

ABA SECTION OF BUSINESS LAW LEGAL OPINIONS COMMITTEE:
CROSS-BORDER OPINION INITIATIVE

The Cross Border Legal Opinions Subcommittee of the ABA Legal Opinions Committee is studying outbound legal opinions (opinions by U.S. counsel addressed to non-U.S. recipients) in cross-border transactions. As a result of this study, the Subcommittee may propose guidelines for such opinions. The ComFin Committee is participating in this project and is represented on the Legal Opinions Committee Cross-Border subcommittee.

At its meeting on January 31, 2008, the ComFin Committee was represented by Larry Safran and the following items were among the issues discussed with respect to outbound legal opinions:

A. General Principles. General concepts that might be addressed include (i) the applicability of the golden rule, (ii) other customary practice issues (including what customary practice applies, that of the opinion giver or that of the opinion recipient?), (iii) the applicability of other provisions of the ABA principles and guidelines, and (iv) the impact of public policy issues;

B. Common Opinions. Opinions commonly requested for outbound opinions include: (i) enforceability of foreign judgments, (ii) validity of choice of non-U.S. law, (iii) enforceability of forum selection clauses, (iv) hypothetical enforceability opinions as if the documents were governed by the law of the relevant U.S. state, (iv) security interest issues, (v) entity status and no dissolution or bankruptcy filing opinions;

C. Inappropriate opinion requests and how best to handle these;

D. Limitations on Liability. Should limitations on liability be included in outgoing opinions where that is customary in a jurisdiction with major contacts with the deal? Choice of non-U.S. law to govern opinion liability issues – e.g. reliance? Choice of forum outside the U.S.?

To help the subcommittee, please send by email to Noel Para (Noel.Para@alston.com) examples of requests to U.S. counsel from non-U.S. recipients and of outbound opinions given in cross-border transactions. The committee also would value comments you have about materials you submit, or about the project, sent either via the list serve or as part of your submission.

The committee is particularly interested in requests and opinions that are (a) customary in cross-border transactions but not in U.S. domestic transactions, (b) unusual, or (c) otherwise problematic. However, we also would like to see examples that are similar to requests that are customary in U.S. domestic transactions. We especially wish to collect examples of opinions that include assumptions, qualifications, limitations and exceptions that are not normally found in domestic U.S. opinions.

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