AMERICAN BAR ASSOCIATION

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Good Practice Principles for Cross-Border Closing Opinions

The Legal Opinion Committee of the Business Law Section of the American Bar Association

IBA Banking & Financial Law Committee

The International Bar Association (IBA), established in 1947, is the world's leading international organisation of legal practitioners, bar associations, law societies, law firms and in-house legal teams. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. It has a membership of more than 80,000 lawyers, 190 bar associations and law societies and 200 group member law firms, spanning over 170 countries. The IBA is headquartered in London, with offices in São Paulo, Seoul, The Hague and Washington, DC.

About the IBA Legal Practice Division (LPD): The objectives of the Legal Practice Division are to promote an interchange of information and views among its members as to laws, practices and professional responsibilities relating to the practice of law throughout the world; to facilitate communication among its members; to provide the opportunity to all its members to be active in the division through its sections, committees, fora and other groupings; and to undertake such related projects as may be approved from time to time by the division's council.

In late 2018, the LPD leadership entrusted the IBA Banking & Financial Law Committee (B&FLC) with the mandate to represent the IBA on a joint task force with the American Bar Association (ABA) on cross-border closing opinion practices. Over the last few years, the B&FLC[1] and the ABA have managed to agree on a set of good practice principles aimed at making the negotiation and rendering of cross-border closing opinions less (1) contentious, (2) time-consuming and (3) costly, thereby increasing capital flow in cross-border transactions.

About the American Bar Association: The ABA was founded in 1878 on a commitment to set the legal and ethical foundation for the American nation. Today, it exists as a membership organization and stands committed to its mission of defending liberty and pursuing justice.

1 The B&FLC members of the joint task force working group were: John Elias, Chair, IBA Derivatives Subcommittee (Fasken Martineau DuMoulin); Michael Kutschera, IBA Council Member (BINDER GRÖSSWANG Rechtsanwälte); Russell DaSilva, Member, IBA Banking & Financial Law Committee Advisory Board (Pillsbury Winthrop Shaw Pittman); Kok Chee Wai, Asia Pacific Regional Forum Liaison Officer, IBA Banking & Financial Law Committee (Allen & Gledhill); Benedikt Maurenbrecher, Member, IBA Banking & Financial Law Committee Advisory Board (Homburger); and Caroline Phillips, Treasurer, IBA Banking & Financial Law Committee (Slaughter and May). The Good Practice Principles for Cross-Border Closing Opinions were finally approved by the B&FLC officers at the Paris 2023 meeting.

Good Practice Principles for Cross-Border Closing Opinions

The Legal Opinion Committee of the Business Law Section of the American Bar Association (ABA) and the Banking & Financial Law Committee of the International Bar Association (IBA) have formed a joint task force on cross-border opinion practice (the 'Task Force'). The Task Force seeks to: (1) build upon work done under the auspices of the ABA, the IBA, the Union International des Avocats and the City of London Law Society; and (2) to collaborate with a number of other bar groups in various countries to improve the practices of lawyers throughout the world relating to the giving of, and advising recipients of, closing opinions in cross-border transactions. The ABA and the IBA have undertaken these efforts to help the legal profession remain a constructive contributor to global finance and commerce, and hopefully, to aid the flow of capital across borders, particularly to emerging economies. This document seeks to establish foundational principles on closing opinions in cross-border finance transactions.

I. The evolution of cross-border transactional practice has drawn on customs and practice from various countries over many decades. Today, standard closing procedures often include the delivery of opinion letters by lawyers ('**opining counsel**') covering selected legal issues under the law that the closing opinion identifies as being covered (the '**covered law**'). Those opinion letters may be addressed to opining counsel's client and thus be part of legal advice that counsel provides to its client in the transaction, or they may be addressed to another party at the request of opining counsel's client (a '**third-party opinion**'), usually to satisfy a condition precedent to closing a commercial or financial transaction. Whether a closing opinion is given to a client or a party who is not opining counsel's client depends principally on the customs and practice of the country whose law is covered by the closing opinion but, to some extent, may be influenced by the practice of the primary jurisdiction of the transaction. For example, in some countries, it is customary for a lender to receive a third-party opinion from the borrower's counsel, whereas in other countries, opinions from the lender's own counsel are the norm.

   This document uses the term '**closing opinion**' to refer to an opinion letter delivered by counsel at the closing of a transaction, whether delivered to opining counsel's own client or to a party that opining counsel does not represent. A closing opinion usually states opining counsel's conclusions on specific legal matters, typically broken into separate numbered paragraphs that are referred to in this document as specific '**opinions**'. Closing opinions typically include assumptions, qualifications, exceptions and/or limitations, both of a general nature and with respect to specific opinions. This document (including its footnotes) focuses exclusively on closing opinions in cross-border transactions because they present issues that differ from closing opinions in domestic transactions.[2]

   When a closing opinion is delivered to opining counsel's own client, the terms of the overall engagement and the rules of professional conduct applicable to the attorney/client relationship

2 Cross-border transactions implicate laws of multiple countries and make it imperative that lawyers with expertise in those laws understand each other's perspective, and address language barriers and differences in market expectations. Therefore, giving and receiving closing opinions in cross-border transactions often is more challenging than in domestic transactions.

govern the opinion process and opining counsel's responsibilities, as well as other aspects of such a relationship. When a closing opinion is delivered to a recipient who opining counsel is not representing in the transaction, opining counsel has no responsibility to explain to the recipient the scope and meaning of the opinions that are being rendered. Rather, the burden is on the opinion recipient to seek such advice from its own counsel. That advice may include the effect of the customs and practice of the country whose law is covered by the closing opinion.[3]

Local customs and practice, which may be more or less developed or formalised in any particular country, will dictate whether an opinion request is appropriate and, if so, whether the opinion should be requested from the recipient's own counsel. Local customs and practice, and the circumstances of the specific transaction also dictate the extent to which: (1) opinions can be varied by express statements mutually agreed upon between opining counsel and the recipient; (2) a closing opinion is governed by arrangements existing outside the closing opinion; (3) opinions are qualified by implied understandings not set forth in the closing opinion itself; and (4) opining counsel may use assumptions or exceptions and, if so, whether they can be implied or should be expressly stated. An important consideration with respect to the customs and practice that govern opining counsel's conduct is whether the form of government in the country of the covered law is a 'federal' system, where constituent states or political subdivisions have their own laws and regulations alongside those of federal authorities, as is the case, for example, in the United States and Canada.

Although there are important differences between closing opinions addressed to one's own client and third-party opinions, the fundamental principles discussed in this document are intended to assist both opining counsel and opinion recipients, whether or not the recipient is represented by opining counsel in the transaction. The principles are based on the following premises:

1. cross-border opinion practice can benefit from the application of common principles by providing a basis for mutually respectful interaction between lawyers in different countries because the typical coverage of closing opinions in cross-border transactions is substantially similar across markets;

2. the giving of a closing opinion is an exercise in professional judgement and should not be treated as a business negotiation in which the recipient seeks to obtain as much as possible and opining counsel seeks to give as little as possible;

3. opining counsel and the recipient, and/or recipient's counsel, should work together in good faith to achieve a balance in which the benefits to the recipient of receiving a specific opinion warrant the difficulty, time and expense required for opining counsel to give it;

3 In the United States, eg, an established body of 'customary practice' ('US Customary Practice') has developed to provide guidance on: (1) the practice of experienced lawyers in the giving of, and advising recipients with respect to the receipt of, third-party opinions, including the work opining counsel is expected to perform to be able to give specific opinions; (2) the way that certain words and phrases are commonly used and understood in closing opinions; and (3) other commonly understood aspects of opinion practice, including standard assumptions, qualifications, exceptions and/or limitations. Conversely, in other countries, eg, England and Wales, no generally understood practice exists on which lawyers can rely for the meaning and scope of their closing opinions, and, therefore, opinion letters ordinarily state explicitly matters that under US Customary Practice would be understood to apply whether or not stated expressly. Depending on whether customs and practice in the country whose law is covered are similar to US Customary Practice, the language in a closing opinion may be more or less expansive on various aspects of the opinions given, including assumptions, qualifications, exceptions and limitations, than the more streamlined language ordinarily used in opinion letters to which US Customary Practice applies.

4. unlike transaction agreements resulting from business negotiations, closing opinions are not a tool to allocate risk or bridge gaps when the law governing a particular issue is uncertain or unsettled. Early in the development of US Customary Practice, the concept of a 'Golden Rule' was developed to guide both givers and recipients of third-party closing opinions in US domestic practice by establishing the principles that: (i) opining counsel should not be expected to give an opinion that counsel for the opinion recipient would not give in similar circumstances if that counsel were opining counsel and had the requisite competence to give the opinion; and (ii) before declining to give an opinion that it is competent to give, opining counsel should consider whether another lawyer in similar circumstances would ordinarily give the requested opinion. The Golden Rule must be adapted for cross-border opinion practice because: (i) in some countries, closing opinions delivered to one's own client are common, whereas third-party opinions are not; (ii) in domestic practice, lawyers generally share common customs and practices, whereas this is not the case among lawyers from different countries; and (iii) the original Golden Rule was based on the fact that opining counsel and counsel advising the opinion recipient could well find themselves in similar but opposite positions in other transactions, whereas that often does not hold true in the cross-border context. Nevertheless, the Golden Rule as a guiding principle can be a valuable tool in cross-border opinion practice to help all participants in the process balance the needs of opinion recipients and opinion givers; and

5. in a cross-border closing opinion, the covered law is often not the law of the opinion recipient's country. A concept under the covered law may not have an analogous concept in the law of the recipient's country and seemingly analogous concepts may not be analogous because of subtle differences in law or practice. Moreover, legal analysis and conclusions expressed in a language (often English) different from the language of the covered law may have substantively different meanings or the translation may not accurately reflect concepts under the covered law. In addition, English may not be the native language of either opining counsel or the opinion recipient. These issues do not exist in opinion practice within the same country. A recipient should not expect a closing opinion in a cross-border transaction to explain the intricacies of legal terminology or differences in the way the covered law and the law with which the recipient is familiar deal with an issue. Even when opining counsel represents the recipient in the transaction, responsibility for such advice may require specialised expertise beyond the expertise in the covered law necessary to give specific opinions.[4]

4 Sometimes recipients request a third-party closing opinion because they do not wish to retain their own counsel in the country of the covered law. If the customs and practice of opining counsel's country make giving a third-party opinion appropriate, the recipient should be on notice that it is not the responsibility of opining counsel to advise the recipient, who is not its client, how the closing opinion should be interpreted, even though opining counsel knows that the recipient itself does not have, and is not represented by counsel with, expertise in the covered law. The customs and practice, terms of the engagement and professional rules may be different when a closing opinion is delivered to opining counsel's own client.

II. The following principles should apply when requesting and preparing a closing opinion in a cross-border transaction:

1. a closing opinion addresses only the law it states it covers. Even within that law, the law covered by specific opinions may be limited to particular statutes, rules and regulations (which may or may not include decisional law interpreting them) that lawyers with expertise in the covered law, exercising customary diligence, would reasonably be expected to recognise as being applicable under the circumstances to the transaction to which the closing opinion relates. The opinion does not cover any law other than the covered law, even when the transaction itself or specific legal obligations are governed by the law of a jurisdiction that the closing opinion does not cover;[5]

2. a closing opinion covers only those matters that it specifically addresses and not matters that might be thought to be implicit but are not expressly stated;

3. opinion requests should be limited to specific and determinable matters of law that: (i) involve the exercise of professional judgement under the covered law; and (ii) relate to the transaction on which, or the party on whom, opinions are being given, as well as legal obligations imposed on such a party by the transaction documents;

4. a closing opinion only expresses opining counsel's professional judgement under the covered law; it is not a guarantee that a court applying such law to a specific case will reach the conclusion expressed in the opinion;

5. opining counsel should not be asked to: (i) confirm matters of fact, even if the confirmation is limited by broadly worded disclaimers, including a limitation to the knowledge of such counsel; or (ii) state that it is not aware of any inaccuracy in representations and warranties contained in an agreement, because neither involves the exercise of professional judgement on matters of law.[6] With rare exceptions, therefore, factual confirmations are not a proper subject for a closing opinion. When an opinion depends on factual matters,

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5 When the laws of multiple countries, or multiple states or political subdivisions in a federal system, apply to a transaction, the parties and their counsel normally have to determine which issues are governed by the law of which jurisdiction. A legal conclusion under the law of one jurisdiction may depend on legal conclusions under the laws of one or more other jurisdictions. The application of the conflict of laws rules of multiple jurisdictions whose laws bear on a relevant issue often makes it difficult to determine with certainty which jurisdiction's law ultimately will be held to control. Consequently, opining counsel ordinarily is entitled to assume legal conclusions under the laws of all relevant jurisdictions other than the covered law, even when those conclusions may affect an opinion it is giving. As there is no single approach in the cross-border area to dealing with conflicts of law analysis in closing opinions, the opinion recipient may need to seek advice from counsel in the multiple jurisdictions involved in the transaction to confirm material aspects of the legal analysis.

6 In some cases, the substance of an opinion may mirror a representation or warranty in an agreement. However, the function of a representation or warranty is to allocate risk as a matter of contract between the parties as to the accuracy of the matters it covers, which often include both legal and factual matters. Conversely, the function of a closing opinion is to express opining counsel's professional judgement on the legal matters addressed by specific opinions. The same analysis applies to requests that counsel state in a closing opinion that nothing has come to counsel's attention that would suggest that statements made in transaction documents are incorrect or incomplete. Not only does this require counsel to make indirect statements of fact, but it also could put counsel in the position of potentially violating an applicable attorney–client privilege.

In rare circumstances, customs and practice in opining counsel's country may permit opinions that involve questions of mixed law and fact. In many countries, however, requesting mixed law and fact opinions is not appropriate and, under most circumstances, giving them is not warranted under a cost-benefit analysis because of the considerable time and expense involved in preparing them, and backup certifications and other due diligence necessary to give them. Such requests should be kept to a minimum or avoided altogether. Moreover, if such an opinion is given, it is advisable for opining counsel to segregate it from the true legal opinions given in the same transaction.

In some countries, lawyers provide a due diligence report on specific factual matters based on the results of a stated review process or specific procedures. Such a report is typically provided to the lawyer's own client, who may ask to share it with a third party, such as a lender, potential acquirer or underwriter. Due diligence reports are not closing opinions and are not covered by the principles set forth herein.

Matters not within the expertise of lawyers, such as financial controls, solvency and generally commercial aspects of a company's business, assets or operations, are never an appropriate subject for closing opinions. Matters of this type should be addressed by reports or advice from experts in the relevant subject matter, such as auditors, appraisers or financial advisers.

for example, the existence or authenticity of a document, opining counsel ordinarily is allowed to make assumptions with regard to such matters or rely on information provided by, or documentation received from, an appropriate source or on representations and warranties contained in the documents on which opinions are being given. Depending on the customs and practice of opining counsel's country, opining counsel may be permitted to rely on unstated assumptions;

6. a closing opinion should be prepared in accordance with, and can only be understood by reference to: (i) the customs and practice of the country whose law is covered by the closing opinion, including those based on applicable professional rules, market conventions, and guidance published by bar associations, law societies and recognised opinion authorities; and (ii) any applicable statutes and regulations of the country whose law is covered by the opinion, together with judicial decisions interpreting them;

7. as a general rule, opining counsel should not be expected to give an opinion in a cross-border transaction that lawyers practising in the country whose law is covered by the closing opinion would not be expected to give in a transaction that is limited to that country. The fact that the opinion recipient would normally expect counsel in its own country to give a particular opinion does not necessarily mean that opining counsel in a different country should be expected to give it;[7]

8. the fact that an opinion recipient has received a particular opinion in the past in a similar cross-border transaction does not mean that opining counsel should be expected to give it again;[8]

9. opining counsel should not give an opinion that, although technically correct, opining counsel recognises would be misleading to the opinion recipient with regard to the subject matter of the opinion. Whether an opinion would be misleading is to be determined under the customs and practice of the country whose law is covered by the opinion and opining counsel may assume, without so stating, that such customs and practice are known to the opinion recipient;

10. if opining counsel declines to give a requested opinion, the opinion recipient may ask whether such a decision is due to: (i) uncertainty regarding the covered law; (ii) the structure or documentation of the transaction; or (iii) the fact that the requested opinion ordinarily is not given in opining counsel's country. However, if opining counsel is giving a third-party closing opinion, applicable rules of professional conduct may require that opining counsel obtain instructions from, or the consent of, its client before providing an answer that could have adverse consequences for the client. If opining counsel declines to provide an answer, the opinion recipient should seek advice from its own counsel;

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7 This is one of the ways in which an adaptation of the Golden Rule discussed earlier can provide helpful guidance in cross-border opinion practice.

8 Parties to a transaction should be mindful that: (i) opinion practice evolves over time in every jurisdiction; (ii) such opinion practice can be interpreted and applied differently by lawyers, even in the same jurisdiction, depending on areas of practice, geographic regions and transaction-specific circumstances; (iii) transactions differ from one another, and even those that appear on their face to be similar can have important differences that merit a different approach to closing opinions given on them; and (iv) the backup work required to give specific opinions often depends on the particular facts and circumstances. The Golden Rule and cost-benefit analysis should play an especially important role in cross-border opinion practice in light of the absence of consistent customs and practice between different countries.

11. the covered law, customs and practice in opining counsel's country, and agreement between opining counsel and the recipient determines which assumptions, qualifications, exceptions and limitations in a closing opinion are appropriate and the extent to which they need to be expressed or can be implied.

III. Opining counsel is subject to the law and rules governing the professional conduct of lawyers in its country (or state or other political subdivision, in a federal system like the US). Those laws and rules, as well as local customs and practice, often will determine the following matters:

1. whether a specific issue is the proper subject of a closing opinion and, if so, whether the issue should be covered in an opinion from the recipient's own counsel or in a third-party opinion;[9]

2. the duties of opining counsel, including how it is expected to act in advising the recipient if the closing opinion is delivered to a recipient that is not its client and whether it can give an opinion to a non-client that may be detrimental to its client's interests;[10]

3. the standard of care that must be exercised by opining counsel (including the scope of work that opining counsel needs to perform to render a specific opinion) and the liability of opining counsel if an opinion proves to be incorrect; and

4. whether, and the extent to which, opining counsel and the opinion recipient can agree on terms and conditions for resolving future disputes relating to matters covered by a closing opinion, including choice of law, forum selection, arbitration and limitations on opining counsel's liability.

IV. The parties should recognise that the cost-benefit analysis with respect to opinions requested in a particular transaction may vary depending on the circumstances, even if the transaction is similar to other transactions with which the parties have dealt before.[11] Relevant circumstances include:

1. the size of the transaction;

2. the number of countries involved and their relative significance to the transaction;

3. special regulatory regimes applicable to the parties or the transaction;

4. the complexity of a particular issue, which may require special expertise or which may not lend itself to an unqualified opinion (eg, issues under tax laws, employee benefits laws, environmental laws, competition laws, economic sanctions, anti-terrorism, anti-money laundering and anti- corruption laws, or laws restricting foreign control of sensitive enterprises); and

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9 If a third-party closing opinion is appropriate, the customs and practice of opining counsel's country and applicable rules of professional conduct may require that a client consent to the giving of particular opinions, which may or may not be implied from a provision in an agreement signed by the client that makes the delivery of the closing opinion a condition to closing. If the opinion discloses information that opining counsel knows the client would not want to be disclosed that is otherwise subject to a duty of confidentiality, specific consent from the client may be required before the closing opinion can be delivered.

10 Eg, in an enforceability opinion on an agreement, opining counsel may need to take an exception for a particular provision, thereby alerting the recipient that it may be unable to enforce that provision.

11 Eg, if the transaction involves secured debt and the borrower has collateral of different types located in different countries and/or upstream or downstream guarantees by entities formed under the laws of different countries, giving opinions covering the creation and validity of security interests or the enforceability of guarantees, to the extent even possible, may not be cost-justified.

5. the degree to which the law being covered is or is not well developed as it relates to the issue addressed by the opinion.

The Task Force hopes that these principles will ease the giving and receipt of closing opinions in cross-border transactions, thereby benefitting trade, commerce and finance around the world.