Legal Opinions in International Transactions

Paul Volken

The multifold progress in international communication techniques has made our globe smaller and shortened distances. All the more we are astonished if we discover, even within communities of equal economic standing, concepts and ideas that are important to one but almost unknown to the other community. Legal opinions are such a concept. Whereas such legal technique is unknown to most lawyers trained in civil law, in other jurisdictions, namely in the USA, the conclusion and finalization of a commercial transaction has become almost unthinkable without being prepared and/or accompanied by one or more legal opinions.

The concept of legal opinions comes from the common law. Mainly in the USA where they have been strongly advocated, legal opinions have become common ground for the commercial world. And since the early seventies the US judiciary has developed an increasing body of case law accompanied by regular legal writing on the topic.

In international transactions the seller of goods, the lender of money and the offerer of technical know-how often have a tendency to handle their business the very same way as they do in their day-by-day activities. As a consequence it follows that e.g. a Midtown Manhattan Bank, in preparing a loan agreement, follows the same steps of proceedings and asks for the same kind of documents, no matter whether the money lent goes just across the Hudson River or is intended to be used on the other side of the Atlantic. All that the Manhattan lender wants is to be sure that its loan contract is a valid, legally binding instrument and that the borrower is bound to repay the loan with interest at maturity.

In the New Jersey case, the Manhattan money-lender gets the required guaranties and controls by asking for a legal opinion on the validity of the loan agreement both under the law of New York and New Jersey. And if the money is supposed to go to France or Italy, or to Yugoslavia, our money-lender in New York wants to receive the very same pieces of paper certifying that the transaction is also valid and binding as to the law of the borrower's country.

There are basically three ways to face the demands of our Manhattan money-lender. The first would be to convince him that, under European law, a legal opinion of the kind he asks for is a meaningless piece of paper. But as the requesting side might not be in a position to dictate modalities, such a solution seems not to be sound. A second way would be what American legal scholars have characterized as the globalization of the American legal profession. An American lawyer would then opine an Austrian, Czechoslovakian or Hungarian law. The obvious variant to this are lawyers coming from, and practising in the countries in question who familiarize themselves with the concept of legal opinions in order to give
an appropriate response to the demands of legal opining as to their domestic legal system.

The present chapter aims to make lawyers from both sides of the Atlantic aware of the conceptual differences when establishing the content of a given legal solution. Thus the North-American lawyer might better understand why his European counterpart sometimes has difficulties in understanding his demands, and the European lawyer might easier grasp what kind of statements his North-American colleague is looking for.

To this end, the present chapter contains two parts, each of which is divided into four sections.

The first part deals with the concept of legal opinions: it describes the legal nature of such opinions, makes some references to comparable Instruments, stresses their principal functions and main purposes, and mentions the areas of law where legal opinions are commonly utilized.

The second part addresses the framing of legal opinions and tries to go systematically through the substantive elements of a legal opinion. In the United States, it is now more or less agreed what legal opinions are, what they say and what they do. The agreement includes the legal matters for which such opinions are required, the topics to be addressed and the language to be used. Recent developments are moving towards the use of standard clauses with an agreed understanding of what such clauses are supposed to mean and/or to say.

The chapter will close with a list citing the principal points of a legal opinion.

I. The Legal Opinion

1. Legal Nature

As a rule, a legal opinion is a written document, prepared by a legal counsel in connection with a given transaction and expressing a lawyer's legal conclusions with respect to one or more legal issues involved in that transaction.\(^6\)

In commercial matters two types of opinions are frequent: the transaction opinion and the reasoned opinion.\(^7\)

Transaction opinions are rendered at the completion of a commercial transaction, and they report on the nature of the transaction accomplished and its legal consequences. Such an opinion can exist of a simple report on the different technical steps undertaken by the lawyer; it can also take a more formal character where, besides the mere technicalities, more detailed information is given about the particular measures undertaken by the lawyer about the assumptions, qualifications or limitations he made, or about the possible legal consequences that might follow from the transaction.\(^8\)

On the other hand, reasoned opinions contain a detailed analysis of the law involved in a particular situation. They can aim at the interpretation of a given statutory rule, they can explain the possible meaning of particular provision in a contract, or they may, as a consequence of an Interpretation, give advice as to a possible course of action.\(^9\)

A transaction opinion usually includes a statement saying that a legally binding, enforceable contract has been formed between the parties to the transaction. But in more complex dealings many difficult legal issues may be involved. They may affect a borrower's obligation to repay the loan; they may also affect the lender's remedies with respect to collateral security, or they may have some influence on the successful promotion of the borrower's projects. As some of the issues may involve unusual and uncertain legal concepts, extensive factual or legal analysis could be required so that the transaction opinion might be combined with a reasoned opinion.

It is understandable that in doubtful cases no prudent lender is prepared to advance funds to his borrower without being convinced that the obligation to repay is legally binding on the borrower. With the legal opinion the lender seeks such assurance. To this end, he requests a reasoned statement from the borrower's counsel or at least from a practising lawyer in the borrower's country confirming that even the lender and his counsel (or a practising lawyer in that country) believe that the obligation of repayment is enforceable under the law of the borrower's country.\(^10\)
2. Functions and Purposes

Lawyers may be involved in international transactions in different ways. On the one hand, they are asked to advise generally on a transaction and to see that their client gets adequate protection by the terms of a contract. On the other hand, they have to provide legal opinions by which they confirm the legal validity of the contract document.

As to legal opinions in particular, they may be requested for different reasons. For example, opinions are prepared at the request of the lawyer's client in order to inform him about the probable legal consequences of a contemplated transaction. Other opinions are prepared in order to satisfy the requirements stipulated under the agreed terms of negotiations between the parties to a transaction and their legal counsel. But legal opinions may also be requested for submission to an administrative authority or to a third party, either directly or in an annual report.\(^{11}\)

In each of these cases such opinions may serve different purposes. They may e.g. underline that an intended course of action is lawful and that certain expected legal consequences will follow or certain undesirable results will be prevented by the proposed course of action. They may also confirm that certain legal relationships have been created; they may warn against undesirable legal risks, they may help to resolve textual uncertainties in a contract; they may satisfy important contractual or statutory requirements in view of the closing of a transaction or they may provide a defence against an allegation of wrongful conduct, etc. In short, legal opinions may serve multifold purposes inside and outside formal legal proceedings.

3. Comparable Instruments

Where a representative of the civil law is confronted with a legal opinion coming from the common law, he might ask himself whether comparable Instruments exist under the civil law system. The answer is yes and no.

If we understand the legal opinion as an instrument by which one contracting party seeks assurance as to the validity and the enforceability of another party's obligations, then a legal opinion might, in its functions, be compared with an instrument of assurance or guaranty.

In international transactions, there are numerous types of assurances or guaranties: the transport sector works e.g. with insurance contracts, the export business uses bills of lading, money-lenders have securities, bonds, collateral with real or personal security, construction builders prefer first demand guaranties and other sectors have recourse to export risk guaranties.

Legal opinions are not securities or guaranties of that kind. The legal opinion is a kind of expertise, a legal document based on special professional skill and knowledge.

Even so, legal opinions can be of considerable economic consequences. As the addressee of an opinion relies on its statements and acts accordingly, an imprecise, incomplete or even partially erroneous opinion can cause significant economic loss. As a consequence, the personal integrity and the Professional renommée of the opinion writer is at stake and he might be held legally liable for the damage caused.\(^{12}\)

4. Fields of Application

Especially in the USA, it seems to be generally accepted nowadays that, for a wide range of business activities, the legal opinion forms an important part of any transaction; almost nothing of substantial importance happens unless one or more legal opinions are submitted.\(^{13}\) For example, in order to receive now loans, in 1988, Mexico issued Floating Rate Bonds guaranteed by zero-coupons from the United States Treasury. The prospectus was accompanied by a dozen opinions and similar statements, including legal opinions given by the Mexican and the United States Counsel of Mexico as well as the Mexican and the United States Counsel of the US Bank acting as an exchange agent.\(^{14}\)

Legal opinions are used in different fields of business transactions such as corporate matters, sales of business, mergers, financing matters, loans or securities transactions. Other typical areas are real estate businesses, information to auditors,
dealings with the S.E.C., statements intended to tax authorities or other state agencies.\textsuperscript{15}

In the USA, nine out of ten legal opinions relate to domestic matters or to cases that are international in the US sense of the term only, i.e. cases which relate to two or more sister states but not to other countries.

In view of the widespread use of legal opinions, several years ago the US legal profession started to deal in a more systematic way with legal opinions in an attempt to create some order out of some chaos.\textsuperscript{16} Over the last fifteen years different Bar Associations established special committees to analyse particular aspects of possible practices in the preparing and drafting of legal opinions.\textsuperscript{17}

So far, general and special reports have been prepared by the American Bar Association (ABA) Committee on Ethics and Professional Responsibility. Recently, the ABA created a special Committee on Legal Opinions. Other reports came from the New York Bar Association, the Bar of the City of New York, the Massachusetts Bar Association and the Texas Bar Association; especially active was the Business Law Section of the State Bar of California.\textsuperscript{18}

The aim of the different reports was to develop commonly acceptable principles as to the structure of legal opinions, their content, their language and standardized terminology.\textsuperscript{19} The second part of this chapter takes a closer look at these questions.

II. The Characteristics of Legal Opinions

Although various committee reports and articles published thus far stress different elements and emphasize different clauses they generally agree on the basic structure common to all kinds of legal opinions.\textsuperscript{20} This structure consists of essentially four parts which can be called the preliminaries, the surroundings, the substance and the closing part.

1. The Preliminaries

In the preliminary part we normally find five elements, i.e, the date on which the opinion was prepared, the addressee of the opinion, the counsel's role in the underlying transaction, some reference to the transaction in the context of which the opinion was given, as well as some references to definitions and qualifications.\textsuperscript{21}

**The Date**

Legal opinions normally bear the date of the day when they were delivered, for the opinion speaks as of that date. In complex transactions it is, however, often required that the opinion bear the date of the closing day of the principal transaction. If the opinion is dated prior to that day, the opining lawyer might not be responsible for matters which have occurred between the two dates, e.g. the changing of a local statute.\textsuperscript{22}

In international transactions, it is usually not possible to have all relevant documents prepared on the day of closing, nor will all local counsel be able to attend the closing. In such cases most attached documents including the relevant legal opinions will be prepared beforehand, and at the day of the closing the opining counsel will confirm his opinion and authorize its dating. Thus, possible liability for modifications, in local law, lies with the local counsel.

**The Addressee**

Legal opinions usually identify their addresses either by indicating their names or by specifying the appropriate group or class of persons (the sellers, buyers, purchasers). As a rule, only addressees are entitled to rely on the opinion. Although non-addressees may acknowledge an opinion, if they rely on it, they normally do so at their own risk. Sometimes counsel indicate in the opinion whether non-addressees are permitted to rely on the opinion and, if so, under what circumstances and to what extent.\textsuperscript{23}

**The Role of Counsel**

In their opinions, lawyers normally state the capacity in which they act, and on behalf of which party the opinion is given. Often the lawyer specifies his function as that of a general, a special or a local counsel, or simply as counsel to one of the parties to the transaction.
The term "general counsel" indicates that there is a substantial, complex relationship between the lawyer and his client. Such counsel may be handling a variety of matters for that client; in particular, he might be responsible for the whole transaction in which a particular legal opinion was required.

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Local (or international) counsel are lawyers outside the (main) jurisdiction of the client. Most of their cases are international transactions where they deal with the law of another jurisdiction.

Whether a lawyer acts as a general, special or local counsel has some impact on his standard of care and liability: the more familiar he is with the aspects on which the opinion is given, the higher his level of liability will be.24

The Underlying Transaction

The introductory paragraph of a legal opinion also refers to the transaction in the context of which such opinion is given (e.g. we have acted as counsel in connection with the issuance of a new series of shares by corporation X).25 In the same context, the opinion usually mentions the documents on which it is based, and indicates the reasons why the opinion was given.26 All these elements might become important if divergent views should arise with respect to the meaning of the language and the content of an opinion, or some of its statements.

Definitions

The same applies to possible definitions and qualifications in the opinion. Such elements should be clearly expressed and accurately explained.27 Sometimes the underlying agreement or some of its annexes might already provide definitions. In such cases it is advisable to use the same definitions for the opinion, and the opinion should make express reference to the agreement or document in question.

2. The Surroundings

After the preliminary matters mentioned in the first paragraph, the legal opinion refers to a set of surrounding factors. For example, reference is made to the counsel's role in the underlying transaction or to a series of assumptions on which the opinion is based. Other factors relate to the documents investigated and to special or local opinions given on specific matters of the transaction.

Counsel's Role

As already mentioned (supra, "The Role of Counsel"), the opining lawyer normally indicates at the beginning of the opinion the capacity in which he was required to act. The statement usually specifies whether the lawyer was acting as a general, a special or local counsel, and whether he prepared his opinion as a corporate, fiscal or a securities lawyer.

In the same context, the opining counsel usually discloses his relationship to the addressee, indicating whether, and if so, in what capacity he was involved in the underlying transaction.28 Such statements are particularly helpful where the quality of an opinion depends an impartiality or where, on the contrary, thorough knowledge of the client's business is required.

Assumptions

Of equal, if not greater importance are the assumptions under which a legal opinion is given. Assumptions are normally made with respect to certain facts or elements. For example, if counsel has to examine a set of documents, he may expressly assume that all documents submitted to him are authentic, or that copies are complete and conform to the original documents. As to facts, counsel may assume that the statements made in the documents are complete and
correspond with reality.\textsuperscript{29}

Sometimes a legal opinion is asked to reassure the addressee that the underlying transaction (in preparation) will be binding on the counsel's client. Such an assurance presupposes that the other contracting party, will also be bound by the planned transaction. Therefore, legal opinions sometimes state that the issuing counsel assumes due authorization, execution and delivery by the other party, as well as the fact that the basic documents are valid and binding on that party.

The text mentioned reflects the importance of adequate assumptions, for if one of the assumptions fails, the sense of the entire legal opinion may be affected. Therefore, before relying on counsel's conclusions, the addresses should carefully check and verify the assumptions.\textsuperscript{30}

In the same context the term "qualification" may be mentioned. Whereas in private international law qualification stands for a process of Interpretation, a qualified legal opinion is the opposite of an unconditional and unrestricted legal opinion based on crystal-clear law.

If the legal rule on which a counsel has to opine is controversial and he takes a stand in favour of one theory, his opinion is deemed to be qualified.\textsuperscript{31} As to the party to an international transaction, any qualification means legal risk; therefore the client or addressee of an opinion should be informed about such qualifications.

Documents Investigated

In most cases, legal opinions are based on factual matters. A legal counsel who has to verify such facts may rely on documentary proof. Some opinions give a detailed overview of the documents that have been examined; others mention just the title of such documents, or make a general statement that such documents have been examined and such investigations as deemed relevant have been made.

Sometimes, the list of documents includes certificates from a government agency indicating the good standing of a corporation or stating that fiscal duties were fulfilled.\textsuperscript{32} If the certificate is dated prior to the closing of the transaction, a supplement to cover the intermediate period of time may be required.

Special Opinions, Local Opinions

As a rule, legal opinions are restricted to specific matters; they serve as an assurance from a legal point of view but do not guarantee that a particular transaction is economically sound. If an opinion affirms that a transaction is binding in accordance with its terms, such statement is only of help if the terms of the transaction themselves are sound. Inappropriate contract terms cannot be improved through legal opinions, not even by the strongest opinion language.

A legal opinion should only deal with the national law of its author, and it should be restricted to legal topics with which the author is familiar. If some of the questions put to the legal counsel refer to special matters such as tax law or the law an intellectual property, then the assistance of a special counsel might be advisable. Similarly, if questions of foreign law are involved, a local counsel of the country in question should be engaged to answer such questions.\textsuperscript{33}

If, in preparing his opinion, a legal counsel realizes that a special or local opinion is needed to clarify a particular question, he may request such an opinion, and then either refer to it or integrate the special counsel's conclusions into his own opinion. On the other hand he may give a qualified opinion and expressly limit the conclusions to his domestic law. In my opinion, counsel at the very least has the duty to draw the addressee's attention to the particular problem.\textsuperscript{34}

Once a special or local opinion has been given, the general (or principal) counsel has to choose between two approaches. One course of action is to indicate the particular problem by expressly excluding it from his opinion. The other is to request a particular opinion, and then either to make a simple reference to such special opinion or to integrate its results into the general opinion.\textsuperscript{35}

The decision on the appropriate course of action depends on how much risk the general counsel is prepared to bear. For him the safest way is to give a qualified opinion. In the case of a simple reference his liability may be restricted to a \textit{culpa in eligendo}, whereas in the case of an integrated opinion, he might be liable for possible errors made by a special, or local, counsel.\textsuperscript{36}
3. The Substance

Whereas the preliminary aspects and the surrounding clauses are identical for most, if not all types of legal opinions, this is no longer true in regard to the substantive clauses. In this section, the content of the clauses depends on the purpose of the opinion, on the nature of the transaction, and on the parties concerned.

The following presentation applies mainly to borrowing and lending between private corporations.

In such cases, the legal opinion usually starts with statements concerning the corporate status; it then concentrates on the essentials of the transaction and its enforceability, and ends with some proposals for possible remedies.

The Corporate Status

The substantive part of a legal opinion dealing with money-lending might start with a clause of the following nature:

"The X-corporation has been duly incorporated and is duly organized, validly existing and in good standing under the laws of State A; in addition it is duly qualified to do business and is in good standing as a foreign corporation in States X, Y and Z."

The terms "duly incorporated", "duly organized", "validly existing", "in good standing" and "duly qualified" need further explanation.

All these terms are from the common law, most of them being US legal language. If a request to act as local counsel is made from the US, the addressee of the local opinion needs to be informed in exactly such terms; otherwise a local opinion might not be operative.

A civil lawyer's task will then be twofold: first, he has to understand what his clients mean by such "strange" terminology; and second, he should be able to adjust such terminology to the appropriate terms of his own domestic legal system. In short, the European lawyer will not only be an opinion writer, but he will have to do some comparative work as well. In addition, he may have to make some adaptations or adjustments. Such task may easily lead to what the US terminology calls a qualified local opinion. After these preliminary remarks we return to the terms mentioned above.

"Duly incorporated" indicates that all the steps required to create a corporation and to realize its specified purposes have been undertaken according to the law of the state or country in which the corporation is deemed to exist.

As to European law in general and Swiss law in particular, this means that all steps required for the founding of a corporation have been fulfilled, i.e. the statutes and by-laws have been accepted by the meeting of the founders, the required capital has been provided, the shares have been taken over by the statutory number of shareholders, and the corporation has been registered at the Registrar's Office in the place of incorporation.

In order to establish these facts, a local counsel in Europe would ask the Register of Commerce at the place of incorporation to issue a certificate of registration. Such a document is issued with *praesumptio iuris pro veritate* and thus establishes full proof of the duly incorporated requirement.

Under US law the term "duly organized" refers to matters such as the proper election of the directors and other officers, holding of the first meeting, regular adoption of the statutes and by-laws, authorization and issuance of stock or shares, payment of a minimum amount of capital and similar matters relating to the starting of a business.

Under US law, the duly organized requirement is more important than the duly incorporated test, for a corporation which is duly organized must have been duly incorporated.

Under European law, the two terms are somewhat different. It is true that an enterprise cannot be duly incorporated without having been duly organized, but such organization may, and in practice often does change afterwards with
respect to the required minimum of capital and membership. A legal opinion must therefore verify these elements not only at the time of the founding, but also at the date of issuance of the opinion.

If a corporation is duly incorporated and duly organized, it also fulfils the requirement of validly existing. This term has no independent meaning, at least not in corporate matters; but things might be different as to contracts or agreements.

The term "good standing" refers to the fiscal situation of a company. It indicates that the company has duly performed its tax obligations in the state of its corporation and the state where it does its business. Therefore, the state authorities have no reason to revoke its corporate status.

The term "duly qualified" concerns a specific US interstate problem. In the US a corporation may be incorporated under the law of one sister state, but carry out its business in one or more other states.

In Europe, things are different. If a company wants to do business in different countries, it needs a local establishment in each such country. As each such establishment normally takes the legal form of an independent local corporation, we have a so-called multinational corporation.

**Corporate Power**

Another substantive clause refers to the powers of a corporation; it normally has the following structure:

"The corporation has the corporate power and authority to enter into and perform the X-agreement. The execution, delivery and performance of the X-agreement has been duly authorized by all corporate action, and the X-agreement has been duly executed by the corporation."

In this clause there are two elements of particular interest.

The first element (corporate power and authority) indicates that the corporation is entitled to be active in the particular field, and that such undertaking falls within the scope of activities provided for in its statutes and by-laws. This clause acts as an assurance against the famous *ultra vires* doctrine.

The second element (duly authorized by corporate action) relates to the question of corporate authorization. It underlines that the appropriate corporate body was acting and confirms that this body was empowered to perform such acts, either by law, by statutes and by-laws or even by an authorization received from the competent corporate body.

**Transactions**

In case a corporation wants to issue new shares, the transaction will probably be accompanied by a legal opinion in which, among others, this special power might be expressly addressed. A possible standard clause would read as follows:

"The corporation's authorized capital stock consists of X. shares, par value of Y-$ per share. The shares have been duly authorized and validly issued and they are fully paid and non-assessable."

When applied to stock, the term "duly authorized" means that under the applicable law, as well as under its statutes and by-laws, this corporation has the power to issue shares. The term also indicates that all corporate action necessary to authorize such issuance has been undertaken.

The power to issue shares contains at least two aspects: first, the power to issue a given number of shares and, second, the power to issue such shares at a particular price.

Shares are validly issued, if the issuance was duly authorized, if payment was made as indicated by the value, and if the certificates evidencing such shares were properly executed. In addition, the necessary technicalities and official authorizations must be met.

Fully paid means that the amount required by the corporate action authorizing the issuance has been paid in full. The clause also implies that such amount was sufficient.
The legally binding clause refers to the validity of the underlying agreement and certifies that this agreement was neither void nor *ultra vires*, nor in conflict with any rule of law. If the agreement is legally binding upon both parties to the transaction, it must also be enforceable before a court; this leads to the next set of clauses.

**Enforceability**

According to the enforceability clause, an agreement can be enforced by a legal action before a court. An agreement may be legally binding without being enforceable, e.g. if one party is a state or an international organization which has not waived its immunity. The term "enforceability" may be used in different contexts.

Specifically enforceable refers to the common law and its equitable remedy of specific performance. The effect of such clause is similar to what a civil lawyer might call a performance *in natura*.

The no-conflict-rule covers and prevents conflicts with other statutory or negotiated texts mentioned in the clause. The following language might be used:

*The execution and delivery of the agreement do not and will not conflict with,*

*any law of States X,*

*the certificate of incorporation or the by-laws of the corporation or with*

*any agreement, instrument, judgment or decree known to us and to which the corporation is a party or is subject.*

*If the documents mentioned in the clause are not in the possession of the opining lawyer, he must rely an Information received from the company or certificates issued by official authorities.*

The no-litigation statement indicates the absence of any pending court or arbitration proceedings. In this respect, again, the opining counsel will have to rely an information provided by the client.

In order to limit personal liability as to such statements, as a safeguard, counsels usually add, the knowledge exception "known to us".

**Official Consents**

In export or international financing transactions, consent, licences and/or authorizations from state agencies may be required. The opining counsel should verify whether such authorizations have been obtained and whether they duly authorise execution of the agreement. The positive result of such control may be stated in the opinion as follows:

*All consents and authorizations of governmental or official authorities of State A have been obtained for the entry into and the performance of the agreement.*

**Remedies**

The substantive part of a legal opinion may also contain a remedy clause declaring that:

*"The agreement is a legal, valid and binding obligation of the corporation and is enforceable against the corporation in accordance with the terms of the agreement, except as may be limited by bankruptcy, insolvency or similar laws affecting the enforcement of the creditors rights in general. In addition, the enforceability of the corporations obligations under the agreement is subject to the general principles of equity."*

As already mentioned, the language in legal opinions resembles that of incoterms. This is especially true in regard to the remedy clauses. In this sense, opinion counsel nowadays give LVB or EAT assurances or they make a BKE or an EPL reservation.
With on LVB clause counsel tends to limit his possible liability; therefore, he restricts his statements to the terms of the agreement. If these terms are unsatisfactory, the impact of a LVB or an EAT clause is manifest.

In addition to the two limitation clauses there are also two exception clauses.

The Bankruptcy Exception (BKE) refers to the function of this procedure. In all jurisdictions bankruptcy is intended to defeat the enforcement of an obligation under certain circumstances. Even in a simple obligation to pay, bankruptcy proceedings tend to release the bankrupt debtor from his obligation to pay. As a consequence, the creditors are deprived from any remedy. Instead, bankruptcy proceedings prescribe a global solution to settle all assets and debts.\(^57\)

The Equitable Principles Limitation (EPL) tends to exempt debtors from the obligation to respond to a duty stipulated in the agreement. Under the common law principle of equity, there may be valid reasons not to perform such duty.\(^58\)

The Closing Part

As in all the other parts of a legal opinion, there is also a set of standard clauses frequently used in the closing part.\(^59\)

The Legal Form Clause

The legal form clause reads as follows: "The agreement is in proper legal form for enforcement in the court." Clauses of this type confirm that the conditions are satisfied, thus permitting one to exercise a particular right.

Filings

In most cases a registration or filing relates to export control, exchange control or similar questions. A possible wording of such a clause might be: "No filings or registration with a public agency is necessary in regard to the making, validity or enforceability of the agreement."

Stamp Duties, Taxes

Another element of the closing part usually states whether the agreement to be concluded has to satisfy stamp duties. This might be the case in the field of securities or bonds. In the same context reference should be made to the question whether some special tax duty is to be taken into account under foreign law.

Other Agreements

Depending on the legal nature of the underlying transaction, a legal opinion might have to deal with various other matters such as the pari passu ranking, the judgment clause, the immunity clause, the no-adverse-consequences clause, the application of the proper law or the adherence to securities regulations.

Signature

Common to all legal opinion, is the final personal signature of the opining counsel.

1 See e.g. J. J. Fuld, infra, n. 4, at 915: "Today, in important business transactions such as sales of businesses, mergers, bank loans or sales of securities, legal opinions are almost always required as a condition precedent to the closing of the transaction."


3 In the sixties and the seventies various malpractice Gases were decided in California; see e.g.: Lucas v. Hamm, 56 Cal. 2d 583, (1961) 15 Cal. Rptr. 821; Smith v. Lewis, 13 Cal. 3d 349, (1975) 118 Cal. Rptr. 621; Horne v. Peckham, 97 Cal. App. 3d 404, (1979) 158 Cal. Rptr. 714; Davis v. Damrell, 119 Cal. App. 3d 883, (1981) 174 Cal. Rptr. 257. According to Fuld, "Lawyers' Standards and Responsibilities in Rendering Opinions" (1978), 33 Bus. Law., 1295, at p. 1298: "[C]onscienious lawyers are deeply concerned today when delivering opinions . . . There is a cumulative effect: Opinions are being requested in increasing types of transactions, the requested opinions are being increasingly broadened as to scope, the class of persons who may rely on lawyers' opinions may be expanding, and lawyers are being increasingly sued on expanding theories."


According to Black's Law Dictionary, 5th ed. (1979), at 985, a legal opinion is a "document prepared by an attorney for his client, embodying his understanding of the law as applicable to a state of facts submitted to him for [a given] purpose". And the Report of the Committee on Corporations of the Californian State Bar stated (supra, n. 5, at 1004-5): "In the context of business transactions, a legal opinion can be more accurately defined as a formal writing prepared by a lawyer, expressing the lawyer's informed understanding of the legal principles generally applicable to a specific transaction or to a particular aspect of such a transaction."

6 See supra, n. 4, at 17.
7 See ibid. 18.
8 See ibid. 19.
9 See e.g. Bermant (supra, n. 4), at 134: "A typical example of the reasoned opinion occurs in transactions where a lender desires legal assurance that the borrower does not have (e.g.) the defence of usury available to it, often in complex financing arrangements . . . In such event, the lawyer's opinion might well discuss the theory of usury . . . and then arrive at the conclusion that "although the issue is not without doubt, we are of the opinion that the transaction when viewed as a whole does not involve the imposition of usurious interest."

10 See S. Fitzgibbon and W. Glazer, "Legal Opinions in Incorporation, Good Standing, and Qualification to Business" (1986), 41 Bus. Law., p. 461: "Legal opinions are short . . . and look simple. But they are an essential element of almost all major corporate financial transactions. In an opinion for such a transaction, the lawyer confirms that the transaction is what it is meant to be from a legal point of view."

11 See e.g. Report of the Committee on Corporations of the Californian State Bar (supra, n. 5, at 1005).
12 See Estey (supra, n. 4), at 255.
13 See Fuld (supra, n. 4), at 914. Estey (supra, n. 4), at 1: "Many lawyers assume that a transaction opinion is among the most important documents to be delivered on closing."

14 See Documents to the Invitation to Bids to purchase United Mexican States Collateralized Floating Bonds, March 1988, Exhibits C to F.
15 See Fuld (supra, n. 4), at 915; Filzgibbon and Glazer, "Legal Opinions in Corporate Transactions: Opinions Relating to Security Interests in Personal Property" (1989) 44 Bus. Law., pp. 655-656; See also Estey (supra, n. 4), for commercial opinions at 129, for real estate opinions at 171.
16 See Fuld (supra, n. 4), at 915.
17 See supra, n. 5.

19 Most of the Committee Reports referred to in nn. 5 and 18 contain structured models for the drafting of legal opinions; See e.g. the three "Reports of the State Bar of California regarding Legal Opinions in Business Transactions" ((1983), 14 Pac. L.J., p. 1001), "... in Real Estate Transactions" ((1987), 42 Bus. Law., p. 1139) and "... in Secured Transactions" (1989), 44 Bus. Law., p. 791).

20 See also Estey (supra, n. 4), at 34: "Many law firms have now produced various standard forms of opinions. These may take the form of a fall opinion for use in a particular type of transaction . . . There appear to be at least two principal reasons for this initiative: (1) firms are becoming more zealous . . . in attempting to achieve a consistency . . . among opinions . . .; and (2) the custom that lawyers on both sides of a transaction drive to deliver on closing substantially similar, if not identical, opinions."

21 See e.g. Report of the Committee on Corporations of the Californian State Bar (supra, n. 5), at 1014.
22 Fuld (supra, n. 4), at 919.
23 Cf. n. 22, at 920.
24 Cf. n. 21, at 1015/1016.
25 Estey (supra, n. 4), at 35.
26 Ibid. 36.
27 See Report of the Committee on Corporations of the Californian State Bar (supra, n. 5), at 1016.
28 Estey (supra, n. 4), at 34.
29 See Fuld (supra, n. 4), at 921.
31 See Fuld, "Lawyers' Standards and Responsibilities in Rendering Opinions" (1978), 33 Bus. Law., 1306; see also Estey (supra, n. 4), at 30, 31.
32 Report of the Committee on Corporations of the Californian State Bar (supra, n. 5), at 1019 and 1023.
33 Cf. n. 32, at 1027.
34 In the same sense M. W. Jonin, "The Lawyer's Responsibility for Foreign Law and Foreign Lawyers" (1982), 16 Int. Law., p. 696: "The client relies on the lawyer for legal advice and services. The lawyer is, generally, better able than the client to recognize when a matter involves aspects of foreign law."
35 According to A. N. Field and R. H. Ryan (Legal Opinions in Corporate Transactions (New York 1988), p. 2) the more common practice is for principal counsel to incorporate local counsel's opinion rather than have it delivered to the client separately as an independent opinion.
36 See also Gruson and Kutschera (supra, n. 2), at 516 where it is stated that "Principal Counsel does not discharge his duties to his client by simply obtaining some opinion from Foreign Counsel. Principal Counsel must make a diligent effort to uncover legal problems that might exist under the relevant Foreign Law and must ascertain that these problems have been addressed and resolved."
39 As to European law see Art. 2 of the First EC directive of 9 March 1968 on the co-ordination of company law.
40 See e.g. Art. 641 Swiss Code of Obligations.
41 See Report of the State Bar of California (supra, n. 37), at 1032; see also Fitzgibbon and Glazer (supra, n. 10), at 468-469.
42 See e.g. Art. 625 para. 2 and Art. 633 para. 2 Swiss Code of Obligations.
43 See Fitzgibbon and Glazer (supra, n. 10), at 470-471.
44 Ibid.: "Good standing certificates are available in most states but mean different things . . . Some states issue a single certificate relating both to the payment of taxes and to other matter, such as filing of periodic reports which the state secretary."
45 Many corporations are incorporated under the laws of Wilmington, Delaware, but have their principle place of business elsewhere.
46 See similar clauses in Report of the State Bar of California (supra, n. 37), at 1035.
47 See Fuld (1973) (supra n. 4), at 927.
48 See Estey (supra, n. 4), at 87.
49 Ibid. 88, 89.
50 See Fuld (supra, n. 4), at 929-931; Report (supra, n. 37), at 1037.
51 See Report (supra, n. 37), at 1047; Estey (supra, n. 4), at 143.
52 Report (supra, n. 37), at 1057; Fuld (supra, n. 4), at 941.
53 See Estey (supra, n. 4), at 82.
54 See Report (supra, n. 37), at 1037, 1039.
55 LVB: Legal, Valid and Binding; EAT: Enforceable in Accordance with its Terms; BKE: Bankruptcy Exception; EPL: Equitable Principles Limitation reservation.
56 See Report (supra, n. 37), at 1038, 1039.
57 Ibid. 1040.
VII.5 - Liability for damages for legal opinions