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Opinion of Counsel on Agreements Governed by Foreign Law

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I. SCOPE OF THE "LEGAL, VALID AND BINDING" OPINION OF FOREIGN COUNSEL

The heart of a legal opinion customary in the United States is counsel's statement that the agreement in question is "legal, valid, binding and enforceable in accordance with its terms." If in an international

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This article is based on a presentation made by Michael Gruson on October 1, 1985, in Singapore before the Committee on Banking Law of the International Bar Association. A Subcommittee on Legal Opinions of the Committee on Banking Law chaired by Michael Gruson presented a multi-country study and report on responses by non-United States counsel to opinion requests by United States counsel at the 21st Biennial Conference of the International Bar Association in New York in September 1986. *See* Subcommittee on Legal Opinions of Committee E of the Section on Business Law of the International Bar Association, *Response to U.S. Opinion Requests, a Report on Legal Opinions in International Transactions* (M. Gruson, Reporter & M. Kutschera, Co-Reporter) (unpublished manuscript 1986) [hereinafter *Response to U.S. Opinion Requests*].

transaction United States counsel requests an opinion from foreign counsel, United States counsel will request foreign counsel to include such a statement in the opinion even when the agreement in question provides that the governing law of the contract shall be the law of the home state of United States counsel. United States counsel and foreign counsel may endlessly discuss the meaning of such an opinion if it relates to an agreement governed by a law which the foreign opining lawyer is not licensed to practice.[1] This article analyzes the meaning behind the incantation and suggests that the opinion requested from foreign counsel be phrased in a way which expresses the true meaning, rather than the traditional formulation. In other words, it is suggested that the "legal, valid, binding and enforceable" formula be demystified and that foreign counsel be encouraged to call a spade a spade.

To understand the scope of these statements by foreign counsel take as an example a loan agreement, expressly governed by New York law, between a New York bank, represented by New York counsel as principal counsel, and a non-United States borrower and the opinion to be rendered with respect to that loan agreement by a lawyer admitted to practice in the country of the borrower (the "foreign counsel"). It makes no difference whether foreign counsel is borrower's counsel or lender's local counsel.

The opinion of foreign counsel, that a New York agreement is "legal, valid, binding and enforceable in accordance with its terms," if read together with the usual express or implied qualification, that his opinion is rendered only under his country's law[2] (the "foreign law"), means that the governing law clause contained in the agreement is valid under the foreign law and that no provision of the agreement and perhaps even no provision of the chosen New York law violates the public policy (*ordre public*) or other similar principles of the foreign law.[3]

The opinions of foreign counsel on the due organization and valid existence of the borrower, on the due authorization of the agreement by the borrower, and on the authority of signing officers of the borrower are given exclusively under the foreign law. However, apart from these elements, a court in the borrower's country will apply foreign law only to

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1. *See* Meyrier, *Legal Opinions in Financial Transactions Involving Foreign Law*, 13 INT'L BUS. LAW. 410 (1985).

2. *See id.* at 410-11; *cf.* Gruson, *American Lawyers and Legal Opinions of Foreign Counsel*, 1975 ANN. PROC. FORDHAM CORP. L. INST. 296.

3. Gruson, *Rechtswahlklauseln in Handelsverträgen in New York*, 29 RECHT DER INTERNATIONALEN WIRTSCHAFT 393, 400 (1983); *see also* Gruson, *Controlling Choice of Law*, in SOVEREIGN LENDING: MANAGING LEGAL RISK 66 (M. Gruson & R. Reisner eds. 1984) [hereinafter *Controlling Choice of Law*].

one aspect of the issue of the legality, validity and binding nature of an agreement governed by a law other than the foreign law: whether and to what extent the governing law clause of the agreement is valid and effective under the *lex fori*. To the extent that the governing law clause is valid and effective, the court will apply New York law. Apart from issues of the due organization of the borrower and the like, foreign counsel's opinion in effect is limited to the one issue which is determined under the foreign law.[4]

This interpretation of the meaning of foreign counsel's opinion parallels the New York conflict-of-laws rule on governing law clauses. The rule requires two levels of inquiry: (1) whether the stipulation of law by the parties to the agreement is valid and (2) if the clause is valid, whether a provision of the agreement or a rule of the chosen law applicable to the agreement violates an important New York public policy.[5] Such a violation limits the effectiveness of the clause and a qualification of counsel's opinion is in order. The conflict-of-laws rules of other countries generally follow the same pattern.[6] Under the laws of some countries, however, the enforcement of an otherwise effective governing law clause is not only limited by an "important" public policy but by any public policy (*ordre public*) or even by certain mandatory rules of law.[7]

In the end, foreign counsel is asked to make a sweeping statement which in effect has a very limited, though important, meaning, namely that the governing law clause is valid. The failure to appreciate this point may cause United States counsel and foreign counsel to spend much time discussing the opinion, which means something else than it appears to mean at first glance. To avoid misunderstanding, it would be better to replace the somewhat misleading "legal, valid, binding and en-

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4. Sometimes foreign counsel is permitted in his opinion to make the strange assumption that the agreement in question is governed by the foreign law (and not by the governing New York law). This opinion is useless because it is rendered on a nonexisting agreement and analyzes the agreement under a law which the foreign court will not apply if the governing law clause is valid. In other cases, foreign counsel has been permitted to assume that the law of New York is not different from the foreign law. This opinion is equally useless because it also requires foreign counsel to analyze the agreement under the foreign law which the foreign court will not apply to the agreement if the governing law clause is valid. An opinion of foreign counsel assuming that foreign law applies to the agreement would make sense only in a case where the governing law clause in its entirety is invalid under foreign law.

5. *See generally* Gruson, *Governing Law Clauses in Commercial Agreements - New York's Approach*, 18 COLUM. J. TRANSNAT'L L. 323 (1979).

6. *See Response to U.S. Opinion Requests*, *supra* note *.

7. As to the terms "mandatory" or "dispositive" rules of law, see Gruson, *supra* note 5, at 340 n.49.

forceable in accordance with its terms" opinion of foreign counsel with a more precisely phrased opinion.

The "legal, valid and binding" opinion of foreign counsel also implies that under the foreign law the borrower is a corporation duly organized and validly existing, that all necessary corporate actions have been taken to authorize the agreement and that the officers who executed and delivered the agreement were duly authorized. Because foreign counsel customarily gives specific opinions on these points it is not necessary to rely with respect to these conclusions on the umbrella of the "legal, valid and binding" formula.

II. Suggested Phrasing of Opinions

A. *Opinion on the Validity of the Governing Law Clause*

Assume that a New York lender asks German counsel of the borrower, a German corporation, to give an opinion under German law on the Credit Agreement. First, foreign counsel should state that the governing law clause is valid under German law by saying:

> (1) The governing law clause, subjecting the Credit Agreement to New York law, is valid under German law.

If foreign counsel opines on the validity or effect of a provision which is part of an agreement governed by a law other than his foreign law, he will usually base his opinion on the assumption that such provision is valid and effective under the governing law. This assumption, however, is neither necessary nor appropriate when the opinion addresses the validity and effectiveness of the governing law clause. The courts of foreign counsel's country will most likely apply only their own conflict-of-laws rules in determining the validity and effect of the governing law clause. They might recognize and give effect to a governing law clause even in a case when the courts sitting in the jurisdiction of the chosen law (in our example, New York) would not.[8]

Next, foreign counsel should explain the rule of foreign law that limits the effect of a generally valid governing law clause. In the hypothetical situation this explanation might read:

> (2) Under German law, New York law will be applied to an agreement, such as the Credit Agreement, which under German law has been validly subjected to New York law, except to the extent that (a) any of the terms of such agreement or any of the provisions of New York law applicable to

8. *See* Yntema, *'Autonomy' in Choice of Law*, 1 AM. J. COMP. L. 341, 356 (1952); *cf. Controlling Choice of Law*, *supra* note 3, at 63 (N.Y. courts apply their own rules).

such agreement are obviously irreconcilable with important principles of German law, (b) there are mandatory provisions of German law which must be applied to the transaction covered by the Credit Agreement irrespective of the law which governs the Credit Agreement or (c) all elements of the transaction covered by the Credit Agreement, other than the choice of law, are connected with only one country at the time of the choice of law and there are mandatory provisions of the law of such country applicable to the transaction.[9]

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9. The principle that the parties to a commercial agreement are free to choose the law applicable to such agreement and the exceptions to that principle are set forth in the *Gesetz zur Neuregelung des Internationalen Privatrechts*, 1986 Bundesgesetzblatt I 1142 (W. Ger.), which was enacted on July 25, 1986. This statute amends and restates the conflict-of-laws provisions of the *Einführungsgesetz zum Bürgerlichen Gesetzbuch* (Introductory Law to the Civil Code).

The relevant provisions of the Introductory Law to the Civil Code, as amended, read as follows:

Article 6. Public Policy (ordre public).

A provision of law of another country shall not be applied if its application would lead to a result which is obviously irreconcilable with important principles of German law. In particular, it shall not be applied if its application is irreconcilable with Basic Rights [set forth in the German Constitution].

Article 34. Mandatory Provisions.

This subpart [concerning contractual obligations — i.e., Arts. 27-37] does not prejudice the application of those mandatory provisions of German law which must be applied to elements of a transaction irrespective of the law which governs the agreement.

Article 27. Free Choice of Law.

(1) The agreement is subject to the law chosen by the parties . . .

(3) If at the time of the choice of law all other elements of a transaction [i.e., other than the choice of law] are connected with only one country, the choice by the parties of the law of another country — even if accompanied by the choice of the jurisdiction of a court of another country — cannot prejudice the application of those provisions [of the law of the former, connected country] which cannot be derogated from by contract pursuant to the law of the former country (mandatory rules).

The relationship between article 6 and article 34 of the revised Introductory Law to the Civil Code is not entirely clear. It has been argued that article 34 contains a specific public policy reservation for contractual obligations and is a *lex specialis* to article 6 which sets forth the general principle. *See* PALANDT, BÜRGERLICHEN GESETZBUCH 2270-71 (46th ed. 1987). Opinion clause (2) is based on the cautious view that both articles may apply to a contractual governing law clause. Should it be clearly established at a later time that article 6 does not apply to contractual governing law clause opinion clause (2) must be modified.

The history of the revisions of the German conflict-of-laws rules is discussed in Bernhardt, *Die Neuregelung des Internationalen Privatrechts*, 1986 DER BETRIEB 2009, 2009-10.

Opinions rendered by German counsel prior to the 1986 amendments were phrased

Next, foreign counsel should state that the limitations mentioned in opinion clause (2) are not present in the agreement under consideration. If, again, a German lawyer was foreign counsel, the opinion would read:

> (3) (a) None of the terms of the Credit Agreement is irreconcilable with important principles of German law, (b) there are no mandatory provisions of German law which must be applied to the transaction covered by the Credit Agreement irrespective of the law which governs the Credit Agreement and (c) the transaction covered by the Credit Agreement was not connected with only one country at the time of the choice of law.[10]

Limitations (a) and (b) in clause (2) are expressions of German public policy. Limitation (c) reflects a limitation on the freedom of the parties to chose a law in the absence of a relationship between the transaction and the country the law of which was chosen. If a provision of the Credit Agreement violates German public policy, for example, an important principle of German law or a relevant rule of mandatory German law, German counsel should mention such provision and describe how the public policy limits the application of such provision. If the transaction is connected only with a country other than the country of the chosen law, German counsel should point out this fact. If this country is Germany, German counsel should mention the mandatory provisions of German law applicable to the transaction covered by the Credit Agreement. If this country is a country other than Germany, German counsel is probably not in a position to mention the mandatory provisions of the law of such country because he does not know them. United States coun-

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somewhat simpler, as follows:

> (1) The governing law clause, subjecting the Credit Agreement to New York law, is valid under German law.
>
> (2) Under German law, New York law will be applied to an agreement, such as the Credit Agreement, which under German law has been validly subjected to New York law, except to the extent that any of the terms of such agreement or any of the provisions of New York law applicable to such agreement violate German public policy or the purpose of a German statute reflecting such public policy.
>
> (3) None of the terms of the Credit Agreement violates German public policy or the purpose of a German statute reflecting such public policy.

This opinion was based on Article 30 of the Introductory Law to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*), which provided that: "[Non-applicable Foreign Law; "ordre public"]. The application of a foreign law is precluded if such application would violate the public policy ("*gute Sitten*") or the purpose of a German statute ("*Zweck eines deutschen Gesetzes*")."

10. If the opinion is issued at the time of execution and delivery of the Credit Agreement, subclause (3)(c) might read: "(c) the transaction covered by the Credit Agreement is not connected to only one country."

sel must then consider whether an opinion from a lawyer admitted in such country should be obtained.

In many countries other than Germany, the limitations to the application of a validly chosen foreign law are less complicated. Under the laws of such countries the effect of a generally valid governing law clause is limited only by the "public policy", "international public policy" or "public policy or good morals" of the respective country. Clauses (2) and (3) in opinions rendered under the law of such countries read as follows:

> (2) Under [country X] law, New York law will be applied to an agreement, such as the Credit Agreement, which under [country X] law has been validly subjected to New York law, except to the extent that any of the terms of such agreement or any of the provisions of New York law applicable to such agreement violate [country X] [public policy] [international public policy] [public policy or good morals].(3) None of the terms of the Credit Agreement violates [country X] [public policy] [international public policy] [public policy or good morals].

This article refers in several places to "the public policy or similar principles of the foreign law of the foreign counsel's country" to indicate the substance of such limitations.[11]

The above opinion leaves one obvious gap: the opinion does not address the issue of whether there are any provisions of New York law which are not reflected in the provisions of the Agreement that are irreconcilable with important principles of German law or contrary to mandatory provisions of German law which must be applied to the transaction covered by the Credit Agreement irrespective of the law which governs the Credit Agreement. By subjecting an agreement to New York law, certain provisions of New York law will be applicable to the agreement because New York law is incorporated into the agreement by virtue of the governing law clause. This incorporation holds for mandatory rules as well as for dispositive rules of New York law. A court in foreign counsel's country will, therefore, have to determine, in accordance with its own conflict-of-laws rules, whether it will apply the relevant provisions of New York law in accordance with the governing law clause. In the hypothetical example, a German court will have to determine whether any rule of New York law incorporated into the Credit Agreement is irreconcilable with important principles of German law or contrary to mandatory provisions of German law which must be applied to the transaction covered by the Credit Agreement irrespective

11. *See Response to U.S. Opinion Requests, supra* note *, at 90-92.

of the law which governs the Credit Agreement.[12] If a court in the foreign counsel's country rejects a rule of New York law because that rule is irreconcilable with important principles of German law or contrary to mandatory provisions of German law which must be applied to the transaction covered by the Credit Agreement irrespective of the law which governs the Credit Agreement, the rejection limits the effectiveness of the governing law clause, with the result that the foreign court will construe the Credit Agreement differently than a court sitting in New York.

To assure the recipient of the opinion that such a gap does not exist when the courts of the foreign counsel's country apply the governing law to the Credit Agreement, foreign counsel would have to give an unqualified opinion as to the compatibility of the governing law applicable to the Agreement with the public policy or similar principles of the foreign law. But foreign counsel will probably not give such an opinion because this opinion requires a knowledge of all rules of the governing law which may apply to the Agreement. In fact, the hypothetical foreign counsel would have to be both a New York *and* a German lawyer.[13] If foreign counsel is very familiar with the loan transactions governed by New York law, he may be willing to opine that he is not aware of any rule of New York law applicable to the Agreement which violates the public policy or similar principles of the foreign law of the foreign counsel's country.

There is no way to close completely that gap in the opinion puzzle.[14] To be sure, the practical implications of the problem are small. However, it ought to be clear, even if not expressly stated, that the opinion which foreign counsel gives with respect to the validity and enforceability of an agreement under foreign law is limited to an opinion on the valid-

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12. *See* Articles 6 and 34 of the Introductory Law to the German Civil Code, as amended, *supra* note 9.

13. Since the opinion gap becomes apparent from a reading of opinion clauses (2) and (3), it is not necessary for foreign counsel to expressly qualify his opinion by stating that he does not express an opinion on whether any provision of the stipulated law applicable to the agreement violates a public policy or similar principle of the foreign law (of foreign counsel's country).

14. In some instances it may be possible for foreign counsel to obtain an opinion from New York counsel stating foreseeably important rules of the chosen New York law which apply to the agreement in question and which could — in New York counsel's view — violate the public policy or similar principles of foreign law because of their impact on the rights and duties of the parties to the agreement in question. Foreign counsel can then opine, based on the New York opinion, whether these rules in fact violate the public policy of his foreign law. *Cf. Controlling Choice of Law*, *supra* note 3, at 67 (similar advice to N.Y. counsel, if foreign law governs).

ity and enforceability of the agreement as its terms appear on its face, that is, without reference to the general body of law incorporated into the agreement by the governing law clause. This is another reason why international agreements should be detailed and complete.

There is a second gap. The opinion that the terms of the Credit Agreement do not violate a public policy or similar principle of the foreign law requires an understanding of the terms of the Credit Agreement. An agreement can only be fully understood if read with a knowledge of the governing law because the governing law determines the meaning of the provisions of the agreement. Foreign counsel, however, does not know the governing law. In the case of opinions rendered in interstate transactions involving sister states of the United States, it has been suggested that counsel from one state should assume that the agreement is governed by his law rather than by the governing sister state law. This approach may not bring to light violations of the public policy of the opining lawyer's state, but it may still have some merit where sister states of the United States with substantially similar legal systems are involved. This approach makes no sense, however, where foreign countries are involved. Because of the difference in law and contract practice it would be ludicrous to suggest to a lawyer from a civil-law country or even from a non-United States common-law jurisdiction to read a New York law agreement as if it were governed by his law. All one can reasonably expect from a foreign counsel rendering an opinion on an agreement governed by the law of a state of the United States is that he is familiar with the English language and United States legal terminology and that he is experienced in international transactions of the type reflected in the agreement. Foreign counsel's opinion that the agreement does not violate a public policy or similar principles of foreign law is based on a reading of the agreement with this background.[15]

For a better understanding, let us assume, that the situation is the other way around, namely the Credit Agreement is subject to German law and the lender asks a New York lawyer to render an opinion as foreign counsel. Clauses (1), (2) and (3) of the opinion would then read:

> (1) The governing law clause, subjecting the Credit Agreement to German law, is valid under New York law.
> (2) Under New York law, German law will be applied to an agreement, such as the Credit Agreement, which under New York law has been val-

15. The same issue arises in connection with the customarily requested opinion that the execution, delivery and performance of an agreement does not require any governmental approvals and does not violate any contractual obligations or the charter and bylaws or similar documents of a party thereto.

> idly subjected to German law, except to the extent that any of the terms of such agreement or any of the provisions of German law applicable to such agreement violate an important public policy of New York.
> (3) None of the terms of the Credit Agreement violates an important public policy of New York.

One gap which is left uncovered by this opinion relates to the provisions of German law applicable to the Credit Agreement which are not reflected in the Credit Agreement. A New York lawyer will not be in a position to opine that none of these provisions of German law violates an important public policy of New York. The other gap relates to the New York lawyer's ability to fully understand the implications of the German law Credit Agreement when determining whether any term of the Agreement violates an important public policy of New York.

B. Opinion on Enforcement and Remedies

If foreign counsel gives the opinions suggested above, the recipient of the opinions knows that a foreign court will apply New York law to the agreement. If foreign counsel makes exceptions with respect to certain provisions of the Credit Agreement or of the governing law, the recipient knows that there are certain limits to the application of the governing law to the Credit Agreement by a court of the foreign country. The recipient does not receive assurance, however, that there will be *remedies* available in the foreign country. He will miss the express and positive statement that the agreement is *enforceable* in the foreign courts.

"Enforceability" of an agreement means that remedies will be available to a party to such agreement if certain requirements are met. "Availability of remedies" means for the United States lawyer the following:

> [I]f there is a default in performance of an obligation (1) if a failure to pay or other damage can be shown and (2) if the defaulting party can be brought into a court which will hear the case and apply the governing law, then, subject to the availability of defenses and the exceptions stated in the opinion [presumably the bankruptcy and equitable remedies exceptions],[16] the court will provide a money damage (or perhaps injunctive or

16. The terms "bankruptcy exception" and "equitable principles limitation" are used in this article as shorthand descriptions for qualifications of the remedies opinion.

The bankruptcy exception contains the warning that a court might refuse to give some remedy because of "bankruptcy, insolvency or other similar laws affecting the enforcement of creditors' rights in general." Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, in Co-operation with Corporation Law Committee, The Association of the Bar of the City of New York, and Corporation Law Committee of the Banking, Corporation and Business Law Section,

specific performance) remedy.[17]

According to the Tribar Report,[18] this statement about enforceability is contained in three phrases which have the same meaning: the agreement is *legal, valid and binding*, the agreement is *legal, valid, binding and enforceable* and the agreement is *legal, valid, binding and enforceable in accordance with its terms*. Another view, however, holds that "enforceable in accordance with its terms" means that the court will hear arguments for specific performance or injunctive relief and that the deletion of the words "in accordance with its terms" indicates that only money damages are available.[19]

Foreign counsel could properly ask why he should give an opinion as to enforceability under foreign law (whether that opinion is included in the word "binding" or in the word "enforceable" or in the words "enforceable according to its terms") if the meaning of that opinion is not even clear to the United States recipient. In addition, the above quoted interpretation of the opinion as to enforceability enumerates various assumptions which are not reflected in the language of the enforceability opinion. A refusal by foreign counsel to give any enforceability opinion would not be very helpful; the opinion-giving process is not an adversarial process, it is a process of cooperation between principal counsel and foreign counsel. The United States lawyer with his less abstract, more result-oriented way of thinking, with his procedural approach to the law, will insist on some assurance as to enforceability. What can foreign counsel offer? Foreign counsel, in our German example, could say:

(4) Assuming that the Credit Agreement is legal, valid, binding and enforceable under New York law,[20] the Credit Agreement is enforceable in

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New York State Bar Association, *Legal Opinions to Third Parties; An Easier Path*, 34 BUS. LAW. 1891, 1917 (1979) [hereinafter *Tribar Report*]; *see also An Addendum — Legal Opinions to Third Parties: An Easier Path*, 36 BUS. LAW. 429 (1981) [hereinafter *Addendum*]. The equitable principles limitation makes the opinion recipient aware of the fact that the enforceability of the obligations under the agreement is subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law). This means that courts might apply a "test of reasonableness . . . in some situations to dilute the effect of the literal language of an obligation." In aggravated situations it seems likely that the courts will act to provide some relief to the obligor. *Tribar Report, supra* note 16, at 1918.

17. *Tribar Report, supra* note 16, at 1914.

18. *See id.* at 1915-16.

19. *See id.* at 1916.

20. In lieu of the assumption, foreign counsel could rely on an opinion of New York counsel that the agreement is legal, valid, binding and enforceable under New York law.

> accordance with its terms, the rules of the German law of civil procedure and, subject to the opinions set forth in clauses (1) through (3), the applicable provisions of the chosen law of New York, except that the enforceability of the Credit Agreement may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforceability of creditors' rights generally.

This statement is more helpful and precise than the abstract statement that the agreement "is enforceable." However, foreign counsel might still be troubled by the dispute as to the meaning of the word "enforceable." Should he not enlarge his opinion and say exactly what the Tribar Report thinks he is saying? The enlarged statement would read:

> (4) In the event that a party to the Credit Agreement breaches the Credit Agreement, and if (i) the other party suffers damages because of such breach, (ii) the breaching party can be subjected to the jurisdiction of a German court which will hear the case, and (iii) the Credit Agreement is legal, valid, binding and enforceable under New York law, then, subject to the availability of defenses, such court will provide some remedy to the injured party in accordance with the terms of the Credit Agreement, the rules of the German law of civil procedure and, subject to the opinions set forth in clauses (1) through (3), the applicable provisions of the chosen law of New York, except that the enforceability of the Credit Agreement may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforceability of creditors' rights generally.

Foreign counsel need make no qualification in the opinion with respect to equitable principles or the principles of fairness and good faith. If these principles under foreign law are embodied in procedural rules, the above opinion language covers them. If these principles are substantive rules of the foreign law, the foreign court generally would not apply them because, in the opinion of foreign counsel, the agreement contains a valid governing law clause. A court would apply such equitable rules of substantive law only to the extent they reflect a public policy or similar principle of law and thereby limit the application of the chosen law to the Credit Agreement. In the latter case, foreign counsel would probably have made an exception in clause (3) of the proposed opinion (if such limitation relates to a provision of the Credit Agreement or a rule of the applicable governing law of which foreign counsel is aware).

The proposal for a reformulation of the legal opinions of foreign counsel is radical in form but conservative in substance. The proposed opinion says in plain, deciphered language what the highly stylized words of the typical United States opinion intend to say. If a foreign counsel responds to a United States opinion request with the proposed opinion, an inexperienced United States counsel might insist on the time-honored

"legal, valid, binding and enforceable" language. If foreign counsel then asks: "What do the words which you request mean?" United States counsel will either not know the answer or give the same interpretation given in this article. If United States counsel has a different understanding, for example, as to the meaning of the word "enforceable," foreign counsel and United States counsel can deal with this understanding in an open and rational way.

C. *Opinion as to the Availability of a Forum*

Opinions do not usually speak expressly about the availability of a forum. If an agreement governed by New York law contains an exclusive or nonexclusive jurisdiction clause providing for jurisdiction in New York, the "legal, valid and binding" opinion given by New York counsel covers the validity of that clause under New York law.[21] A separate opinion by foreign counsel as to the availability of jurisdiction over the borrower in the borrower's country might be appropriate because the chosen New York law probably does not govern the issue of jurisdiction in the borrower's country but, rather, the *lex fori* of the borrower's country does.[22] It would be appropriate for foreign counsel, in our example, German counsel, to give an opinion as follows:

> The [named German] court has jurisdiction over the borrower in an action by the lender arising under the Credit Agreement.

This opinion would be based on general German principles of jurisdiction or on a contractual submission by the borrower to jurisdiction in Germany.

If the agreement contains a jurisdiction clause giving New York exclusive jurisdiction, the German opinion should cover the validity of such clause under the German *lex fori*. The purpose of this opinion is to ascertain whether and to what extent a German court accepts the "ouster" of its jurisdiction by virture of an exclusive jurisdiction clause. An opinion by German counsel that the Credit Agreement is legal, valid, binding and enforceable or that the governing law clause is valid would be of secondary importance in that case because a German court would never hear a case involving the Credit Agreement except under very special circumstances, such as bankruptcy of the borrower.

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21. *See generally* Gruson, *Controlling Site of Litigation*, in SOVEREIGN LENDING: MANAGING LEGAL RISK 29 (M. Gruson & R. Reisner eds. 1984) [hereinafter *Controlling Site of Litigation*]; Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133.

22. *Cf. Controlling Site of Litigation, supra* note 21, at 39-41.

D. *Opinion on Enforcement of Judgments*

The opinion of foreign counsel that a contract subject to a law other than the foreign law is legal, valid and binding under the foreign law, does not mean that a judgment obtained in the courts of the jurisdiction chosen by the parties in the agreement would be enforceable in the borrower's country. An opinion as to the enforceability of a foreign judgment or arbitration award, although potentially of interest and value, is frequently not requested and if requested would have to be rendered expressly.

Further, an opinion as to the enforceability of a hypothetical judgment or award to be rendered in the future should be very limited and should not amount to much more than a recitation of statutes and general principles of the foreign law. If foreign counsel is a German lawyer he might say:

> Any final and conclusive judgment for a definite sum of the Supreme Court of the State of New York, New York County, or of the United States District Court for the Southern District of New York rendered in a suit, action or proceeding against the borrower arising out of the Credit Agreement should be enforceable against the borrower by courts of the Federal Republic of Germany, provided that the requirements of Section 328 of the German Code of Civil Procedure are met.[23]

It may be possible for foreign counsel to render favorable opinions that some of the requirements to Section 328 of the German Code of Civil Procedure would be met on the date of the opinion. These opinions might address the issues of (1) whether German law would recognize the jurisdiction of the courts which will render the hypothetical judgment (in our example, the New York Supreme Court and the United States Dis-

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23. Section 328 of the German Code of Civil Procedure (*Zivilprozessordnung*) reads:

[Recognition of Foreign Judgments]

(1) The recognition of the judgment of a foreign court is precluded:

1. if the courts of the state in which the foreign court is sitting lack jurisdiction according to German law;
2. if the defendant against whom a judgment was rendered is German and he did not enter an appearance in court, and if he was not served with the summons or other court order initiating the proceedings either in the state in which the court is sitting or by way of German judicial assistance;
3. [relevant for family law matters only];
4. if the recognition of the judgment would violate the public policy or the purpose of a German statute;
5. if reciprocity is not assured.

(2) [irrelevant].

trict Court for the Southern District of New York) — an issue which should not be difficult to resolve when the jurisdiction is based on a submission clause contained in the Credit Agreement — and (2) whether reciprocity exists with respect to the recognition and enforcement of judgments (in our example, between Germany and New York).[24]

If one reverses the roles and assumes that a New York lawyer were asked to give an opinion as to the enforceability in New York of a hypothetical German judgment for a sum of money, he might opine as follows:

> A German judgment which is a "foreign country judgment" as defined in Section 5301(b) of New York's Civil Practice Law and Rules (the CPLR) and which is final, conclusive and enforceable in Germany is enforceable in New York in accordance with Section 5303 of the CPLR, even though an appeal therefrom is pending or it is subject to appeal, except as provided in Section 5304 of the CPLR.[25]

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24. *See generally* 1 R. GEIMER & R. SCHÜTZE, INTERNATIONALE URTEILSANERKENNUNG 1681-747 (1984).

25. N.Y. CIV. PRAC. L. & R. §§ 5301-5304 (McKinney 1978):

§ 5301. Definitions.

As used in this article the following definitions shall be applicable.

* * * *

(b) Foreign country judgment. "Foreign country judgment" in this article means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

§ 5302. Applicability.

This article applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.

§ 5303. Recognition and enforcement.

Except as provided in section 5304, a foreign country judgment meeting the requirements of section 5302 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or in a pending action by counterclaim, crossclaim or affirmative defense.

§ 5304. Grounds for non-recognition.

(a) No recognition. A foreign country judgment is not conclusive if:

1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirement of due process of law;

2. the foreign court did not have personal jurisdiction over the defendant.

(b) Other grounds for nonrecognition. A foreign country judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;

III. CONCLUSION

An opinion delivered as a condition precedent to the effectiveness of an agreement serves the purpose of assuring the opinion recipient of the correctness of the legal assumptions on which he bases his decision whether or not to enter into the agreement. In case of a transborder agreement, the laws of more than one country apply to various aspects of the transaction even if the agreement contains an express governing law clause, and the opinions of lawyers from the relevant countries must, if read together, cover all important legal issues. On the other hand, each lawyer must limit his opinion to his law and with respect to issues governed by other laws either remain silent, make certain assumptions or rely on a foreign lawyer's opinion.

The United States bar has only in recent years begun to think about and question the time-honored language used by United States lawyers in their opinions.[26] Little thought has been given to the explanation and justification of the language customarily requested by United States lawyers from foreign counsel involved in an international transaction. Foreign counsel has usually been requested to give opinions which follow the traditional United States practice. This practice is questionable in the case of opinions rendered on agreements governed by a law other than the law of the lawyer rendering the opinion.

This article suggests that the foreign lawyer should clearly state the issues which are to be determined under his law and which are covered by his opinion. In particular, he should not opine that an agreement

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2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

3. the judgment was obtained by fraud;

4. the cause of action on which the judgment is based is repugnant to the public policy of this state;

5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

26. *See, e.g.*, Babb, Barnes, Gordon & Kjellenberg, *Legal Opinions to Third Parties in Corporate Transactions*, 32 BUS. LAW. 553 (1977); Fuld, *Legal Opinions in Business Transactions - An Attempt to Bring Some Order out of Some Chaos*, 28 BUS. LAW. 915 (1973); Business Law Section of the State Bar of California, *Report of the Committee on Corporations Regarding Legal Opinions in Business Transactions* (1982); *Tribar Report, supra* note 16; Subcommittee on Opinion Writing of the Massachusetts Bar Association, *Omnibus Opinion for Use in Loan Transactions*, 60 MASS. L.Q. 193 (1976).

which is governed by a law other than his law is "legal, valid and binding"; he should only opine that the governing law clause in the agreement is effective under his law.