# In My Opinion....
# It's a Small World After All: Cross-Border Opinions

*by Lydia C. Stefanowicz*

Increasingly, U.S. lawyers (and not just those in large New York City law firms) are being asked to deliver closing opinions in business transactions involving both U.S. and non-U.S. parties (cross-border transactions). Particularly in a state like New Jersey, where many foreign companies have located U.S. subsidiaries, a business lawyer may from time to time become involved in a cross-border transaction and may be asked to issue a legal opinion on behalf of its U.S. client to a non-U.S. opinion recipient.

This can be a daunting prospect for several reasons. As difficult as it sometimes can be to negotiate closing opinions in purely domestic transactions, in cross-border transactions the difficulty is compounded when the transaction is governed by the law of a jurisdiction outside of the U.S., the recipient of the opinion is in a country with a different legal system and different opinion practices, and the parties must overcome cultural differences in business practices. In addition, even if the transaction documents are in English or have been translated into English, there will often be language issues.

Since 2006, the Subcommittee on Cross-Border Legal Opinions of the American Bar Association (ABA) Business Law Section's Legal Opinions Committee has been working on a report on closing opinions by U.S. lawyers to non-U.S. recipients in cross-border transactions, designated as "outbound opinions." In April 2015, the subcommittee released an exposure draft of the report entitled "Cross-Border Closing Opinions of U.S. Counsel" (the report). The report is in the final editing stage and is expected to be published presently in the ABA Business Law Section journal, *Business Lawyer*. Presumably the report will thereafter be available online on the ABA Business Law Section Legal Opinions Committee's Legal Opinion Resource Center website page (which is accessible by non-ABA Business Law Section members).

The purpose of the report is to promote a better understanding of opinion practice between U.S. and foreign lawyers and to facilitate the giving of cross-border opinions. Particularly for lawyers who do not deal in cross-border transactions on a regular basis, the report will provide a wealth of guidance on current cross-border opinion practice not readily available elsewhere.

In domestic U.S. transactions, custom and practice in connection with closing opinions is reasonably well-established with respect to many standard opinions, and guidance on what specific opinions mean and what due diligence is required to support them can be found in bar association reports and other published materials. There is, however, no well-established opinion practice in cross-border transactions. This, together with the lack of a shared conceptual framework between U.S. opinion givers and non-U.S. opinion recipients, stemming from differences in legal systems and business practices, as well as language barriers, can create misunderstandings over what opinions are appropriate to request, the meaning of the opinions given and the work opinion givers are expected to perform to support the opinions given.

The goals of the 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 which opinions to request; 2) to clarify and confirm the application of U.S. customary practice to outbound opinions; 3) to provide guidance on the special considerations that apply to opinions commonly given in U.S. domestic transaction when they are requested in cross-border transactions; 4) to explain why some opinion requests are inappropriate in cross-border transactions; 5) to provide guidance on the meaning of and the due diligence expected to support opinions frequently given in cross-border transactions that are not normally given in domestic U.S. transactions; and 6) to establish some basic rules of engagement between U.S. opinion givers and non-U.S. opinion recipients.

The report confirms that U.S. customary practice should and does govern the preparation of outbound closing opinions as much as it governs closing opinions in U.S. domestic transactions, and recommends that

outbound opinions expressly state that their interpretation is to be governed by U.S. customary practice with respect to legal opinions. Non-U.S. opinion recipients are responsible for ensuring that they understand the opinions they receive, including, if necessary, by consulting their own U.S. counsel.

Outbound opinions are usually issued in cross-border transactions where the operative agreement, by its terms, is governed by the law of a country other than the United States. Thus, outbound opinions usually do not include an enforceability opinion on the operative agreement as a whole. They typically cover, under the law of a specified U.S. state or states and/or U.S. federal law, the enforceability of key provisions of the operative agreement. Those key provisions typically may include choice of law, forum selection, service of process and arbitration. In addition, non-U.S. recipients of outbound opinions often seek opinions regarding recognition and enforcement of foreign judgments and foreign arbitral awards. In a domestic U.S. transaction closing opinion these key provisions would be implicitly covered by an enforceability opinion. And opinions on recognition and enforcement of judgments and awards would not be deemed necessary. The report analyzes opinions that are typically given by U.S. lawyers only in cross-border transactions, and suggests how they should be worded and the issues they may raise.

Given the nature of the issues typically covered in an outbound opinion, the predicate to giving an opinion on their enforceability under U.S. law is that the operative agreement as a whole is enforceable in the non-U.S. governing law jurisdiction, and the report recommends that an outbound opinion expressly include an assumption to that effect, which assumption the report designates as the "Omnibus Cross Border Assumption."

Opinion givers of outbound opinions may also be requested to cover core opinions typically requested in a U.S. domestic transaction, such as entity existence, good standing, power and authority, due execution and delivery with respect to the U.S. company. The report discusses how some opinions that are routine in the United States (*e.g.,* due execution and delivery opinions) can present challenges when given in a cross-border setting, and suggests practical ways to address those challenges.

The report represents several years of work on the part of a sizeable committee composed of noted lawyers experienced in the area of cross-border transactions, as well as opinions practice; is a valuable tool for lawyers who lack substantial experience in this area; and is an important addition to the literature of opinions practice.

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