–96 (2d Cir. 2011) (waiver under FSIA must be clear and unambiguous; broadly worded waiver not clear and unambiguous enough to waive central bank’s immunity); see also Latelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984) (cautions against too easily overcoming the Bancoc presumption of separateness).

214. The opinion could be worded as follows:

Under the Foreign Sovereign Immunities Act of 1976, as amended, [NON-U.S. PARTY] has validly waived its sovereign immunity (if any) from (i) suit in the courts in [COVERED LAW STATE] and United States federal courts and (ii) related legal process, including service of process, attachment of assets, or enforcement by those courts of a judgment against [NON-U.S. PARTY] related to the Agreement.
Law) or under mandatory provisions of foreign law; or (iv) the foreign sovereign’s right to revoke the waiver.\textsuperscript{215}

If a non-U.S. party has not waived sovereign immunity, whether an opinion can be given that the non-U.S. party is not immune under the FSIA depends on the circumstances. The opinion preparers could give an unqualified opinion if they are able to conclude with sufficient confidence that the non-U.S. party is not a “foreign state” as defined in the FSIA.\textsuperscript{216} In rare situations a U.S. lawyer may believe, but not with the confidence needed to give an unqualified opinion, that a foreign sovereign’s activities in the transaction are commercial in nature and, therefore, fall within the FSIA exception for commercial activities; if so, if asked, the lawyer may be willing to give a qualified, reasoned opinion to that effect.

III-9 **No Requirement to Qualify to Do Business in the United States**

Lenders sometimes request an opinion that making a loan and, in the case of a secured loan, taking a security interest in a borrower’s property\textsuperscript{217} will not require the lender to qualify to do business as a foreign company in the Covered Law State.\textsuperscript{218} This opinion ordinarily is requested only when a non-U.S. lender is making a loan to a borrower in the Covered Law State and the lender is not

\textsuperscript{215} On these issues the opinion can be based, without so stating expressly, on the Omnibus Cross-Border Assumption. See supra text accompanying note 17. 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.

\textsuperscript{216} The opinion preparers may need to base the opinion on stated assumptions as to factual matters and qualify it to the extent that the non-U.S. party’s status depends on non-U.S. law.

\textsuperscript{217} 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 or phrase the opinion to relate solely to specific activities involved in the transaction, or both.

\textsuperscript{218} See generally TriBar 1998 Report, supra note 35, at 646–47 & n.119 (§ 6.1.6) (opinion provides comfort that that recipient is not exposed to fines, penalties, or administrative sanctions for failure to qualify); Glazer Treatise, supra note 10, at 229 & 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 2014) (discussing foreign lenders); Credit Suisse Int’l v. Urb, DeSarrollos Urbanos, S.A.B. de C.V., 971 N.Y.S.2d 176 (Sup. Ct. Aug. 21, 2013) (unauthorized foreign corporation doing business in New York prohibited from bringing suit even if choice of New York forum valid).

An opinion that a foreign judgment may be enforced in the Covered Law State does not address a lender’s need to qualify to do business in that state before it can sue to enforce the judgment. See supra text accompanying notes 106 & 127.

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 an opinion that an out-of-state entity is duly qualified to do business in a particular state, which, when given as it sometimes is in domestic U.S. transactions, is normally 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, supra note 5, at 877 (§ 4.1) (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).
otherwise conducting activities, and therefore is not qualified to do business generally, in that state. Although this opinion was once common, today it is rarely requested or given in domestic U.S. transactions. Some non-U.S. lenders, however, continue to request it in cross-border transactions. If the opinion is requested, U.S. lawyers ordinarily are willing to give it (if they are willing to give it at all) only when the transaction is a bank loan. The opinion is not typically requested, and is almost never, if ever, given in transactions such as cross-border joint ventures or investments in U.S. businesses by non-U.S. parties because of the difficulty of analyzing a complex web of contractual rights and obligations and of concluding with the confidence needed to give an opinion that none of the non-U.S. party’s activities contemplated by the agreement will constitute “doing business” in the Covered Law State.

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 the Covered Law clearly provides that those activities do not require the lender to qualify to do business in the Covered Law State. The activities covered by the opinion ordinarily should be limited to the lender’s making a loan to a borrower in, or obtaining a guaranty from a guarantor in, the Covered Law State and its taking a security interest in collateral located there. To give the opinion, the opinion preparers do not have to determine whether the lender’s possible future activities in the Covered Law State, such as exercising remedies under the loan agreement against a borrower or guarantor or enforcing rights against collateral, would constitute “doing business” under the Covered Law.

Sometimes non-U.S. lenders request an opinion that covers additional matters under the Covered Law, such as licensing requirements, treatment 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

219. Even in lending transactions the opinion preparers may be unwilling to give the opinion if the loan is not straightforward and requires them to address the difficult issues often presented by complex corporate financing transactions. For example, if the agreement provides for a series of loan advances, the opinion preparers may not be comfortable with activities that the lender may have the right to engage in under the agreement over the term of the transaction, which may, for example, be contingent on how the project being financed progresses (or fails to progress) over time.

220. The opinion could be worded as follows:

Lender is not required to qualify to do business as a foreign corporation in [COVERED LAW STATE] solely by reason of its execution and delivery of the Agreement and consummation on the date of this letter of the transactions contemplated by the Agreement.

221. Depending on the facts and the Covered Law, steps a lender can later 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, may require it to qualify to do business in the Covered Law State. While some state statutes include in their list of activities that do not constitute “doing business” foreclosure by a lender on property in which it has a security interest and taking possession of collateral, many state statutes 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 those activities would constitute “doing business” for purposes of the qualification requirement, the opinion preparers may not be able to give the opinion or may have to qualify it.
which the lender should be seeking advice from its own counsel rather than counsel for the borrower.\textsuperscript{222}

\section*{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,\textsuperscript{223} it does not cover every opinion a non-U.S. party may request. Moreover, non-U.S. parties and their counsel may seek formulations of opinions that are different from what U.S. lawyers commonly use. Thus, notwithstanding the guidance provided by this Report, opinion giving in cross-border transactions will continue to present challenges and opportunities for misunderstanding.\textsuperscript{224}

Bar groups in the United States have articulated a Golden Rule\textsuperscript{225} to provide guidance on what opinions U.S. lawyers can properly be asked and expected to give in domestic U.S. transactions.\textsuperscript{226} The Golden Rule, however, does not translate easily to cross-border opinion giving.\textsuperscript{227} That is principally because the Golden Rule relies on an assumption that the opinion giver and counsel for

\textsuperscript{222} State and federal regulations governing financial services and financial institutions determine what filings or permits are required for different types of lending. To determine whether and how they apply would require an opinion giver to conduct an analysis of the lender’s structure and operations in the United States that goes well beyond what can reasonably be expected of counsel for a borrower. Eligibility for the benefits of bilateral treaties against double taxation often depends on non-resident status or whether a non-U.S. entity has a “permanent establishment” in the United States, issues that go well beyond the specific transaction. Whether a non-U.S. party’s activities subject it to taxation in the United States at the federal, state, or local level is often a complex issue that does not bear on the question of whether a bank is required to qualify to do business as a foreign entity in a particular state.

\textsuperscript{223} The \textit{CLLS Opinion Guide} contains a list of comparable opinions English lawyers give when transaction documents are governed by foreign law. \textit{CLLS Opinion Guide}, supra note 4, at 11 (¶ 55).

\textsuperscript{224} The risk of misunderstanding 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, exceptions, and qualifications are reasonable, what various opinions mean, and what work is required to support them.

\textsuperscript{225} The ABA Guidelines express the Golden Rule as follows:

\textit{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.}

ABA Guidelines, supra note 5, at 878 (§ 3.1).

\textsuperscript{226} See infra note 233. Many of the opinions which U.S. lawyers should not give are identified in bar association reports, which often characterize even requests for these opinions as inappropriate.

\textsuperscript{227} \textit{CLLS Opinion Guide}, supra note 4, at 2 (¶ 8), 12 (¶ 59) (the Golden Rule can minimize difficulties and costs, but can be difficult to apply). As discussed in prior sections of this Report, opinions given in cross-border transactions often raise issues that do not arise when the same opinions are given in domestic U.S. transactions. Moreover, some opinions U.S. lawyers regularly give in cross-border transactions are not normally given in domestic U.S. transactions (e.g., separate opinions on choice of law, forum selection, and arbitration).
the recipient will be in analogous but opposite positions in other transactions. That assumption does not hold true when opinion givers and recipients’ counsel practice in different countries having different legal systems, rules of professional conduct, and opinion practices. Moreover, the opinions requested and given in one country are often different from those requested and given in another, and market expectations are different as well.228

While opinion discussions between U.S. lawyers and non-U.S. counsel for the recipient present challenges that U.S. lawyers on opposite sides do not face in domestic U.S. transactions, this Committee believes that the guidelines below, which derive in part from experience with the Golden Rule, will facilitate the giving of opinions in cross-border transactions, and often will reduce friction and cost, if followed by all parties and their counsel.

First, lawyers give opinions in accordance with the customary practice of the jurisdiction in which they practice and should not be expected to know or take into account any other jurisdiction’s practice.229

Second, the parties to a cross-border agreement and their counsel should consider whether the cost of preparing each opinion requested is justified by its benefit to the recipient in the specific transaction.230

Third, a non-U.S. recipient should not insist on receiving an opinion simply because U.S. lawyers give it in domestic U.S. transactions.231 If the opinion is one that a non-U.S. recipient does not regularly ask non-U.S. lawyers to give in comparable circumstances, questions 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 pre-

228. Even when a law firm has lawyers with expertise in, and is giving opinions covering, the law of more than one of the jurisdictions whose laws are involved in the transaction, it generally provides a separate opinion letter covering the law of each jurisdiction. This Committee endorses that approach because it reduces potential confusion if matters of both U.S. law and non-U.S. law were addressed in the same opinion letter. The different opinion letters can refer to each other, just as advice from, or reliance on opinions of, non-U.S. counsel from a different law firm can be referred to in opinion letters of U.S. counsel.

229. See supra text accompanying notes 9–16; see also CLLS Opinion Guide, supra note 4, at 12 (¶ 60).

230. 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 ABA Guidelines, supra note 5, at 878 (¶ 1.2); see generally supra text accompanying notes 6–7. 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 (when the opinion is requested of U.S. counsel), and the relevance of the issues to be covered by the opinion to the commercial bargain between the parties. See CLLS Opinion Guide, supra note 4, at 11 (¶ 54). These factors may be weighted differently in the cross-border setting than in the domestic U.S. setting. In some jurisdictions or transactions, legal advice from a party’s own counsel may take the form of a written opinion; in that case, the cost of an opinion by U.S. counsel that duplicates an opinion the recipient already is receiving from its own counsel may well not be justified by the incremental benefit to the recipient.

231. Some opinions that are worded the same as opinions routinely given in domestic U.S. transactions are more difficult to give in cross-border transactions. See supra Parts III-6 & III-7 (regarding no breach or default and no violation of law opinions); see also supra text following note 6.
paring it in a cross-border transaction is not significant, a question can legally be raised why a U.S. lawyer is refusing to give it to a non-U.S. recipient even though non-U.S. counsel for the recipient, acting under its jurisdiction’s practice, would 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. Gaps, however, cannot always be bridged; when U.S. counsel is unable to give a requested opinion, the non-U.S. party is put on notice that a legal issue may exist and faces a choice, with advice from its own counsel, between proceeding without a third-party legal opinion on the issue or changing the terms of the transaction to address the issue (if possible).232 The opinion process should not be approached as a game in which one side wins and the other side loses.233

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 “customary usage”).234 Customary usage is more than a matter of style. Sometimes, opinion requests by a non-U.S. party use different words and phrases than a U.S. opinion giver would use. The requested wording may stem from differences in law or practice between jurisdictions and not necessarily signal a substantive opinion issue. Misunder-

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232. Closing opinions serve as part of the recipient’s diligence, providing the opinion giver’s professional judgment on legal issues the recipient has determined to be important to it in the transaction. See ABA Guidelines, supra note 5, at 875 (§ 1.1). Recipients, however, should not expect opinions given to them by counsel for the other party to address all important legal issues. See generally IBA Report, supra note 2, at 23–25 (some gaps will remain; opinion recipient should understand those gaps).

233. An opinion request requiring more than an expression of professional judgment on legal issues or seeking overly broad opinions is inappropriate. See ABA Guidelines, supra note 5, at 876 (§ 1.2) (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 that a client’s assets are not subject to any prior security interests; a statement that the client’s representations and warranties in the agreement are accurate; 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.

standings and delays can be reduced if non-U.S. recipients and their counsel are sensitive to the importance to U.S. opinion givers of adhering to customary usage and, therefore, are willing to accept opinion language commonly used in the United States even if that language does not track the language of the initial opinion request.

Sixth, non-U.S. recipients should not treat an opinion given by U.S. counsel as providing anything more than U.S. counsel’s professional judgment on the particular legal issues the opinion addresses. They should not expect U.S. opinion givers to provide confirmations of what are essentially factual, rather than legal, matters or to state a lack of knowledge of acts or events.235 The parties to a transaction should look to their own counsel to advise them on legal matters, structure the transaction, and negotiate agreements. This is particularly important in transactions involving countries where opinion practice is not well established and each party is represented by lawyers with the necessary expertise to advise it on the relevant issues without incurring the cost and delay of negotiating and preparing a third-party opinion.

V. CONCLUSION

When U.S. lawyers give opinions in cross-border transactions, they have to deal with legal and interpretive issues that do not arise in domestic U.S. transactions. In addition, they have to deal with expectations of non-U.S. opinion recipients that often are different from those of U.S. recipients. These factors, as well as others discussed in this Report, create a greater risk of misunderstanding in cross-border opinion practice than in domestic U.S. opinion practice.

U.S. lawyers rely on U.S. customary practice when giving opinions in cross-border transactions, just as they do in domestic U.S. transactions. As a result, non-U.S. parties and their non-U.S. counsel must be prepared to commit the time and resources (possibly including retaining U.S. counsel to advise them) required for them to understand the opinions being given. Early in a cross-border transaction counsel for the parties should discuss: (1) the work required to deliver each requested opinion, (2) the cost of preparing each opinion requested compared to its benefit to the recipient, and (3) the assumptions, exceptions, and qualifications that are required to give the requested opinions.

One way of reducing the risk of misunderstanding in cross-border transactions is for U.S. opinion givers to spell out in their opinion letters assumptions, exceptions, or qualifications that do not have to be stated in opinion letters in domestic U.S. transactions. The goal of doing so is greater clarity for the benefit of both non-U.S. opinion recipients and non-U.S. courts that later may be called upon to interpret the opinion letter. To achieve that goal, the opinion preparers should seek to strike the right balance between specificity in the opinion letter’s language and reliance on U.S. customary practice, which provides that com-

235. See ABA Guidelines, supra note 5, at 875 (§ 1.1), 880 (factual confirmations do not require the exercise of professional judgment and are inappropriate subjects for legal opinions even when limited by broadly worded disclaimers).
monly understood assumptions, exceptions, and qualifications apply whether stated or unstated.

In some cases legal uncertainties will require that exceptions be taken to opinions being given or may make it impossible to give an opinion. In those cases, the parties, working together and with advice from their own counsel, will need to deal with those uncertainties by finding ways to reduce or allocate the risks they pose. Third-party legal opinions, either in domestic U.S. or in cross-border transactions, should not be expected to—and in any event cannot—bridge gaps that the parties are unwilling or unable to fill.

This Committee hopes that this Report will help U.S. lawyers who give opinions in cross-border transactions and lawyers, both U.S. and non-U.S., who advise the recipients of those opinions gain a better understanding of U.S. opinion practice so as to facilitate both requesting and giving outbound opinions on matters subject to U.S. law.
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APPENDIX B

ILLUSTRATIVE OPINION LANGUAGE, INCLUDING SELECTED ASSUMPTIONS, EXCEPTIONS, AND QUALIFICATIONS

The following language, which also appears in various footnotes in this Report (as indicated below in parentheses), is intended only as illustrative of how certain opinions and related assumptions, exceptions, and qualifications discussed in this Report could be drafted. The illustrative language may need to be customized to suit the circumstances of particular transactions and applicable law. Also, this Report contains numerous suggestions as to the phrasing of the opinion as well as related assumptions, exceptions, and qualifications, both in text and in footnotes, concerning the opinions covered by the illustrative language that the opinion preparers may want to consider when drafting their opinion letters.

ASSUMPTIONS, EXCEPTIONS, AND QUALIFICATIONS

1. **Reference to U.S. customary practice** (see note 15 and accompanying text):

   Alternative 1: This opinion letter shall be interpreted in accordance with the Legal Opinion Principles prepared by the Legal Opinions Committee of the American Bar Association’s Business Law Section as published in 53 Bus. Law. 831 (1998)[, a copy of which is attached to this opinion letter].

   Alternative 2: This opinion letter shall be interpreted in accordance with the customary practice of United States lawyers who regularly give, and lawyers who regularly advise recipients regarding, opinions of the kind included in this opinion letter.

2. **Omnibus Cross-Border Assumption** (see note 17 and accompanying text):

   We have assumed that the choice of the law of [FOREIGN COUNTRY] in the Agreement is valid and the Agreement and each of its provisions are valid, binding and enforceable under the law of [FOREIGN COUNTRY] and of any other jurisdiction whose law applies, other than law covered expressly in an opinion included in this opinion letter. [IF THE AGREEMENT CONTAINS A FORUM SELECTION CLAUSE, ADD—We also have assumed that, other than the courts of [COVERED LAW STATE] and United States federal courts, any court named in the forum selection clause of the Agreement will have jurisdiction over the parties and the subject matter of any action brought in that court under the Agreement.]

3. **Bremen exception for opinions on the validity of forum selection clauses** (see note 120 and accompanying text):

   The opinion in numbered paragraph ___ is limited to the extent that a court may decline to give effect to the forum selection clause in Section ___ of the
Agreement because enforcement would be unreasonable or unjust under the principles enunciated in the decision of the U.S. Supreme Court in M/S Bremen & Unterweser Reederel, GmbH v. Zapata Off-Shore Co., 402 U.S. 1 (1972) and in related cases, including that it would contravene a strong public policy of [COVERED LAW STATE].

4. Interpretation of contracts for purposes of the no breach or default opinion (see note 179 and accompanying text):

We have interpreted the provisions of the contracts addressed by the opinion in numbered paragraph __ as those provisions would be understood in [COVERED LAW STATE] whether they are governed by the law of [COVERED LAW STATE] or by the law of another jurisdiction.

Opinions

1. Validity of choice of non-U.S. law (see note 35 and accompanying text):

Under the law of [COVERED LAW STATE], the choice of the law of [FOREIGN COUNTRY] in the Agreement is valid except to the extent that giving effect to the law of [FOREIGN COUNTRY] would violate a fundamental policy of (i) the jurisdiction whose law is covered by this opinion letter or (ii) any other jurisdiction having a materially greater interest than [FOREIGN COUNTRY] in the determination of the issue, if the law of that jurisdiction would apply to the Agreement or any of its provisions in the absence of a governing law clause.

2. Enforceability of cross-border arbitration clause (see note 59 and accompanying text):

The arbitration clause in Section ___ of the Agreement is valid and enforceable under the federal law of the United States and the law of [COVERED LAW STATE], except to the extent that an exception set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Federal Arbitration Act, 9 U.S.C. §§ 201–208, applies. (*)

(*) If the opinion is being given on the basis that the arbitration clause falls under the New York Convention and Chapter 2 of the Federal Arbitration Act, some lawyers choose to be specific about the scope of the arbitration provision by using language such as the following:

The Company’s covenant in Section ___ of the Agreement to submit to mandatory arbitration in [ARBITRAL TRIBUNAL OUTSIDE THE UNITED STATES] is valid and enforceable under the federal law of the United States and the law of [COVERED LAW STATE] to the extent that the arbitration relates to contract claims arising under the Agreement, except to the extent that an exception set forth in the Con-

3. **Recognition and enforcement of foreign arbitral award** (see note 69 and accompanying text):

   Except to the extent that an exception 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”), applies, an arbitral award made under Section __ of the Agreement will be recognized and enforced under the New York Convention and the FAA, if a proceeding to enforce the award is properly brought in a United States federal court within three years after the arbitral award is made. (*)

   (*) If the opinion is being given on the basis that the arbitration clause falls under the New York Convention and Chapter 2 of the Federal Arbitration Act, some lawyers choose to make it clear that the arbitral award must be a “foreign” award by using language such as the following:

   Except to the extent that an exception 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”), applies, an arbitral award made by [ARBITRAL TRIBUNAL OUTSIDE THE UNITED STATES] in accordance with the requirements of Section __ of the Agreement will be recognized and enforced under the New York Convention and the FAA to the extent that the arbitration relates to contract claims arising under the Agreement, if a proceeding to enforce the award is properly brought in a United States federal court within three years after the arbitral award is made.

4. **Validity of forum selection clause if the opinion does not characterize the clause as permissive or mandatory** (see note 90 and accompanying text):

   The forum selection clause in Section __ of the Agreement is valid and enforceable under the law of [COVERED LAW STATE] for actions relating to contract claims arising under the Agreement.

5. **Validity of permissive outbound forum selection clause** (see note 99 and accompanying text):

   The Company’s agreement in Section __ of the Agreement to submit to the non-exclusive jurisdiction of the courts of [FOREIGN LAW COUNTRY] is valid and enforceable under the law of [COVERED LAW STATE] for actions relating to contract claims arising under the Agreement.
6. **Validity of permissive inbound forum selection clause** (see note 102 and accompanying text):

   The Company’s agreement in Section __ of the Agreement to submit to the non-exclusive jurisdiction of the courts of [COVERED LAW STATE] [and United States federal courts] is valid and enforceable under the law of [COVERED LAW STATE] [and the federal law of the United States] for actions relating to contract claims arising under the Agreement.

7. **Validity of mandatory outbound forum selection clause** (see note 116 and accompanying text):

   The Company’s agreement in Section __ of the Agreement that the courts of [FOREIGN COUNTRY] shall have exclusive jurisdiction is valid and enforceable under the law of [COVERED LAW STATE] for actions relating to contract claims arising under the Agreement.

8. **Validity of mandatory inbound forum selection clause** (see note 125 and accompanying text):

   The Company’s agreement in Section __ of the Agreement that the courts of [COVERED LAW STATE] [and United States federal courts] shall have exclusive jurisdiction is valid and enforceable under the law of [COVERED LAW STATE] [and the federal law of the United States] for actions relating to contract claims arising under the Agreement.

9. **Recognition and enforcement of foreign judgments** (see note 133 and accompanying text):

   To the extent that it relates to contract claims arising under the Agreement, 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 that is enforceable in [FOREIGN COUNTRY] will be recognized as valid and enforced under the law of [COVERED LAW STATE] by the courts of [COVERED LAW STATE] or by United States federal courts having 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 enforcement set forth in the Uniform Foreign Money-Judgments Recognition Act as adopted in [COVERED LAW STATE] (the “Act”)[IF OPINION GIVER WISHES TO REFER TO PARTICULAR EXCEPTIONS FROM THE STATUTE, ADD— , which include, but are not limited to, _________________ ] and (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. [IF APPLICABLE IN THE COVERED LAW STATE, ADD—This opinion is based on the assumption that the law of [FOREIGN COUNTRY] requires a court of competent jurisdiction in [FOREIGN COUNTRY], in a
reciprocal manner, to recognize and enforce a final and conclusive judgment of a court of [COVERED LAW STATE] without reconsideration of the merits.]

10. **Validity of service of process** (see note 161 and accompanying text):

   The methods for service of process set forth in Section __ of the Agreement are valid under the law of [COVERED LAW STATE].

11. **No violation of U.S. statutes, rules, or regulations** (see notes 189 & 194 and accompanying text):

   Except as set forth below, the execution and delivery of the Agreement by the Company and consummation by the Company of the transactions contemplated by the Agreement do not result in any violation by the Company of statutes of the United States or [COVERED LAW STATE], or rules or regulations thereunder, that, subject to the limitations in the following sentence, we would reasonably be expected to recognize as being applicable to an entity, transaction or agreement to which this opinion letter relates. (*)

   (*) Some lawyers choose to be specific about statutes, rules, or regulations that are not covered by the no violation opinion by using language such as the following:

   The opinion in paragraph __ does not cover, without limitation, the following statutes, rules, and regulations: [. . . ], or other statutes, rules, or regulations customarily understood to be excluded even though they are not expressly stated to be excluded.

12. **No sovereign immunity of U.S. party** (see note 204 and accompanying text):

   Neither [U.S. PARTY] nor its assets are immune on grounds of sovereign immunity from (i) suit in connection with the Agreement in the courts in [COVERED LAW STATE] [or United States federal courts] or (ii) related legal process, including service of process, attachment of assets, or enforcement by those courts of a judgment against the Company related to the Agreement.

13. **Waiver of sovereign immunity under FSIA** (see note 214 and accompanying text):

   Under the Foreign Sovereign Immunities Act of 1976, as amended, [NON-U.S. PARTY] has validly waived its sovereign immunity (if any) from (i) suit in the courts in [COVERED LAW STATE] and United States federal courts and (ii) related legal process, including service of process, attachment of assets, or enforcement by those courts of a judgment against [NON-U.S. PARTY] related to the Agreement.
14. **Foreign lender not required to qualify to do business** (see note 220 and accompanying text):

*Lender is not required to qualify to do business as a foreign corporation in [COVERED LAW STATE] solely by reason of its execution and delivery of the Agreement and consummation on the date of this letter of the transactions contemplated by the Agreement.*