Common Qualifications to a Remedies Opinion in U.S. Commercial Loan Transactions

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As a condition to the closing of many types of business transactions, one or more of the parties may be required to provide written opinion letters of counsel for the benefit of other parties to the transaction. These opinions are often referred to as "third-party" opinions because the opinion giver renders them to a party or parties other than the opinion giver's own client. These opinions may cover a range of issues, including, among others, the entity status and power of, the due authorization, execution and delivery of the transaction documents by, and the enforceability of those documents against, the opinion giver's own client in the transaction. Oftentimes the discussions regarding the scope of these opinions and the extent to which they will be qualified are time-consuming, and the resulting costs, borne by the client whose counsel is asked to render the opinions, increase substantially as negotiations proceed. This article, focusing on third-party opinions rendered in the context of U.S. commercial loan transactions, considers a number of qualifications that for various reasons, in the experience of the authors, opinion givers commonly include and opinion recipients and their counsel commonly accept. The authors believe that the identification of commonly used and accepted qualifications in the U.S. commercial loan market can help to streamline the opinion process in many transactions.

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This article arose out of discussions that took place at meetings of the Working Group on Legal Opinions ("WGLO"), but this article reflects only the views of its authors and has not been submitted for approval to WGLO or to any bar association or other organization. Further, this article does not necessarily reflect the views of the law firms with which the authors are associated or modify the positions taken on subjects covered in this article in various bar association reports promulgated by committees on which any of the authors has served.

Contents

Introduction

Set forth below are qualifications that, in the authors' experience, are commonly taken by opinion givers, and also commonly accepted by banks and other institutional lenders, in third-party legal opinion letters addressing the enforceability of financing agreements in the U.S. domestic loan context.[2] In describing these qualifications, this article does not purport to reflect a statistical analysis of opinion practice or to analyze the need for or desirability of these qualifications under specific circumstances. Rather, it attempts to identify selected common qualifications, offer reasons for their being taken, and set forth common formulations for expressing them. The list of qualifications is neither exclusive nor suggestive of those that should be taken or accepted.[3]

Sometimes a qualification is included in a legal opinion to highlight a legal issue that could affect the enforceability of provisions of the covered agreement.

2. While the focus of this article is on exceptions and other qualifications commonly accepted in opinion letters in the context of U.S. commercial loan transactions, the authors believe the citations and other information provided will assist both opinion givers and recipients in other types of transactions as well.

3. *See infra* notes 4–6 and accompanying text.

Sometimes a qualification is necessary for an opinion to be correct; at other times, it clarifies how the opinion should be interpreted.[4]

In many cases, however, factors other than a perceived necessity for the qualification may account for the opinion giver's taking the qualification, such as: a decision that engaging in the requisite research to resolve a legal issue is not justified on a cost-benefit or other basis; the unwillingness of the lawyer to make a determination that he or she views as factual (for example, whether a waiver is conspicuous or knowing, or whether liquidated damages are reasonable); the fact that the qualification is among those listed in one or more bar or other association reports; personal preference of the opining lawyer or law firm opinion committee policy; or an unwillingness on the part of one or more parties to modify the transaction structure or documentation to eliminate the need for the qualification.

Furthermore, as transactions become more complex and close more quickly, time constraints often make it difficult for an opinion giver to complete the legal research—or even to undertake the legal analysis—needed to narrow or eliminate qualifications upon which the opinion giver commonly relies. Cost-benefit considerations are another important reason that many of these qualifications have become common in the U.S. commercial loan context. In the process of preparing and negotiating legal opinions, opinion givers and recipients, to some extent, undertake a cost-benefit analysis to determine whether the cost of doing research, or undertaking careful legal analysis regarding a given set of legal issues, is justified by the benefit of receiving an opinion covering those issues.

Part of the explanation for the willingness on the part of recipients to accept qualifications identified in this article may also be found in the sophistication of many recipients who know that their rights are based on the law rather than on the wording of an opinion. In fact, experienced lenders and their counsel in the U.S. domestic loan market often have sufficient knowledge of, and experience with transactions under, the applicable law so as to have little need for the advice provided by a carefully drawn opinion. Further, while the remedies in question may be important enough to be addressed in the transaction documentation, they may not be core considerations for many lenders.

As to virtually all of the qualifications identified in this article, variations exist in the positions taken by the bar reports of different jurisdictions, as well as in the forms of expression used by different law firms, including firms practicing in the same jurisdiction. Some of these variations reflect real differences in law that require differences in wording. Others reflect different preferences or practices, whether in a particular area of practice, jurisdiction, or law firm. For example, some of the qualifications discussed below may be omitted from an opinion,

4. The authors recognize that some opinion qualifications are understood to be implicit even if not expressly stated in the opinion letter. *See, e.g.*, *infra* note 11. However, a discussion of which qualifications may be recognized as implicit, and the extent of that recognition, is beyond the scope of this article, which addresses certain qualifications commonly stated expressly in opinion letters.

not because the opinion giver has determined they are not appropriate or relevant, but because the opinion giver believes they are implicit and need not be expressly stated or are adequately covered by other qualifications contained in the opinion. Also, the wording of the agreement covered by an opinion may dictate either that a particular form of qualification be used or, alternatively, that none is needed.[5]

The inclusion of the common qualifications identified in this article and the form of their expression may not always be appropriate. In the end, each opinion will turn on the particular facts and circumstances presented as well as the relevant law covered by the opinion.[6] The text and footnotes explain some of the relevant legal authority, including legal uncertainties, of the jurisdictions in which the authors practice. Differences or departures in law or practice in some states from the opinion language set forth in boldface type below are also noted in some of the related comments, either in the text or in the footnotes.

The qualifications to the remedies opinion covered in this article will come as no surprise to any practitioner with experience in the domestic commercial lending market. After a brief discussion of the bankruptcy and equitable principles qualifications, the article moves on to address a number of "usual suspects," including qualifications relating to arbitration, choice of law, indemnification and exculpation, submission to jurisdiction and forum selection, venue, jury trial waivers, setoff, usury, and liquidated damages and penalty clauses. The final portions of this article address some matters commonly arising in loan transactions with an international dimension, such as qualifications relating to comity, sovereign immunity waivers, judgment currency, and currency indemnity, though always in the U.S. domestic loan context.

Each part of this article addresses a separate qualification and begins with a boldface sample formulation of the relevant qualification as it might be set forth in an opinion. The boldface statement of the qualification language reflects a typical formulation. It should be emphasized that each sample is posited as one of a number of possible formulations that either might be used, or are in fact often used, to express the same type of qualification. Following each sample qualification is a discussion of (i) the reasons why practitioners might consider taking the qualification and (ii) variations in law and practice among the seven states in

5. For example, in the experience of the authors, inclusion in an agreement of language qualifying a particular provision with words such as "to the extent permitted by applicable law" sometimes suffices to satisfy an opinion giver that a qualification to the remedies opinion for that particular provision is unnecessary.

6. For purposes of this article, the authors have approached the use of opinion qualifications on an exception-by-exception basis, with each qualification being targeted to a particular type of provision. Some opinion givers include a generic qualification in their opinion letters in addition to or in lieu of targeted qualifications tailored to the specific provisions of a covered agreement. Two commonly used formulations of the generic qualification are the material breach qualification and the practical realization qualification. Other opinion givers use other types of generally stated qualifications, and some opinion givers include in their opinion letters extensive lists of qualifications that are not necessarily related to the provisions of the covered agreement (the so-called laundry list or kitchen sink approach). This article takes no position on the appropriateness or inappropriateness of any of these types of other qualifications or approaches.

which the authors practice. Additional detail on state law, including case citations, appears in footnotes.

The discussion on each subject in this article and the related footnotes provide summaries of the legal and opinion practice issues underlying the qualifications. The case citations and other state-specific details are intended to provide some sense of the issues or uncertainties that have been cited as a basis for taking a given qualification. It should be noted, however, that their inclusion is not intended to suggest that a qualification is necessary in all or even most transactions.[7] In fact, it is hoped that the case authority and other state-specific details presented will not only explain some of the legal bases for these qualifications, but will also serve to help opinion givers navigate the law, and opinion recipients to understand the limits of what might reasonably be required, in those transactions where the parties determine, for whatever reason, that further work should be performed to try to narrow or even eliminate one or more of these qualifications. In some cases, the parties might decide to revise provisions in the transaction documents to avoid the legal uncertainties addressed in the footnotes to this article. In other cases, opinion givers might consider the state-specific authorities provided as starting points for analyzing whether it is possible to narrow or eliminate some of these qualifications. In still other cases, the parties might determine that a narrowing or elimination of the qualification will not, in fact, be required by the recipient.

The authors do not express any view on the practice of taking a qualification that might be narrowed or even eliminated, for whatever reason, especially when the recipient does not object. It seems clear that the parties to a transaction can agree to limit the scope of opinions as they might see fit. However, some practitioners believe the proliferation of unnecessary or overly broad qualifications burdens the opinion process unnecessarily by, among other things, making it more difficult to ascertain the meanings of the opinions that are rendered.

In recognizing that certain qualifications are often used, the authors do not intend to address what either does or should constitute customary legal opinion practice. Simply because certain qualifications to the remedies opinion have become common or frequent in a given context (whether as a consequence of cost-benefit considerations, law firm policies and procedures, time constraints, or other factors unrelated to the extent to which provisions of an agreement are enforceable as a matter of law), the use or acceptance of such qualifications should not be viewed as constituting or establishing customary legal opinion practice. Customary practice permits opinion givers and recipients to have certain common

7. In fact, a review of opinions delivered and accepted by experienced practitioners in the U.S. commercial loan context in the same jurisdiction is likely to show variation in the qualifications that are actually taken. As the footnotes in this article indicate, for example, some opinion givers in some jurisdictions usually take a qualification for a jury waiver clause while others do not. One will also find variation in how the qualifications are phrased, with some practitioners in some cases taking, for example, a narrower qualification than do others. Such differences suggest that the qualifications described in this article, though often taken for the cost-benefit and other reasons described above, remain variable and contextual.

understandings about opinions in two principal ways: by providing guidance on the meaning of legal opinions that are requested and rendered and by identifying the scope of diligence expected to be performed in rendering those opinions.[8] However, except for statements in the opinion literature that opinion requests should address matters that are relevant and opinions delivered should be within the professional competence of lawyers, as well as the "Golden Rule,"[9] the authors are of the view that customary practice does not address the question of whether an opinion recipient should request or insist on any particular opinions, or of whether opinion givers should render or limit particular opinions when their omission or limitation in particular transactions might be acceptable.

This article is intended to help practitioners by describing certain qualifications to the remedies opinion that, for various reasons, opinion givers have tended to proffer, and recipients have tended to accept, in a particular market segment. The authors believe that identifying these types of qualifications can expedite the opinion process, especially for those who may be less experienced in handling U.S. commercial loan transactions. We happily leave to bar associations and other groups the more difficult questions relating to what customary legal opinion practice may require.

A. The Bankruptcy and Equitable Principles Qualifications

1. Bankruptcy

Sample Qualification:	**Our opinions are subject to the effects of applicable bankruptcy, insolvency, fraudulent transfer and conveyance, preference, reorganization, receivership, moratorium, and other similar laws affecting the rights and remedies of creditors generally.**[10]

8. *Statement on the Role of Customary Practice in the Preparation and Understanding of Third-Party Legal Opinions*, 63 Bus. Law. 1277 (2008). As of its 2008 publication date, this statement was approved by twenty-eight bar groups from around the country, and it has since been approved by a number of other such groups.

9. ABA Bus. Law Section Legal Opinions Comm., *Guidelines for the Preparation of Closing Opinions*, 57 Bus. Law. 875, 876, 878 (2002) (§§ 1.3, 1.4 & 3.1) [hereinafter *Closing Opinion Guidelines*].

10. The Business Law Section of the California State Bar concluded that various commonly used formulations of the bankruptcy exception should not be understood to have different meanings. State Bar of Cal. Bus. Law Section, Report on Third-Party Remedies Opinions app. 10, at 5 (2004 & 2007 update) (Exceptions Subcommittee Report) [hereinafter 2007 California Remedies Report Exceptions Appendix], *available at* http://apps.americanbar.org/buslaw/tribar/materials/20120820000005.pdf. Accordingly, while the bankruptcy exception set out above is stated somewhat differently in the *Sample California Third-Party Legal Opinion for Business Transactions*, published by the Business Law Section of the California State Bar, this formulation should be an acceptable alternative form of bankruptcy exception for California opinion givers. State Bar of Cal. Bus. Law Section, Sample California Third-Party Legal Opinion for Business Transactions 16 (2010 & rev. 2014) [hereinafter California Sample Opinion], *available at* http://apps.americanbar.org/buslaw/tribar/ (in the California section under the heading "State and Other Bar Reports").

The authors from Florida believe that the above formulation of the bankruptcy exception and the meaning of this qualification are consistent with the position on this qualification taken in the *Report on Third-Party Legal Opinion Customary Practice in Florida*, and such formulation should be an acceptable alternative form of bankruptcy exception for Florida opinion givers. Legal Opinion Standards

Comments

The bankruptcy qualification and the equitable principles qualification addressed in the following part, however formulated, are universally recognized opinion limitations, so much so that they are generally understood as applicable even when not expressly stated.[11] Nevertheless, most opinion givers are more comfortable specifically stating these qualifications in their opinion letters. While directed most specifically to the remedies opinion, both the bankruptcy and equitable principles qualifications are recognized as having application more generally and are often so expressed.

The bankruptcy qualification excludes the effect of bankruptcy and similar creditors' rights laws from the scope of the opinion. It also excludes the effect of such laws on matters such as non-consolidation of entities, fraudulent transfers and conveyances, and preferences. The bankruptcy qualification relates to a body of law rather than to a particular proceeding and includes not only federal bankruptcy law but also similar state or federal insolvency laws of general applicability.[12]

2. Equitable Principles

Sample Qualification:	**Our opinions are subject to the effects of general principles of equity (whether considered in a proceeding at law or in equity), including but not limited to principles limiting the availability of specific performance and injunctive relief, and concepts of materiality, reasonableness, good faith, and fair dealing.**

Comments

See *Comments* under the bankruptcy qualification above.

The above formulation of the equitable principles qualification is only one of many possible formulations. The equitable principles qualification may be phrased as simply as "except as may be limited by general principles of equity" and, indeed, like the bankruptcy qualification, is understood as a matter of customary usage to apply to all remedies opinions whether or not stated

COMM., BUS. LAW SECTION, FLA. BAR & LEGAL OPINIONS COMM., REAL PROP., PROBATE & TRUST LAW SECTION, THIRD-PARTY LEGAL OPINION CUSTOMARY PRACTICE IN FLORIDA 98–100 (2011) [hereinafter FLORIDA REPORT], *available at* http://www.flabizlaw.org/images/pdf/thirdpartylegalopinions120311.pdf.

11. *See* TriBar Opinion Comm., *Third-Party "Closing" Opinions: A Report of The TriBar Opinion Committee*, 53 BUS. LAW. 592, 623 (§ 3.3.1) (1998) [hereinafter *1998 TriBar Report*], *available at* http://apps.americanbar.org/buslaw/tribar/materials/20050303000003.pdf ("These qualifications are understood to be applicable to the remedies opinion even if they are not expressly stated."); *see also* 2007 CALIFORNIA REMEDIES REPORT EXCEPTIONS APPENDIX, *supra* note 10, at 1 ("The bankruptcy exception and the equitable principles limitation . . . should be understood to be included in every remedies opinion, regardless of whether they are expressly stated."); FLORIDA REPORT, *supra* note 10, at 99 ("The bankruptcy exception and the equitable principles limitation are implicit qualifications to every remedies opinion rendered by Florida counsel.").

12. *See 1998 TriBar Report*, *supra* note 11, at 623 (§ 3.3.2). In the view of the authors, this exception also excludes from the scope of the opinion the effect of the orderly liquidation authority provisions of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, tit. II, §§ 201–217, 124 Stat. 1376, 1442–1520 (2010) (codified at 12 U.S.C. §§ 5381–5394 (2012)).

expressly.[13] The equitable principles qualification relates to those principles that courts apply when, in light of facts or events that occur *after the effectiveness of an agreement*, they decline in the interest of equity to give effect to particular provisions in the agreement. For example, under circumstances that occur after the effectiveness of the agreement, a court may determine, based on equitable principles, that the agreement's notice provision is too short or the withholding of consent under the agreement is unreasonable.

The equitable principles qualification applies to such court determinations grounded in the belief that it would be inequitable to enforce the literal meaning of an agreement in the particular context in which a dispute has arisen. However, if in the example in the prior paragraph an agreement's notice provision would, in all circumstances, be held to be too short or if the withholding of consent under the agreement would in all circumstances be improper, the equitable principles qualification would not apply. Relief would be denied because of the invalidity of the provision, rather than because of the application of equitable principles, and a specific exception as to that provision (in addition to the equitable principles qualification) should be taken.[14]

The equitable principles qualification also covers, without so expressly stating, concepts of undue delay and the impracticability or impossibility of performance; limitations on the availability of equitable remedies, such as injunctive relief and specific performance; and the possible application of equitable defenses such as estoppel and the doctrine of unclean hands, as well as the discretion of courts sitting in equity.[15]

B. Other Qualifications

1. Arbitration

Sample Qualification:	**We express no opinion with respect to any provision requiring arbitration.**

Comments

In the authors' experience, opinion givers commonly exclude arbitration provisions from the scope of third-party closing opinions in U.S. commercial loan transactions. Furthermore, because arbitration provisions are often lengthy

13. *See supra* note 11.

14. *See 1998 TriBar Report*, *supra* note 11, at 625 (§ 3.3.4).

15. As with the bankruptcy exception, the California Opinions Committee has concluded that various common formulations of the equitable principles qualification adequately encompass what should commonly be understood to be included within that qualification. 2007 California Remedies Report Exceptions Appendix, *supra* note 10, app. 10, at 9. Accordingly, while the equitable principles qualification set out above is stated somewhat differently in the California Sample Opinion, the formulation set out above should be an acceptable alternative form of qualification for California opinion givers. *See* California Sample Opinion, *supra* note 10, at 16. The authors from Florida believe that the above formulation of the equitable principles qualification and the meaning of this qualification are consistent with the position on this qualification taken in the Florida Report, and such formulation should be an acceptable alternative form of qualification. Florida Report, *supra* note 10, at 100.

and frequently include specific agreements on the rules of arbitration and other procedural matters, in the unusual circumstance where the parties determine that the need for such an opinion justifies the cost and time required to analyze the arbitration provisions and render the opinion, the opinion giver will want to consider what qualifications (if any) may be required in connection with the arbitrability of matters covered by the arbitration agreement, as well as the rules and procedures set out therein.[16]

2. Characterization

Sample Qualification:	**We express no opinion as to the characterization of any agreement for tax or accounting purposes [or with respect to whether any agreement is a true sale, an assignment for security, or a lease].**

Comments

This qualification relates to transactions for which characterization, tax, or accounting considerations are relevant.

Lawyers, when asked by their clients and if they are experts, do sometimes render opinions regarding the tax characterizations of transactions and may even render opinions, typically reasoned (or explained) and sometimes qualified, regarding whether a transaction denominated as a "sale" or "lease" of goods is a true sale or lease versus a financing transaction with a retained security interest. However, in most U.S. commercial loan transactions, the opinion giver is not expected to address such matters.

In cases where there is concern that the tax or accounting characterization of the transaction is important (as may be the case in sale, structured finance, leasing, derivatives, and similar transactions), some opinion givers include a qualification, such as the example set out above, to underscore the fact that these types of matters are not being addressed. However, the authors believe that inclusion of an express qualification of this type is generally unnecessary because, as a matter of customary practice, legal opinions do not extend to tax matters unless specifically addressed, and they do not extend to accounting matters.[17]

16. The *1998 TriBar Report* provides that "as a matter of customary usage the remedies opinion is understood not to address the enforceability of . . . rules" of the applicable arbitral tribunal. *See 1998 TriBar Report*, *supra* note 11, at 631 (§ 3.6.2). For a discussion of the issues that arise in rendering enforceability opinions on arbitration clauses, see DONALD W. GLAZER ET AL., GLAZER AND FITZGIBBON ON LEGAL OPINIONS: DRAFTING, INTERPRETING, AND SUPPORTING CLOSING OPINIONS IN BUSINESS TRANSACTIONS 383–86 (3d ed. 2008 & Supp. 2013). In those instances where opinion givers agree to cover the enforceability of arbitration provisions, they may find helpful the recent U.S. Supreme Court cases of *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) and *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011), each upholding arbitration agreements to which the Federal Arbitration Act applies.

17. *See* ABA Bus. Law Section Comm. on Legal Opinions, *Legal Opinion Principles*, 53 BUS. LAW. 831, 832 (1998) (§ II.D); *Closing Opinion Guidelines*, *supra* note 9, at 876 (§ 1.4).

The bracketed sample language set out above, which refers to a true sale, assignment for security, or lease, is applicable only in certain assignment or leasing transactions.

3. Choice of Law

Where no opinion is rendered on the choice of governing law under the agreement:

Sample Qualification:	**We express no opinion with respect to any provision purporting to choose the [law of any jurisdiction to govern any matter][law of [chosen governing law] to govern the agreement].**

For states having a statute permitting the choice of governing law under the agreement:

Sample Qualification:	**Our opinion as to the enforceability of any provision purporting to choose the governing law of the agreement is given solely in reliance on [the relevant statute].**[18]

For states where an opinion is given in reliance on the Restatement (Second) of Conflict of Laws[19] (the "Restatement") (and applicable case law applying the Restatement in those states) and not based on a statute permitting the choice of governing law under the agreement, opinion givers frequently give a qualified or reasoned opinion describing the Restatement tests in a manner such as the following:

Sample Qualification:	**In a properly presented proceeding in a court of competent jurisdiction in this State for the enforcement of the agreement [and based on [factual statements or assumptions as to the reasonable relationship of the transaction to the chosen jurisdiction]],**[20] **the court [would]**

18. Many opinion givers, when rendering opinions on choices of law that are clearly authorized by statute, will render such opinions without qualification and without including any express reference (such as the one set out in the text above) to the statute on which they are relying.

19. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) [hereinafter RESTATEMENT].

20. The bracketed language relates to the reasonable relationship standard established under Restatement § 187(2), quoted below in this note. Sometimes opinion givers, rather than assuming or specifying the contacts on which the opinion is based, simply assume the existence of a reasonable relationship of the parties or the transaction to the chosen jurisdiction.

The rule of the Restatement set out in § 187 is as follows:

§ 187. LAW OF THE STATE CHOSEN BY THE PARTIES

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

[should][21] give effect to the provision of the agreement selecting the law of [the chosen jurisdiction] as the governing law, except to the extent (i) that any provision of the agreement is determined by the court to be contrary to a fundamental policy of the jurisdiction whose law would apply in the absence of that choice-of-law provision, and (ii) that jurisdiction has a materially greater interest in the determination of the particular issue than does the jurisdiction whose law is chosen.

Comments

Legal opinions frequently include qualifications with respect to the enforceability of provisions in covered agreements choosing the governing law. In cases where a choice-of-law clause selects the law of the jurisdiction that is

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

21. *See* California Sample Opinion, *supra* note 10, at 11 n.23 (uses the word "should" instead of "would" in its sample qualification). As explained in the *1998 TriBar Report*, *supra* note 11, at 607 n.37, "would" and "should" "convey the same professional judgment as to the judicial resolution of the issues covered," and, consequently, "would" and "should" are "equally appropriate as a matter of customary practice." *Accord Closing Opinion Guidelines*, *supra* note 9, at 879 (§ 3.5); State Bar of Cal. Bus. Law Section, Legal Opinions in Business Transactions (Excluding the Remedies Opinion) 19 (2005 & rev. 2007) [hereinafter California Opinion Report (Excluding Remedies)] ("Recent reports take the position . . . that there is no difference in meaning between a 'would hold' and a 'should hold' opinion."). However, a recent real estate finance opinion report promulgated by the legal opinions committees of the ABA Real Property, Trust and Estate Section, the American College of Real Estate Lawyers, and the American College of Mortgage Attorneys addresses this issue as follows:

> Some opinion givers prefer the use of "should" when referring to likely actions of a court; some opinion recipients prefer the use of "would." Practitioners differ on whether the two words have different meanings in the context of [a choice-of -law] opinion. . . . Moreover, there is authority for the position that such an opinion has the same meaning whether stated as "would" or "should." . . . Regardless of the choice of words . . . opinions [sic] letters are expressions of professional judgment and not guarantees of particular results.

ABA Section of Real Prop., Trust & Estate Law Comm. on Legal Opinions in Real Estate Transactions et al., *Real Estate Finance Opinion Report of 2012*, 47 Real Prop. Prob. & Tr. J. 213, 247 n.33 (2012).

The Florida-recommended form of choice of law opinion uses the phrase "more likely than not . . . a Florida court . . . would conclude," Florida Report, *supra* note 10, at 174. Further, the Florida Report recommends that such opinion provide that it is "not free from doubt (or words to similar effect)" and that the opinion has the same meaning whether the words "more likely than not" or "should" are used. *Id.*

otherwise covered by the opinion (the "Covered Law"), a remedies opinion regarding the covered agreement would implicitly contain an enforceability opinion on the "inbound" choice-of-law clause except to the extent that opinion is expressly disclaimed or qualified. In other cases, an opinion giver may be asked to address separately the enforceability under the Covered Law's choice-of-law principles of "outbound" governing law provisions selecting the law of a jurisdiction other than the Covered Law.[22]

Sometimes, most commonly in the case of inbound choice-of-law clauses, the facts and circumstances may provide a clear basis for the parties' contractual choice of governing law under the Covered Law's choice-of-law rules. However, because choice-of-law matters can often be difficult, many opinion givers are hesitant to address them without qualification of some kind.

Some states, including New York, Illinois, Delaware, and California, have adopted statutes expressly authorizing, in commercial contracts exceeding a minimum dollar threshold, the inbound selection of that state's own law as the governing law of the contract whether or not the parties or the transaction have any contacts with the state.[23] In these jurisdictions, opinion givers commonly render choice-of-law opinions, relying on the relevant statute as to inbound choices of law.[24] Many opinion givers render these opinions without

22. When used in this article in connection with choice of law, choice of forum, and venue, "inbound" refers to the selection of a state's law, forum, or venue under that same state's rules governing such selection, while "outbound" refers to the selection of another state's or country's law, forum, or venue under the selection rules of the state governing the selection. For example, the selection of New York law as the governing law under New York's choice of law rules is an inbound selection, while the choice of Illinois law as the governing law under New York's choice of law rules is an outbound selection.

23. *See, e.g.*, CAL. CIV. CODE § 1646.5 (West Supp. 2014) (applies whether or not the contract, agreement, undertaking, or transaction in question bears a reasonable relation to California, but does not apply to "any contract, agreement, or undertaking (a) for labor or personal services, (b) relating to any transaction primarily for personal, family, or household purposes, or (c) to the extent provided to the contrary in [CAL. COM. CODE § 1301(c) (West 2012)]"); DEL. CODE ANN. tit. 6, § 2708 (2013); 735 ILL. COMP. STAT. 105/5-5 (2012); N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2010). A TriBar report provides that "[i]n states that have adopted the statutory approach, opinion preparers typically have no difficulty concluding that an exception is not required." *Report of the TriBar Opinion Committee: The Remedies Opinion—Deciding When to Include Exceptions and Assumptions*, 59 BUS. LAW. 1483, 1496 (2004) [hereinafter *2004 TriBar Report*], *available at* http://apps.americanbar.org/buslaw/tribar/materials/20050303000002.pdf. It goes on to say that "[i]n states that follow the Restatement approach, the analysis is more complex." *Id.* at 1497.

24. Note that the Texas statute—TEX. BUS. & COM. CODE ANN. §§ 271.001–.011 (West 2009 & Supp. 2014)—is somewhat unusual, in that it addresses both inbound and outbound choices of law *and* requires the same types of reasonable contacts to support both. The statute authorizes, for transactions involving at least $1,000,000 (generally including commercial transactions but expressly excluding certain issues relating to transactions involving real property), the selection of the laws of either Texas or another jurisdiction so long as the transaction bears a reasonable relation to the chosen jurisdiction. *Id.* §§ 271.001, .005. The statute includes a non-exhaustive list of specific contacts that constitute a "reasonable relationship" for purposes of applying the statute. *Id.* § 271.004. Accordingly, it is common in Texas for opinion givers to render both inbound choice-of-law opinions on choices of the Covered Law, as well as outbound choice-of-law opinions on choices of the laws of other jurisdictions, provided that, in each case, the transaction falls within one or more of the statutory safe harbors. Texas practitioners are rarely expected to render choice-of-law opinions based on the Restatement and Texas common law when this statute is either inapplicable or does not afford a clear safe harbor.

qualification; others prefer to state expressly that their choice-of-law opinion is based on the relevant statute, as in the second sample qualification set out above. Sometimes, in these instances, opinions will also include assumptions about compliance with the statutory predicates (such as deal size) where such compliance is not readily apparent.[25]

In the absence of an applicable statute, a choice-of-law opinion may present additional difficulties because the opinion giver needs to evaluate the choice of law under common law. In the event an applicable statute does not apply (whether for inbound or outbound opinions), opinion givers commonly either (a) disclaim any opinion[26] or (b) provide a reasoned or qualified opinion that

25. Delaware practitioners generally agree that compliance with the Delaware statute eliminates the requirement that the parties or the transaction have any contacts with the state. However, some Delaware practitioners are of the view that the Delaware statute does not necessarily preempt the fundamental policy aspect of the Restatement test, which is quoted at *supra* note 20. These practitioners, therefore, will sometimes qualify their opinions using the exception provided in the Restatement sample qualification set forth above in the text.

Florida has an inbound choice-of-law statute, FLA. STAT. § 685.101 (2014), which, subject to certain enumerated exceptions, allows the parties to select Florida law as the governing law in a contract, but only to the extent permitted by the United States Constitution and so long as the transaction involves at least $250,000. The statute provides certain exclusions, including exclusions for transactions that bear no substantial or reasonable relation to Florida and transactions where no party to the contract is a resident of Florida, is incorporated in Florida or maintains a place of business in Florida. As a result of these qualifications in the statute, the authors of this article from Florida believe that few third-party legal opinions are rendered by Florida lawyers in reliance on Florida's inbound choice of law statute.

26. This appears to be the practice, for example, in New York. New York lawyers are generally reluctant to give an outbound choice-of-law opinion because New York courts have applied at least three different choice-of-law rules. Under the majority of New York cases, courts will honor parties' selection of a non-New York law if the jurisdiction of the chosen law has a "reasonable relationship" to the transaction reflected in the agreement. *See* A.S. Rampell, Inc. v. Hyster Co., 144 N.E.2d 371, 381 (N.Y. 1957); Culbert v. Rols Capital Co., 585 N.Y.S.2d 67, 68 (App. Div. 1992); Vital Spark Found., Inc. v. N. Am. Globex Fund, L.P., No. 650415, 2013 WL 486517, at *10 (N.Y. Sup. Ct. Jan. 31, 2013); Reger v. Nat'l Ass'n of Bedding Mfrs. Grp. Ins. Trust Fund, 372 N.Y.S.2d 97, 114 (Sup. Ct. 1975). However, the New York Court of Appeals, in *Auten v. Auten*, 124 N.E.2d 99, 101–02 (N.Y. 1954), also applied the "grouping of contacts" or "center of gravity" test as a choice-of-law rule. Under *Auten*, the court will apply the substantive law of the jurisdiction "which has the most significant contacts with the matter in dispute." *Id.* at 102. Though the agreement in *Auten* appears not to have had a choice-of-law clause, the New York Court of Appeals in *Haag v. Barnes*, 175 N.E.2d 441, 443 (N.Y. 1961), applied *Auten*'s grouping of contacts test to a child-support agreement containing a choice-of-law clause. And courts in New York have also applied a third choice-of-law rule—the "governmental interest" test—in upholding a governing law clause selecting a non-New York law. Under the governmental interest test, the law of the jurisdiction having the most interest in the disputed issue will be applied to a contract. *See* Zanfardino v. E-Sys., Inc., 652 F. Supp. 637, 639 (S.D.N.Y. 1987) (applying to a contract containing a choice-of-law clause the ruling in *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576, 582 (N.Y. 1969)); Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank, 774 N.E.2d 696, 700 (N.Y. 2002). In addition, whatever the choice-of-law rule applied, a New York court will limit the application of any such rule if such application results in a violation of a fundamental public policy of New York. *See* Guar. Mortg. Co. v. Z.I.D. Assocs., Inc., 506 F. Supp. 101, 107–08 (S.D.N.Y. 1980); Nakhleh v. Chem. Constr. Corp., 359 F. Supp. 357, 360 (S.D.N.Y. 1973). This uncertainty in the New York choice-of-law rules is the reason New York adopted section 5-1401 of the General Obligations Law of New York for inbound choice-of-law opinions, which New York lawyers will generally give, and is also the reason New York lawyers are generally reluctant to give any outbound choice-of-law opinions.

reflects the relevant jurisdiction's choice-of-law rules. The first sample qualification above is an example of a qualification disclaiming any choice-of-law opinion.

In states such as California, Delaware, Illinois, and North Carolina, which follow the approach set out in section 187 of the Restatement,[27] in the event a statute does not apply, opinion givers often provide a reasoned or qualified opinion that reflects the rule of the Restatement as modified or supplemented by relevant case law. Such Restatement-based opinions, as illustrated in the third example set out above, often restate the requirements of the Restatement rule, but (because those requirements are fact based or otherwise difficult to determine) without expressing an opinion on whether they have been satisfied.[28] Accordingly, an opinion based on the Restatement is often effectively qualified to the extent any provision of the covered agreement is determined by the court to be contrary to a fundamental policy of a jurisdiction whose law would apply in the absence of the choice-of-law clause and which other jurisdiction has a materially greater interest in the determination of the particular issue than does the state whose law is chosen.[29]

Note that, in the sample Restatement opinion qualification set out above, the bracketed language relates to the question of how to address the Restatement

27. *See* Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1151–52 (Cal. 1992); Annan v. Wilmington Trust Co., 559 A.2d 1289, 1293 (Del. 1989) (holding that under Delaware law, choice-of-law provisions will be respected so long as the chosen law bears some material relationship to the transaction); Pharmathene, Inc. v. Siga Techs., Inc., C.A. No. 2627-VCP, 2008 WL 151855, at *6–8 (Del. Ch. Jan. 16, 2008) (applying § 187 of the Restatement (Second) of Conflicts of Laws); Abry Partners V, L.P. v. F & W Acquisition LLC, 891 A.2d 1036, 1049 (Del. Ch. 2006) (noting that satisfaction of requirements of section 2708 of Title 6 of the Delaware Code establishes a material relationship sufficient to satisfy § 187 of the Restatement (Second) of Conflicts of Laws); Morris B. Chapman & Assocs. v. Kitzman, 739 N.E.2d 1263, 1269 (Ill. 2000) ("Ordinarily, Illinois follows the Restatement (Second) of Conflict of Laws (1971) in making choice-of-law decisions."); Torres v. McClain, 535 S.E.2d 623 (N.C. Ct. App. 2000). In North Carolina, which is a Restatement jurisdiction, there are also a number of statutory exceptions to the enforceability of the choice of a foreign law. These exceptions include matters relating to usury laws, provisions governed by the Uniform Computer Transactions Act, and N.C. Gen. Stat. § 22B-2 relating to contracts for the improvement of real property.

28. For a discussion of some of those difficulties, see TriBar Opinion Comm., *Opinions on Chosen-Law Provisions Under the Restatement of Conflict of Laws*, 68 BUS. LAW. 1161 (2013), *available at* http://www.americanbar.org/content/dam/aba/publications/business_lawyer/2013/68_4/report-chosen-law-provisions-201308.authcheckdam.pdf.

29. The Florida Supreme Court has not expressly adopted the Restatement. In *Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co.*, 761 So. 2d 306, 311 (Fla. 2000), the Florida Supreme Court stated that a choice of law provision in a contract will be upheld unless the application of the law of the chosen forum contravenes strong public policy. Prior to *Mazzoni*, Florida-reported decisions on choice of law had generally followed an analysis similar to the Restatement (but without adopting the second prong of the Restatement test requiring analysis as to whether another state has a materially greater interest in the matter) that required a showing of a normal relation or a reasonable relation between the parties or the transaction, on the one hand, and the state whose law has been selected to govern the agreement, on the other hand, in order to uphold the parties' contractual choice of a governing law for the transaction documents. However, notwithstanding the broad language used by the Florida Supreme Court in *Mazzoni*, state and federal court cases interpreting Florida law on this issue subsequent to *Mazzoni* have created confusion regarding whether such a normal relation or reasonable relation test is still required before a Florida court will uphold the parties' contractual selection of a governing law for an agreement. As a result, many Florida attorneys who render outbound choice of law opinions continue to take assumptions for their choice of law opinions with respect to such normal or reasonable relations as well as qualifications with respect to public policy. For further information, see FLORIDA REPORT, *supra* note 10, at 169.

requirement that the applicable transaction bear a reasonable relationship to the chosen law state.[30] Sometimes an opinion giver will implicitly address, based on either known or assumed facts, the question of whether such a reasonable relationship exists under applicable law. Often, however, opinion givers do not wish to address this reasonable relationship requirement, in which case a further express assumption is included to make that clear. The hesitancy on the part of many opinion givers to address this and other Restatement requirements for a valid choice of law often renders a Restatement opinion of limited utility to the recipient.[31]

Sometimes an agreement is phrased so as to choose the law of a specified jurisdiction while excluding that jurisdiction's choice-of-law rules. For example, the agreement may provide that the chosen law is the "substantive" or "internal" law of the chosen jurisdiction without regard to the application of that jurisdiction's choice-of-law rules. While it may not be necessary to do so,[32] some opinion givers choose either to qualify their opinions to point out that certain mandatory choice-of-law provisions may nonetheless apply or to request rephrasing of the agreement to avoid the need for this type of qualification. For example, Article 1 of the Uniform Commercial Code imposes mandatory choice-of-law rules for the perfection of security interests.

Further, some opinion givers also include some type of opinion qualification if an agreement's choice-of-law clause purports to govern matters beyond the interpretation or enforceability of the contract, such as related tort disputes.

4. Indemnification, Exculpation, and Waivers of Damages

Sample Qualification:	**We express no opinion with respect to provisions purporting to indemnify, release, exculpate, hold harmless or exempt any person or entity from liability for [gross] negligence, willful misconduct, intentional harm, criminal violations or other wrongdoing or strict product liability or for any liabilities arising under securities laws.**[33]

30. *See* Restatement (Second) of Conflict of Laws § 187(2)(a) (1971).

31. Due to the limited utility of many choice-of-law opinions, opinion recipients may—if they are concerned about the possible applicability of the Covered Law rather than the governing law chosen in the agreement in circumstances where a reasoned or Restatement choice-of-law opinion would be rendered—seek an "as if" remedies opinion (either in conjunction with or in lieu of a choice-of-law opinion) to the effect that the agreement in question would be enforceable if the Covered Law, rather than the law chosen in the agreement, were applied.

32. *See 1998 TriBar Report*, *supra* note 11, at 633 n.89. Recently, the New York Court of Appeals unanimously applied New York substantive law, and refused to apply New York's choice-of-law rules, where the parties chose "the laws of the State of New York" to govern their agreement. IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A., 982 N.E.2d 609, 610, 612 (2012), *cert. denied*, 133 S. Ct. 2396 (2013). The court held that "the plain language" of the New York choice-of-law statute, N.Y. Gen. Oblig. Law § 5-1401 (McKinney 2010), dictates that "New York substantive law applies when parties include an ordinary New York choice-of-law provision." *IRB-Brasil Resseguros, S.A.*, 982 N.E.2d at 612.

33. While some commercial loan recipients will accept, in lieu of a more targeted qualification such as the sample qualification set out in the text above, a public policy qualification with respect

Comments

Jurisdictions vary in the enforceability of indemnification and exculpation provisions where the effect of the indemnity or exculpation is to shield a party from the consequences of its own actions. In the case of intentional conduct, such as willful misconduct, violations of law, and other wrongdoings, as well as in the case of gross negligence, these types of provisions are generally unenforceable and an exception from a remedies opinion is regularly taken. In the case of ordinary negligence, courts in many states often enforce indemnification clauses, though some states impose requirements for enforceability that opinion givers may be reluctant to address.[34]

In states that permit indemnification or exculpation as to a party's own ordinary negligence, the exclusion from the opinion may be limited to "gross" negligence, hence the inclusion of the bracketed reference to "gross" in the sample qualification set out above. Some states, however, permit an agreement to indemnify or exculpate a party for its own ordinary negligence only if that agreement is stated expressly or conspicuously or in some special way; and opinion practice varies as to whether opinion givers will opine on the satisfaction of these types of express negligence rules, and, in some instances, a broader qualification on the subject is taken.[35] On a separate point, indemnification and

to indemnification and other exculpation provisions, such as the following, note that such a public policy qualifier does not apply to the remedies opinion more generally:

> We express no opinion with respect to provisions purporting to indemnify, release, exculpate, hold harmless or exempt any person or entity from liability for its own [gross] negligence or willful misconduct or to the extent that such provisions are otherwise against public policy.

See *infra* note 35 for a further discussion of exceptions that are commonly taken in some jurisdictions on these types of risk-shifting agreements, including discussions of broader qualifications that are commonly taken and accepted in Florida, North Carolina, and Texas.

34. *See infra* note 35.

35. California courts continue to be guided by Rossmoor Sanitation, Inc. v. Pylon, Inc., 532 P.2d 97, 100 (Cal. 1975), in which the California Supreme Court noted that a contract may expressly "provide for indemnification against an indemnitee's own negligence, but such an agreement must be clear and explicit and is strictly construed against the indemnitee." Given that an enforceability opinion only addresses a clause as interpreted, California practitioners can opine on clauses indemnifying for ordinary negligence if the contract is clear. If it is not, a court may not interpret it as covering at least a party's own "active" negligent acts. Given the judicial proclivity toward strict construction as well as the tendency to distinguish between "active" and "passive" negligence, it is not uncommon for opinion givers in California not to opine as to the enforceability of attempts to indemnify against ordinary negligence.

In Delaware, a contract provision must be "crystal clear and unequivocal" in requiring one party to assume liability for the negligence of another party in order to be enforceable. State v. Interstate Amiesite Corp., 297 A.2d 41, 44 (Del. 1972). Similarly, in Illinois, the language in a contract requiring one party to assume liability for the negligence of another party must be "clear and explicit." Tatar v. Maxon Constr. Co., 294 N.E.2d 272, 273 (Ill. 1973); *see also* Westinghouse Elec. Elevator Co. v. LaSalle Monroe Bldg. Corp., 70 N.E.2d 604, 607 (Ill. 1946). Thus, depending on the language at issue, opinion givers in both Delaware and Illinois may qualify opinions on indemnification or exculpation provisions with respect to negligence as well as gross negligence.

Florida courts have enforced express carveouts of ordinary negligence if the contract clearly and expressly states that the indemnitees' own wrongful acts are indemnified. *See* Fid. & Guar. Ins. Co. v. Ford Motor Co., 707 F. Supp. 2d 1300, 1313 (M.D. Fla. 2010). Thus, a provision that purports to "indemnify, protect and save forever harmless from and against any and all claims" was held to be legally insufficient to provide indemnity from an indemnitee's own ordinary negligence. *See* Cox

exculpation with respect to securities law liabilities are also generally carved out from the opinion in light of the uncertainty of the enforceability of such provisions under both federal and state law.

Many loan documents also contain exculpation provisions exempting lenders from liability for various types of damages that are neither actual nor direct, such as special, indirect, consequential, or punitive damages. Sometimes these provisions state that the lenders shall in no event be liable for such damages. Sometimes they are couched, instead, as the borrower's waiver of the right to assert a claim for these types of damages. In either case, opinion givers commonly do not express opinions about the enforceability of these types of exculpation provisions.[36]

Cable Corp. v. Gulf Power Co., 591 So. 2d 627, 629 (Fla. 1992). The illustrative forms of opinion letters that accompany the FLORIDA REPORT, *supra* note 10, at Form A-16, Form B-15, Form C-14, and Form D-14, contain a qualification excluding from the scope of the remedies opinion any provision that "purports to excuse a party from liability for the party's own acts." The authors of this article from Florida believe that Florida lawyers commonly take this qualification.

New York courts have consistently affirmed the enforceability of indemnities and exculpatory clauses that protect a party against such party's own ordinary negligence. *See* Abacus Fed. Sav. Bank v. ADT Security Servs., Inc., 967 N.E.2d 666, 669 (N.Y. 2012); Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1370 (N.Y. 1992); Kalisch-Jarcho, Inc. v. City of New York, 448 N.E.2d 413, 416 (N.Y. 1983). While New York courts have continually upheld indemnities and exculpatory clauses against ordinary negligence, they have made clear that such indemnities and clauses will not protect a party from its own "gross negligence." *See Sommer*, 593 N.E.2d at 1371; *Kalisch-Jarcho*, 448 N.E.2d at 416–17. However, under New York law, gross negligence is more than just heightened negligence. Rather, the New York concept of "gross negligence" is closer to willful misconduct ("smacks of intentional wrongdoing" and "betokens a reckless indifference to the rights of others") and thus is different in kind, not just degree. Colnaghi, U.S.A., Ltd. v. Jewelers Prot. Servs., Ltd., 611 N.E.2d 282, 283–84 (N.Y. 1993); *accord Sommer*, 593 N.E.2d at 1371; *Kalisch-Jarcho*, 448 N.E.2d at 416–17.

As to North Carolina, see LEGAL OPINIONS COMM., BUS. LAW SECTION, N.C. BAR ASS'N, THIRD PARTY LEGAL OPINIONS IN BUSINESS TRANSACTIONS 57 (2d ed. 2004) (§ 10.2) [hereinafter NORTH CAROLINA REPORT], which includes as a common qualification to a remedies opinion an exception for "any provisions of the Agreement that purport to excuse a party for liability for its own acts."

Texas is an example of a state with an express negligence rule that imposes restrictions on the ability of parties to enter into contractual indemnification and exculpation provisions. A statement on contractual indemnity and exculpation issued by a Texas bar committee contains a number of alternative formulations of indemnity and exculpation qualifications for legal opinions, depending upon the nature of the provisions covered by the opinion and the parties' determination as to the necessity of an enforceability opinion on such provisions in light of the time and expense required to render such an opinion. *See* Tex. State Bar Bus. Law Section Legal Opinions Comm., *Statement on Legal Opinions Regarding Indemnification and Exculpation Provisions Under Texas Law*, 41 TEX. J. BUS. L. 271, 281–86 (2006) [hereinafter *Texas Indemnity Statement*]. The *Texas Indemnity Statement* notes that parties to certain types of transactions frequently agree that the opinion recipient will accept a legal opinion that completely excludes indemnification and exculpation provisions from coverage under a Texas law enforceability opinion, in which case the *Texas Indemnity Statement* offers the following sample qualification:

> We express no opinion with respect to the validity or enforceability of the following provisions to the extent that the same are contained in the Transaction Documents: provisions purporting to release, exculpate, hold harmless, or exempt any person or entity from, or to require indemnification of or by any person or entity for, liability for any matter.

Id. at 283.

36. *See, e.g.*, NORTH CAROLINA REPORT, *supra* note 35, at 57 (§ 10.2), which includes as a common qualification to a remedies opinion an exception for provisions "that purport to effect waivers of constitutional, statutory or equitable rights or the effect of applicable laws."

5. Jurisdiction or Venue of Courts; Service of Process

Sample Qualification:	**We express no opinion with respect to any provisions relating to the jurisdiction or venue of courts or service of process.**

Comments

Commercial contracts frequently contain provisions pursuant to which the parties agree to litigate disputes relating to the contracts in the courts of specified jurisdictions. Some of these provisions are permissive, allowing the parties to bring an action in the chosen jurisdiction or elsewhere, while others are mandatory and require that suit be brought only in the chosen jurisdiction. These provisions are also sometimes accompanied by clauses pursuant to which the parties submit to the jurisdiction of the specified courts,[37] waive the doctrine of *forum non conveniens* and other objections to the venue of chosen courts, and agree to one or more methods of service of process in actions brought in the chosen courts. Provisions relating to submission to jurisdiction are often referred to as forum selection clauses,[38] although some authorities use other descriptive terms.[39] In this article, unless otherwise required by the context, these provisions will be referred to as "forum selection clauses." As discussed in greater detail below, except where there is clear statutory authority, opinion givers commonly do not opine on forum selection clauses and the agreements and waivers ancillary thereto. By referring to "provisions relating to the jurisdiction or venue of courts or service of process," the sample qualification set forth above is intended to be

For reasons explained in the 2007 California Remedies Report Exceptions Appendix, *supra* note 10, at B-9 n.6, it is common for California opinion givers to state that certain exculpatory provisions, including waivers of rights to damages, may be limited by statute or public policy.

The illustrative forms of opinion letters that accompany the Florida Report, *supra* note 10, at Form A-16, Form B-16, Form C-14, and Form D-14, contain a qualification excluding from the scope of the remedies opinion any provision that "purports to effect waivers of . . . rights to damages," and the authors of this article from Florida believe that Florida lawyers commonly take this qualification.

As to Texas opinion practice, the last paragraph at *supra* note 35 quotes a sample qualification from the *Texas Indemnity Statement*. This sample qualification is broad enough to exclude exculpation provisions and waivers that purport to exempt a party from liability for damages. *See also Texas Indemnity Statement*, *supra* note 35, at 296–98 (discussing Texas case law regarding contractual provisions purporting to exonerate a party from liability for damages for breach of contract).

37. Some forum selection clauses (such as a provision stating that all disputes between the parties shall be litigated in a specific court) do not contain an express statement pursuant to which the parties submit to the jurisdiction of the chosen forum. In the absence of such a submission-to-jurisdiction clause, courts still typically interpret a forum selection clause as a consent to personal jurisdiction in the designated forum. *2004 TriBar Report*, *supra* note 23, at 1499 n.77. However, some state forum selection statutes require an express submission or other consent to the jurisdiction of that state's courts. *See infra* note 46.

38. *See, e.g.*, *2004 TriBar Report*, *supra* note 23, at 1498; GLAZER ET AL., *supra* note 16, § 9.14.13, at 387–90. The United States Supreme Court has used the term "forum-selection clause" to refer to mandatory forum selection clauses. *E.g.*, Atl. Marine Constr. Co. v. U.S. Dist. Court W. Dist. of Tex., 134 S. Ct. 568 (2013); Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

39. *See, e.g.*, 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE—CIVIL § 108.53 (2013) (referring to permissive forum selection clauses as "non-exclusive consent-to-jurisdiction clauses" and mandatory forum selection clauses as "prorogation (exclusive forum selection) agreements").

broad enough to cover forum selection clauses and any such ancillary agreements and waivers, although the sample language is only one of many possible formulations of such a qualification.[40]

The enforceability of a forum selection clause generally turns on such factors as whether the clause is permissive or mandatory, whether the selection is accompanied by a waiver of the doctrine of *forum non conveniens* (either expressly or impliedly), and whether the chosen jurisdiction has subject matter jurisdiction. Historically, most states have taken the position that, whatever the agreement might specify, courts should be free to determine for themselves whether to accept cases brought before them based on such factors as the sufficiency of contacts, the burden on the court, convenience, and the availability of other forums.[41] The sample qualification set out above reflects this historical concept that courts have generally reserved to themselves the power to accept or reject cases for a variety of reasons, notwithstanding the agreement of the parties.[42] While some states have adopted a more modern view in cases involving contractual forum selection clauses, sufficient uncertainty remains in some states such that opinion recipients in those states commonly accept the kind of broad qualification set out in the sample above.[43]

More recently, in recognition of the right of parties to order their affairs by contract, some states, including California, Delaware, Illinois, and New York, have enacted very generous forum selection statutes that validate the enforceability of most inbound forum selection clauses in large commercial transactions.

40. As noted at *infra* note 46, the illustrative forms of opinion letters that accompany the Florida Report contain a broad qualification excluding any provision in a transaction document that "concerns choice of forum, consent or submission to the personal or subject matter jurisdiction of courts." FLORIDA REPORT, *supra* note 10, at Form A-16, Form B-16, Form C-14, and Form D-15. In addition, the North Carolina Report includes as a common qualification to a remedies opinion an exception for provisions "concerning choice of forum or consent to the jurisdiction of courts, venue of actions or means of service of process." NORTH CAROLINA REPORT, *supra* note 35, at 57 (§ 10.2).

41. *See 2004 TriBar Report*, *supra* note 23, at 1499.

42. *See, e.g.*, N.C. GEN. STAT. § 22B-3 (2013) (invalidating any provision in a contract entered into in North Carolina that requires the prosecution of any action arising from the contract to be instituted or heard in another state). Although there are statutory exceptions to this prohibition, lawyers in North Carolina, as in other states, typically do not render opinions on forum selection clauses (even as to those matters excepted from the prohibitions of the North Carolina statute).

43. *2004 TriBar Report*, *supra* note 23, at 1499–1500 (agreeing that "when a forum selection clause is governed by the law of a state that [has *not* adopted the "modern" view] . . . , the opinion may require an express exception or assumption." However, when a forum selection clause is governed by the law of a state that *has* adopted the "modern" view, the Report says that "opinion givers rendering an opinion on a mandatory forum selection clause (or a permissive forum clause with a waiver of *forum non conveniens*) generally do not regard the possibility that a court might decline to enforce the clause by reason of the *Bremen* exception [that is, non-enforcement if the clause would be 'unfair or unreasonable'] to require an opinion qualification." *Id.* at 1501. The U.S. Supreme Court, adopting the "modern view" in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), held that a mandatory forum selection clause is enforceable as a constitutional matter, unless it can be shown by the resisting party that such enforcement would be "unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."

For a discussion of cases that have adopted the "modern" view, see, for example, *2004 TriBar Report*, *supra* note 23, at 1500 n.9; Joseph E. Smith, *Civil Procedure—Forum Selection—N.C. Gen. Stat. § 22B-3 (1994)*, 72 N.C. L. REV. 1608 (1994); GLAZER ET AL., *supra* note 16, § 9.14.4, at 389 n.53.

Under this type of state statute, a forum selection clause choosing courts in that state will be upheld so long as the clause is in a contract that satisfies the specified statutory conditions and that also selects the law of such state to govern the contract.[44] Texas, in contrast, has adopted a somewhat different type of statute that honors both inbound and outbound forum selection clauses in some circumstances.[45] While these statutes make it easier for opinion givers to render enforceability opinions on forum selection clauses covered by the statutes, it is common, given the uncertainty of the enforceability of forum selection clauses generally and historically, even when rendering an opinion based on these inbound and other statutes, to exclude from the remedies opinion those actions

44. *See, e.g.*, CAL. CIV. PROC. CODE § 410.40 (West 2012); DEL. CODE ANN. tit. 6, § 2708 (2013); 735 ILL. COMP. STAT. 105/5-10 (2012); N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2010). The *2004 TriBar Report* confirms that, at the time of its publication in 2004, "opinion preparers in New York typically give opinions without an exception on the forum selection clauses (permissive or mandatory) selecting New York courts as the forum in agreements that qualify under the statute." *2004 TriBar Report*, *supra* note 23, at 1502.

45. Section 15.020 of the Texas Civil Practice and Remedies Code is a venue statute that applies by its terms to a "major transaction," which is defined to mean "a transaction evidenced by a written agreement under which a person pays or receives, or is obligated to pay or entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million," provided that the term "does not include a transaction entered into primarily for personal, family, or household purposes, or to settle a personal injury or wrongful death claim, without regard to the aggregate value." TEX. CIV. PRAC. & REM. CODE ANN. § 15.020(a) (West 2009 & Supp. 2014). Section 15.020(b) provides that "[a]n action arising from a major transaction shall be brought in a county if the party against whom the action is brought has agreed in writing that a suit arising from the transaction may be brought in that county." *Id.* § 15.020(b). Section 15.020(c) provides that "an action arising from a major transaction may not be brought in a county if: (1) the party bringing the action has agreed in writing that an action arising from the transaction may not be brought in that county, and the action may be brought in another county of this state or in another jurisdiction; or (2) the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction, and the action may be brought in that other county, under [section 15.020] or otherwise, or in that other jurisdiction." *Id.* § 15.020(c).

Section 15.020(d) provides that section 15.020 "does not apply to an action if (1) the agreement described by this section was unconscionable at the time it was made; (2) the agreement regarding venue is voidable under Chapter 272 [of the Texas Business and Commerce Code]," which provides that, as to contracts principally for the construction or repair of an improvement to real property located in Texas, a forum selection clause choosing the courts of a state other than Texas is voidable by the party obligated by the contract to perform the construction or repair; "or (3) venue is established under another Texas statute other than Title 2 of the Texas Civil Practice and Remedies Code." *Id.* § 15.020(d).

Some Texas courts have adopted a narrow construction of section 15.020. *See, e.g.*, *In re* Togs Energy, Inc., No. 05-09-01018-CV, 2009 WL 3260910, at *1 (Tex. App. Oct. 13, 2009) (mem.) (in order to satisfy the $1 million threshold, written agreement must contain the aggregate stated value of the consideration). However, Texas courts have also applied the statute to enforce forum selection clauses in contracts that are found to meet the statutory requirements. *See, e.g.*, Spin Doctor Golf, Inc. v. Paymentech, L.P., 296 S.W.3d 354, 359 (Tex. App. 2009) (agreement contained a forum selection clause specifying Dallas county as the site of a lawsuit relating to the agreement; appellate court found that agreement constituted a "major transaction" for the purposes of section 15.020 and affirmed order of trial court transferring the case from Harris County to Dallas County); *In re* Royalco Oil & Gas Corp., 287 S.W.3d 398, 400–01 (Tex. App. 2009) (lease with a 99-year term and monthly rental payments of $20,000 satisfied "major transaction" requirement; appellate court affirmed order of trial court transferring case to Tarrant County, in which suits were contractually required to be brought pursuant to the lease).

or matters not specifically covered by the statute, such as matters relating to the jurisdiction of federal courts and mandatory (i.e., exclusive) forum choices.[46]

46. Section 5-1402 of the New York General Obligations Law expressly permits parties to maintain an action in New York state courts if such action arises out of an agreement wholly or in part governed by New York law, which agreement (a) relates to an obligation arising out of a transaction covering in the aggregate not less than $1,000,000, and (b) contains a provision in which the non-resident expressly submits to the jurisdiction of New York state courts. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2010). The New York Civil Practice Law's Rule 327, enacted together with section 5-1402, provides that New York state courts shall not stay or dismiss any action on the ground of inconvenient forum where section 5-1402 applies. N.Y. C.P.L.R. 327(b) (McKinney 2010). In New York, these provisions support both mutual and non-mutual choices of New York state courts. Based on section 5-1402 and N.Y. C.P.L.R. 327, a New York opinion qualification might be stated as follows:

> We express no opinion with respect to [cite forum selection Section] of the Agreement to the extent such Section (i) contains a waiver of any objection based on inappropriate venue or *forum non conveniens* in a federal court of the United States, (ii) implies that a federal court of the United States has subject matter jurisdiction, or (iii) purports to grant any court exclusive jurisdiction.

While California, Delaware, and Illinois have adopted forum selection statutes similar to that of New York, these states have not adopted an equivalent to N.Y. C.P.L.R. 327, so opinion qualifications relating to the laws of those states may be further qualified. Further, while California case law has upheld both exclusive and nonexclusive forum selection clauses (*see, e.g.*, Smith, Valentino & Smith, Inc. v. Superior Court, 551 P.2d 1206 (Cal. 1976) (en banc)), so a California opinion giver typically would be in a position to render an opinion on the enforceability of such clauses, venue selection clauses that select a venue in contravention of applicable California venue statutes are not enforceable under California law. In general, this means that under California law the parties may designate the *state* (forum) in which matters are to be litigated, but cannot designate a *county* (venue) except in accordance with California's venue statutes. *See* Global Packaging, Inc. v. Superior Court, 127 Cal. Rptr. 3d 813, 820 (Ct. App. 2011) ("If [plaintiff] meant 'forum,' it should have said 'forum,' not 'venue,' and it should have specified a state (a forum), not a county (a venue)."); Alexander v. Superior Court, 8 Cal. Rptr. 3d 111 (Ct. App. 2003); *see also* Battaglia Enters., Inc. v. Superior Court of San Diego Cnty., 154 Cal. Rptr. 3d 907 (Ct. App. 2013). Moreover, under California law, merely designating a forum state does not constitute a submission to jurisdiction in that state; the submission to jurisdiction must be express. *See Global Packaging*, 127 Cal. Rptr. 3d at 820.

Section 2708 of Title 6 of the Delaware Code provides that any person may maintain an action in a court of competent jurisdiction in Delaware where the action arises out of a contract not subject to section 1-301(c) of Title 6 of the Delaware Code and not involving less than $100,000 and for which the parties have chosen Delaware law, if the parties, either as provided by law or in the manner specified in such contract, are (i) subject to the jurisdiction of the courts of, or arbitration in, Delaware and (ii) may be served with legal process. DEL. CODE ANN. tit. 6, § 2708 (2013). The similar Illinois statute provides that any person may maintain an action against a foreign corporation or nonresident in a court of competent jurisdiction in Illinois where the action arises out of a contract not involving less than $500,000 and for which the parties have chosen Illinois law as the governing law, subject to the further requirement that the foreign corporation or nonresident has agreed in the contract to submit to the jurisdiction of the Illinois courts. 735 ILL. COMP. STAT. 105/5-10 (2012).

In Florida, under Florida Statutes section 685.102, but subject to whatever limitations arise under the U.S. Constitution, an agreement in a contract that a matter will be litigated in Florida will be upheld if the selection of Florida as the governing law for the agreement has been made under Florida Statutes section 685.101. FLA. STAT. § 685.102 (2014). However, in *McWane, Inc. v. Water Management Services, Inc.*, 967 So. 2d 1006 (Fla. Dist. Ct. App. 2007), the court refused to enforce a forum selection clause because enforcement would have been "unjust and unreasonable" in a products liability case involving interrelated claims, cross-claims, and multiple defendants from multiple states. The court noted that a party seeking to avoid the enforcement of a mandatory contractual forum selection provision as unreasonable or unjust must demonstrate that trial in the agreed-upon forum "will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. . . . Although mere inconvenience or additional expense will not suffice, a venue provision may be avoided when it appears that enforcement of the provision will lead to multiple lawsuits, a splitting of the causes of action, and the potential for conflicting results in different courts." *Id.* at 1007. As a result, notwithstanding Florida Statutes section 685.102, Florida lawyers

In addition, with respect to service of process, the states of Illinois and New York permit the parties to a contract, in connection with a party's inbound submission to jurisdiction pursuant to statute, *either* to provide in the contract a method for service of process upon such party or its agent *or* to remain silent in the contract as to service of process, with the state's service-of-process statute providing a method for service of process.[47] Thus, in those states, opinion givers commonly do not take exceptions with respect to service of process relating to inbound forum selection clauses pursuant to statutes of the type discussed above. California permits process to be served in several ways, including in the manner provided by statute for service in California, in the manner provided by law in the place where service is effected (in the case of foreign jurisdictions, subject to the satisfaction of specified requirements of due process), and by prepaid first class mail with return receipt requested.[48] It is very rare that an agreement specifies a manner of service that is not in accordance with applicable statutory provisions, and California opinion givers commonly do not take exceptions with respect to service of process.

Delaware also permits parties to a contract in connection with the parties' inbound submission to jurisdiction pursuant to Delaware's choice-of-law statute[49] to provide in the agreement a method of service of process. Alternatively, the requirements of the Delaware statute will be satisfied, and the parties' inbound submission to jurisdiction will be effective, if each party can otherwise be served with legal process in connection with an action in a Delaware court. Any Delaware entity or non-Delaware entity qualified to transact business in Delaware can be served with legal process through its registered agent. However, non-Delaware entities that are not qualified to do business in Delaware (and non-resident persons) may not be subject to service of process absent appropriate provision in the agreement for such service. Consequently, in Delaware, agreements generally provide for service of process, usually by certified or registered mail with return receipt requested. When agreements contain such a provision, opinion givers will generally not take a qualification. However, absent such a provision, opinion givers will commonly take an exception with respect to inbound forum selection clauses relating to non-Delaware entities (or individuals who are not Delaware residents).

In the case of service-of-process agreements relating to outbound proceedings not covered by the types of inbound statutes described above, opinion givers in California, Delaware, Illinois, and New York commonly exclude such agreements from the coverage of the remedies opinion. In other jurisdictions, including Florida, North Carolina, and Texas, opinion givers commonly do not opine on either inbound or outbound contractual service of process agreements. For these reasons, service of process is included in the sample qualification set out above.

commonly exclude coverage of express forum selection clauses from the scope of their remedies opinions, and the illustrative forms of opinion letters that accompany the Florida Report contain a broad qualification excluding from the scope of the remedies opinion any provision in a transaction document that "concerns choice of forum, consent or submission to the personal or subject matter jurisdiction of courts." *See supra* note 40.

47. *See* 735 Ill. Comp. Stat. 5/2-201–5/2-212 (2012); N.Y. C.P.L.R. 303–318 (McKinney 2010).

48. Cal. Civ. Proc. Code §§ 413.10–415.95 (West 2004 & Supp. 2014).

49. Del. Code Ann. tit. 6, § 2708 (2013).

6. Jury Trial Waivers

Sample Qualification:	**We express no opinion with respect to waivers of the right to trial by jury.**

Comments

While many jurisdictions permit the waiver of the right to trial by jury in advance in commercial contracts, this result is not universal. Even in jurisdictions that generally sustain such waivers, the case authority is often ambiguous and the effectiveness of such waivers is often conditioned on matters as to which opinion givers are not generally expected to opine. Accordingly, jury trial waivers are commonly excluded from the scope of the remedies opinion.

In some jurisdictions, such as California and North Carolina, all pre-dispute contractual jury trial waivers are simply unenforceable,[50] and remedies opinions given under those states' laws can be expected to include an exception, similar to the sample qualification set out above, as to any waiver of jury trial included in the transaction documents.

In many states, however, jury trial waivers are not flatly prohibited. Rather, their enforceability is conditioned on factual matters that may be easily satisfied as a business matter, but which opinion givers may not expect to address in a legal opinion, such as whether the waiver is expressed in a *conspicuous* manner, or is *knowingly* granted. Whether opinion givers in such a jurisdiction include an exception for jury trial waivers in transaction documents will turn on their willingness to address these types of factual matters, as well as on how clearly and consistently the courts in that jurisdiction have defined and applied the relevant conditions to enforceability.

Sometimes opinion givers are comfortable addressing the satisfaction of these conditions and take no qualification as to jury trial waivers.[51] In New York, for

50. In California, the state supreme court, in the case of *Grafton Partners L.P. v. Superior Court*, 116 P.3d 479 (Cal. 2005), held that provisions waiving a party's right to a jury trial are not enforceable. The California Sample Opinion provides the following sample exception, which does not differ materially from the sample formulation set out above: "We express no opinion regarding the enforceability of [Section __] of the [Loan Agreement], which purports to waive the parties' rights to a jury trial." California Sample Opinion, *supra* note 10, at 17.

In North Carolina, section 22B-10 of the North Carolina General Statutes expressly provides that any provision in a contract waiving the right to a jury trial is unenforceable. N.C. Gen. Stat. § 22B-10 (2013). An opinion exception on a provision governed by North Carolina law purporting to waive the right to jury trial might read as follows: "Any provision waiving a right to jury trial is unenforceable as against public policy pursuant to North Carolina General Statutes § 22B-10."

51. Under Illinois law, for example, judicial decisions make reference to a broad array of factors such as whether the jury trial waiver was conspicuous and knowing, whether it was the subject of negotiation, whether the waiver was reviewed by counsel, and the relative bargaining power and business acumen of the parties. Despite the broader scope of these conditions, the Illinois courts have nevertheless consistently upheld contractual jury trial waivers absent a statute to the contrary. (Examples of statutory prohibitions may be found in the Illinois Home Repair and Remodeling Act, 815 Ill. Comp. Stat. 513/15.1 (2012), which requires specific disclosure and express acceptance of a jury trial waiver in a contract for home repair or remodeling, and in a provision of the Illinois Code of Civil Procedure, 735 Ill. Comp. Stat. 5/9-108 (2012), which provides that when a landlord files a forcible action for possession of residential property, either party may demand a trial by jury, and

example, where courts have upheld mutual jury waiver provisions that are clear and not obscurely placed in an agreement between parties represented by counsel,[52] opinion givers commonly consider the satisfaction of these factual conditions to be legally determinable and so avoid opinion exceptions for mutual jury waiver agreements that effectively choose New York law.[53]

In many instances, however, opinion givers are reluctant or unwilling to address the satisfaction of these types of conditions other than by a complete exclusion from the enforceability opinion. In these instances, even though the jury trial waivers in the agreements are not unenforceable on their face, opinion givers will nonetheless commonly take a complete exception such as the sample qualification set out above and (for one or more of the reasons set out in the introduction to this article) opinion recipients commonly accept this type of broad qualification.[54] Sometimes, when these types of conditions to the enforceability

that any lease provision purporting to waive this right is unenforceable.) The Illinois Supreme Court has not yet addressed the topic, leading the Seventh Circuit to conclude in a recent case that there was no clear basis in Illinois law for scrutinizing a jury trial waiver, even in a form agreement. *See* IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 992 (7th Cir. 2008) (reviewing a district court decision that invalidated a bench trial agreement "because it was not the subject of negotiation (that is, it appears on a form), does not stand out (it is in the same type as other clauses), and was not reviewed by the Credit Union's lawyer before the contract was signed (the Credit Union's executives negotiated the deal without the participation of counsel)"). The Seventh Circuit reversed, stating, among other things, that it had been unable to identify a clear basis in Illinois law for imposing the requirements enumerated by the lower court. Against this somewhat unsettled background, some Illinois opinion givers do not routinely include exceptions for jury waivers in the absence of special statutory requirements, while others, acknowledging the array of conditions referenced in the cases, routinely do.

See also 2004 TriBar Report, *supra* note 23, at 1494 (stating that "often, when states impose conditions on enforcing a jury waiver, those conditions will not necessitate an exception"). The *2004 TriBar Report* concludes that in states that require a jury trial waiver to be "conspicuous," such waiver "ordinarily will be made conspicuous [and therefore needs no exception]." *Id.* That same report also concludes that when jurisdictions require a jury trial waiver to be "knowing or intentional," the opinion preparers "ordinarily will satisfy themselves that their client is aware of the waiver [and therefore do not take an exception]." *Id. But see infra* notes 54 & 55 (discussing the reasons that practitioners in Delaware, Florida, and Texas often take a different view).

52. *See*, *e.g.*, Uribe v. Merchants Bank of New York, 642 N.Y.S.2d 23 (App. Div. 1996); Gunn v. Palmieri, 589 N.Y.S.2d 577 (App. Div. 1992); Barclays Bank of New York, N.A. v. Heady Elec. Co., 571 N.Y.S.2d 650, 652–53 (App. Div. 1991).

53. Note, however, that under New York law, jury waivers in leases of real property are ineffective as to claims for personal injury or property damage. N.Y. REAL PROP. LAW § 259-c (McKinney 2006). Thus, many New York lawyers specifically limit jury waivers in leases of real property to exclude personal injury or property damage claims and so avoid an opinion exception.

54. Under Florida law, a jury trial waiver, to be enforceable, must be clear on its face, knowing and with no evidence of unconscionability, matters which Florida opinion givers are frequently unwilling to address other than by a complete exclusion of the jury trial waiver from the enforceability opinion. Most Florida cases that have addressed the jury trial waiver issue have examined a mutual jury trial waiver without noting whether mutuality is a factor in their decisions. In *Oglesbee v. IndyMac Financial Services, Inc.*, 675 F. Supp. 2d 1155, 1158 (S.D. Fla. 2009), the court upheld a non-mutual jury waiver by a borrower. Both the *Oglesbee* court and the court in *Lascoutx v. Wells Fargo Bank*, No. 11-21619-CIV, 2011 WL 5825655, at *6–7 (S.D. Fla. Nov. 16, 2011), considered five factors when determining whether a waiver was "knowing and voluntary": "(1) the conspicuousness of the provision in the contract; (2) the level of sophistication and experience of the parties entering into the contract; (3) the opportunity to negotiate terms of the contract; (4) the relative bargaining power of each party; and (5) whether the waiving party was represented by counsel." As noted by the *Lascoutx* court, "[a] court can consider these factors, but they are not determinative." *Id.* at *8. In *GE Commercial Finance*

of a jury trial waiver apply, opinion givers will take a narrower exclusion from the opinion, thereby giving a somewhat limited opinion on the subject, by opining on the waiver only to the extent that certain stated legal requirements have been met.[55] An example of such a qualification might be: "We express no opinion as to the enforceability of any waiver of the right to trial by jury except to the extent it is determined to be [unambiguous, knowing and conspicuous] [with the specified conditions varying to reflect state specific requirements]." Under this type of qualification the opinion giver is advising the recipient as to the requirements that must be satisfied for the jury trial waiver to be given effect.

7. Receivers (Appointment of)

Sample Qualification:	**We express no opinion with respect to any provision providing for the appointment of a receiver.**

Business Property Corporation v. Heard, 621 F. Supp. 2d 1305, 1310 (M.D. Ga. 2009), the court held that while a waiver of jury trial is enforceable under Florida law when there is no evidence of unconscionability, the court must also determine whether the federal right to a jury trial was properly waived in a federal diversity case by a knowing and voluntary waiver. In addition, a Florida court may, in its discretion, utilize an advisory jury even if the parties have effectively waived their right to a common law jury trial. *See* Gelco Corp. v. Campanile Motor Serv., Inc., 677 So. 2d 952, 953 (Fla. Dist. Ct. App. 1996).

The Texas Supreme Court has upheld knowing and voluntary jury trial waivers and has further held that, absent fraud or imposition as to the waiver provision itself, a conspicuous jury trial waiver is prima facie evidence that the waiver is knowing and voluntary, thereby shifting the burden of proof to the party challenging the waiver's validity. *See In re* Bank of Am., N.A., 278 S.W.3d 342, 344–46 (Tex. 2009) (per curiam); *In re* Gen. Elec. Capital Corp., 203 S.W.3d 314, 316 (Tex. 2006) (per curiam); *In re* Prudential Ins. Co. of Am., 148 S.W.3d 124, 129–35 (Tex. 2004). However, because many lawyers in Texas do not generally opine as to matters of "conspicuousness" or as to states of mind such as whether an action is "knowing" or "voluntary," opinion givers in Texas frequently express no opinion with respect to waivers of the right to trial by jury.

55. Under Delaware law, for example, to be enforceable a jury trial waiver must meet a number of tests. The Delaware Superior Court has held that a party can waive the right to a jury trial where the waiver provision is clear and unambiguous. *See* CIT Commc'ns Fin. Corp. v. Level 3 Commc'ns, LLC, C.A. No. 06C-01-236JRS, 2008 WL 2586694, at *5 (Del. Super. Ct. June 6, 2008) (finding that lease provision "clearly and unambiguously" waived right to jury trial); *see also* Cantor Fitzgerald, Inc. v. Cantor Fitzgerald, L.P., Civ. A. No. 00C-05-151WCC, 2001 WL 589028, at *2 (Del. Super. Ct. May 24, 2001). In addition, the *CIT* court set forth four elements, some involving considerations outside the terms of the contract, that a court will consider when determining whether a contract effectively provides for a waiver of a jury trial: "(1) the negotiability of the contract terms; (2) any disparity in bargaining power between the parties; (3) the business acumen of the party opposing the waiver; and (4) the conspicuousness of the jury waiver provision." *CIT Commc'ns Fin. Corp.*, 2008 WL 2586694, at *5. The Delaware Supreme Court has stated that the right to jury trial "is not absolute but subject to waiver if the parties so intend." Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908, 912 (Del. 1989). In *Graham*, the court held that an arbitration clause in an insurance contract can serve as a "fully informed" waiver of the right to jury trial even where the arbitration provision is part of a contract of adhesion and the non-drafting party is not specifically advised of the inclusion of such provision. *Id.* Lawyers in Delaware commonly express no opinion on the enforceability of jury trial waivers, though sometimes an opinion under Delaware law is rendered noting that the jury trial waiver must meet certain requirements, such as being clear, unambiguous, and conspicuous, and, in addition, sometimes assuming as well that the parties are sophisticated and that the waiver provision is material and freely bargained for.

Comments

If an agreement provides for the appointment of a receiver, a qualification such as the one set out above is commonly taken. Generally, the decision to appoint a receiver is a matter reserved to the discretion of the court before which the request for such an appointment is being heard, and, accordingly, most courts do not consider themselves bound by such agreements.

8. Setoff

Sample Qualification:	**We express no opinion with respect to any provision relating to any right of setoff.**

Comments

Under applicable common law in most jurisdictions, the setoff of mutual and matured debts is enforceable, with the result that a bank may generally set off funds in a depositor's account against matured debts owed by the depositor to the bank. Many credit agreements, however, seek to expand the common law rule by contract, providing that a lender or lender affiliate may, upon the occurrence of an event of default, set off against obligations of the borrower under the credit agreement, or any of the borrower's affiliates, any deposits at any time held and other indebtedness at any time owing by such lender or lender affiliate to or for the credit of the borrower or any of its affiliates, whether matured or unmatured. In some jurisdictions, such as California and Illinois, prevailing principles of freedom of contract seem not to preclude many of these types of contractual setoff rights, and some opinion givers in those jurisdictions will not take the kind of broad qualification as to setoff set out above, or even any qualification at all, in reliance on available case law.[56] Even in these states, however, many practitioners commonly do take a broad exception from their opinions for these types of provisions, partly because of the potential for inequity inherent in the breadth of such setoff provisions, partly because the applicable law in their respective jurisdictions is not definitive,[57] and partly for some of the

56. 2007 California Remedies Report Exceptions Appendix, *supra* note 10, at B-33 n.27 (in considering provisions pursuant to which a debtor agreed to allow a lender or the lender's affiliates or participants to set off amounts owed to them against amounts owed to the debtor, noting that no case had been found "indicating that contractual provisions granting rights of setoff in the commercial context would not be enforced, except to avoid inequity, a basis that falls within the scope of the equitable principles limitation"). As to Illinois, see *infra* note 57.

57. Under Delaware law, for example, "a bank, undoubtedly, has the right to apply a balance on general deposit to a matured note or other debt held by it against a depositor." Reed v. Cent. Nat'l Bank of Wilmington, 184 A. 772, 773 (Del. Super. Ct. 1936). In addition, in several cases the Delaware courts have recognized the general validity of a contractual right to setoff even though, in certain cases, the court found that the contractual conditions to setoff had not been met. *See* Republic Envtl. Sys. v. RESI Acquisition (Del.) Corp., No. 99C-02-194WTQ, 1999 WL 464521, at *5 (Del. Super. Ct. May 28, 1999) (recognizing the validity of a promissory note's setoff provision, but finding the facts at issue to be outside the specific terms of such provision); Biasotto v. Spreen, C.A. No. 96C-04-030WTQ, 1997 WL 527956, at *13 (Del. Super. Ct. July 30, 1997) (declining to enforce a setoff provision in a promissory note because the conditions necessary to trigger the setoff right had not

other reasons discussed in the introduction to this article. Some bar reports, due to the absence of clear authority in their respective jurisdictions, have recommended a broad qualification similar to the following: "We express no opinion as to provisions that purport to create rights of setoff otherwise than in accordance with applicable law."[58]

While there is clearer support under applicable New York law for contractual setoff clauses, a notice requirement does apply.[59] Accordingly, where no notice

occurred); Lynch v. Cnty. Bank, C.A. No. 92C-08-024, 1993 WL 390217, at *3 (Del. Super. Ct. Aug. 9, 1993) (upholding a bank's right to setoff amounts due under a loan with funds in the debtor's bank account where the loan documents provided for such a right); Kimmel v. Wilmington Trust Co., 287 A.2d 760, 762–63 (Del. Ch. 1972) (enforcing setoff provisions granting a bank the right to set off against any commissions due to a trustee the amount of any unpaid obligations to the bank, whether or not due). Based on the foregoing authority, some opinion givers will not take an exception for a setoff provision between a borrower and its lender. However, in the event that the provision in question is broader in scope than the few that have been upheld by the courts, which will often be the case, Delaware opinion givers will often either take a general exception such as the sample qualification set out in the text above or specifically refer to the problematic provisions.

The general rule in Illinois is that a bank may look to deposits in its hands for the repayment of an indebtedness owed to it by the applicable depositor where the debt is a matured obligation. First Nat'l Bank of Blue Island v. Estate of Philp, 436 N.E.2d 15, 16 (Ill. App. Ct. 1982). In addition, there is substantial case law indicating that a contractual setoff provision is enforceable even in cases where the requirements of the general rule are not met. *See, e.g.*, Selby v. DuQuoin State Bank, 584 N.E.2d 1055, 1058 (Ill. App. Ct. 1991) (a bank had the right to set off funds in a joint checking account against the amount due on a decedent's loan even though the surviving joint depositor did not execute the note and security agreements, where there was a setoff provision in the signature card agreement); Gillett v. Williamsville State Bank, 34 N.E.2d 552, 558 (Ill. App. Ct. 1941) (absent an express agreement, bank cannot apply the deposits to an unmatured indebtedness of the depositor). Against that background, some Illinois opinion givers routinely take an exception to the extent that the loan agreement provision contemplates setoff that is not fully mutual or may be applied to debt that is not fully matured, while others, on the strength of the case law enforcing contractual setoff provisions, do not.

There is clear authority in Texas for the exercise of a common law right of setoff against funds held in a depositor's bank deposit accounts for debts owed to that depository bank where there is a mutuality of obligations between the depository bank and the depositing borrower, the obligations set off are fully matured, and the funds are held in general deposit accounts, as distinguished from trust or other special or restricted accounts. *See, e.g.*, Bandy v. First State Bank, 835 S.W.2d 609, 617–22 (Tex. 1992). There is, however, limited authority in Texas as to a contractual right of setoff, and many opinion givers in Texas, in the absence of clear authority, take a broad qualification such as the sample qualification set out in the text above.

58. North Carolina Report, *supra* note 35, at 58 (§ 10.2) (including as a common exception to a remedies opinion an exception for "provisions that purport to create rights of setoff otherwise than in accordance with applicable law"); Florida Report, *supra* note 10, at Form A-17, Form B-16, Form C-14, and Form D-15 (containing a substantially similar common exception to the remedies opinion). There is no case law in Florida that deals with the issue of a contractual setoff that allows setoff rights beyond applicable common law. Further, in a case decided under Florida law, the U.S. Court of Appeals for the Fifth Circuit determined that there is no requirement to notify a borrower before a bank can enforce a common law setoff right. McKee v. Hood, 312 F.2d 394, 397 (5th Cir. 1963).

59. Cases in New York hold that a bank's right of setoff may not be exercised, *unless otherwise agreed*, until *the day after maturity* of the applicable obligations of the borrower. Marine Midland Bank v. Graybar Elec. Co., 363 N.E.2d 1139, 1143 (N.Y. 1977). However, N.Y. Banking Law § 9-g (McKinney 2010) provides that no bank shall assert, claim or exercise any right to setoff against any deposit account held by such bank unless, prior to or on the same business day of such setoff, notice of such setoff together with the reasons for such setoff are mailed to the depositor. Although section 9-g says that the "failure to provide the notice required by this section shall not be deemed to

of setoff is provided in the agreement, New York lawyers may phrase the qualification more narrowly, as, for example: "We express no opinion with respect to section __ of the agreement to the extent that such section permits setoff to be made without notice."

9. Statute-of-Limitations Waivers

Sample Qualification:	**We express no opinion as to any waiver of any statute of limitations.**

Comments

Many jurisdictions limit or restrict waivers of statutes of limitations. For example, Delaware, New York, and Texas limit the enforceability of an agreement to waive or not to plead the statute of limitations to an expressly made undertaking of reasonable duration pertaining to disputes or claims existing at the time such waiver is made.[60] Other states, such as California, impose statutory restrictions on waivers of the statute of limitations.[61] Opinion givers in each of the jurisdictions discussed above commonly take a broad qualification, such as the sample

affect the validity of the right of setoff," it is generally thought to be unclear as to what this exculpatory provision means.

60. For applicable case law in Delaware, see, for example, Studiengesellschaft Kohle, GmbH v. Hercules, Inc., 748 F. Supp. 247, 249, 251 (D. Del. 1990); Dep't of Labor v. Red Rose Roofing, Inc., C.A. No. 98C-02-019SCD, 2000 WL 970678, at *1 (Del. Super. Ct. Mar. 13, 2000). In New York, statutes and case law restrict the enforceability of such waivers. N.Y. GEN. OBLIG. LAW § 17-103 (McKinney 2010); John J. Kassner & Co. v. City of New York, 389 N.E.2d 99, 102–03 (N.Y. 1979). The New York statutes also impose similar restrictions on waivers affecting the time limited for actions to foreclose on a mortgage. N.Y. GEN. OBLIG. LAW § 17-105 (McKinney 2010).

The Texas courts have held that, as a defense to a civil action, the statute of limitations is a personal privilege and may be waived by agreement either before or after expiration of the prescribed time limit, provided that any agreement made before the statutory bar has fallen must be specific and for a reasonable time. The Texas courts have also held that a general agreement in advance to waive or not to plead the statute of limitations on a particular obligation is void as against public policy. *See, e.g.*, Gardner v. Cummings, No. 14-04-01074-CV, 2006 WL 2403299, at *3 (Tex. App. Aug. 22, 2006); Duncan v. Lisenby, 912 S.W.2d 857, 858–59 (Tex. App. 1995); Am. Alloy Steel, Inc. v. Armco, Inc., 777 S.W.2d 173, 177 (Tex. App. 1989).

Note that, under New York law, a qualification for statute-of-limitations waivers should not be needed in the case of a guaranty's "obligation absolute" clause that provides that the guaranty will be absolute and unconditional irrespective of, among other things, any statute of limitations applicable to the guaranteed obligations. Such a "waiver" is a waiver of the statute of limitations applicable to the *underlying* guaranteed obligations; it is *not* a waiver of the statute of limitations applicable to the guaranty itself (which cannot be waived unless the statutory or other conditions for such a waiver are satisfied). New York lawyers may, however, take an exception for the guaranty of an amendment that is so substantial as to constitute a new obligation. However, it does not appear that practitioners in California, Delaware, Florida, Illinois, or Texas typically opine on these types of provisions purporting to make a guarantor's obligations absolute and unconditional irrespective of the occurrence of various enumerated matters.

61. For example, Cal. Civ. Proc. Code § 360.5 (West 2006) limits the effect of a waiver of an applicable statute of limitations to an *extension* of the period for an additional four years. However, Cal. Civ. Proc. Code § 337.1 (West 2006) provides that any provision contained in a deed of trust to the effect that the debtor waives the right to plead a statute of limitations as a defense to any demand secured by the deed of trust is void.

set out above, so as to carve out any opinion as to the enforceability of waivers of statutes of limitations.[62]

A related issue may arise when provisions of an agreement indirectly have the effect of extending a statute of limitations. In 2014, the Delaware legislature amended section 8106 of title 10 of the Delaware Code to permit the parties to a contract involving at least $100,000 to bring an action based on the contract within a period specified in the contract provided it is brought prior to the expiration of twenty years from the accruing of such cause of action.[63] Prior to the amendment to section 8106, Delaware law did not permit the extension of the statute of limitations by contract,[64] though, as noted above, it could be waived under circumstances where the claim had already accrued.[65] Under both prior and current law, the Delaware statute of limitations can be contractually shortened.[66] In contrast to Delaware law, a Massachusetts court recently held that a contract provision not permitting a reasonable period to discover a breach is not enforceable in that state.[67]

An unenforceable alteration of the statute of limitations may occur in ways that are not immediately obvious. Under Delaware law, for example, a claim for breach of representations or warranties can accrue at closing. Thus, in the event a borrower were to breach its representations or warranties at the closing of a term loan, a provision in the loan agreement obligating the borrower to indemnify the lender for losses arising from such a breach for more than the applicable statute of limitations could constitute an impermissible attempt to extend the statute of limitations by contract, absent a basis for tolling of the statute.[68] Given the amendment to section 8106, this may no longer be a practical problem in Delaware; however, it may still be of issue in other states

62. *See* 2007 California Remedies Report Exceptions Appendix, *supra* note 10, at B-35 n.30 ("We advise you that the waiver of the applicable statute of limitations set forth in Section ___ of [the Agreement] will be subject to the limitations of [the relevant statutory limitation].").

There is no Florida case law that addresses the enforceability of a statute of limitations waiver. However, Fla. Stat. § 95.03 (2014) provides: "Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void." As a result, in the view of the authors of this article who practice in Florida, most Florida lawyers exclude coverage of waivers of statute of limitations provisions from the scope of their remedies opinions, and the illustrative forms of opinion letters that accompany the Florida Report, *supra* note 10, at Form A-16, Form B-16, Form C-14, and Form D-14, contain a qualification excluding from the scope of the remedies opinion any provision that purports to effect any waiver of any statute of limitations.

63. 79 Del. Laws c. 353, § 1 (2014).

64. Shaw v. Aetna Life Ins. Co., 395 A.2d 384, 386–87 (Del. Super. Ct. 1978).

65. *See, e.g.*, *Studiengesellschaft Kohle*, 748 F. Supp. at 249, 251; *Red Rose Roofing*, 2000 WL 970678, at *1.

66. *See* GRT, Inc. v. Marathon GTF Tech., Ltd., C.A. No. 5571-CS, 2011 WL 2682898, at *15 n.80 (Del. Ch. July 11, 2011).

67. Shahin v. I.E.S. Inc., 988 N.E.2d 873, 874–75 (Mass. App. Ct. 2013).

68. *See* Certainteed Corp. v. Celotex Corp., Civ. A. No. 471, 2005 WL 217032, at *1 (Del. Ch. Jan. 24, 2005) (distinguishing between direct claims for breach of representations and warranties between the contracting parties, which accrue at closing, and claims for reimbursement for third-party claims, which may not accrue until payment is made to the third party).

that have shorter statutes of limitations and that analyze the issue the way the Delaware courts have.

Given the foregoing, opinion givers sometimes include a qualification in an enforceability opinion as to any provision that could be construed as an unenforceable modification of the applicable statute of limitations.

10. Transfer-of-Property Restrictions

Sample Qualification:	**We express no opinion with respect to the enforceability of any provision of the agreement that unreasonably restricts the ability of any person to transfer any property or that purports to render void or of no force or effect any transfers of property in breach of the terms of the agreement.**

Comments

This qualification relates to agreements that contain broad, unusual, or unqualified restrictions on transfer that may rise to the level of unreasonable restraints on alienation. The qualification is not, therefore, usually needed in a typical commercial loan transaction. For example, opinion givers typically do not need to take this kind of qualification as to a typical negative pledge covenant, negative sale, or other disposition covenant contained in a credit agreement with typical exceptions (such as those frequently contained in standard forms of credit agreements). Sometimes, however, collateral documents or other ancillary loan documents may contain more sweeping or unusual restrictions on transfer.

When the covered agreement goes even further than prohibiting transfer by purporting to render the prohibited transfer void or of no force or effect, some opinion givers also choose to state expressly, as in the example set out above, that they express no opinion as to the enforceability of any provision of the agreement "that purports to render void or of no force or effect any transfers of property in breach of the terms of the agreement."[69]

In general, a transfer restriction will be enforced unless it is found to be unreasonable. A typical test for determining the reasonableness of a restriction is by the court's examining "whether the provision is sufficiently necessary to the particular corporate enterprise to justify overruling the usual policy [against restraints on the alienability of personal property]."[70] Although questions of reasonableness are generally questions of fact, case law does provide guidance with respect to some kinds of transfers. For example, in a case where the corporation was a brokerage house member of the New York Stock Exchange, a provision in the corporation's articles of incorporation requiring a shareholder intending to transfer his stock first to seek the approval of the New York Stock

69. *See, e.g.*, U.C.C. § 9-401(b) (2013) (providing that "[a]n agreement between the debtor and the secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect").

70. Dixie Pipe Sales, Inc. v. Perry, 834 S.W.2d 491, 493 (Tex. App. 1992).

Exchange was found by a Texas court not to be "arbitrary, capricious and unreasonable."[71] The common law rule prohibiting unreasonable restraints on alienation has also been applied to rights of first refusal, although a right of first refusal, depending on its terms, may be found reasonable and thus a permissible restriction on transfer. For example, restrictions requiring selling shareholders to notify other shareholders (who have a right to purchase the shares) of the selling shareholders' intent to sell, and the price at which the shares are offered, have been held reasonable when the time period during which the shares are to be offered to other shareholders is short.[72]

Alternatively, if an option to buy another's stock or other property were to have no time limit, specify a purchase price highly disproportionate to the market price, and serve no reasonable commercial purpose, such an option could well be an unreasonable restraint on alienation and if so, would be unenforceable in many jurisdictions.[73]

It should also be noted that there is an extensive body of case law regarding restraints on alienation in the context of real property. Further, the Uniform Commercial Code contains provisions that invalidate certain anti-assignment provisions regarding specific types of personal property.[74]

11. Usury, Liquidated Damages, and Penalty Clauses

Sample Qualification:	**We express no opinion with respect to provisions providing for forfeitures or liquidated damages, and we also express no opinion as to any other remedies to the extent such other remedies are deemed to constitute penalties. [A state-specific usury qualification would be included where applicable.]**

71. Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841, 844 (Tex. 1972).

72. *See* Wildenstein & Co. v. Wallis, 595 N.E.2d 828, 833–35 (N.Y. 1992) (art dealer's right of first refusal to purchase and an exclusive right to consign paintings was reasonable); Metro. Transp. Auth. v. Bruken Realty Corp., 492 N.E.2d 379, 385 (N.Y. 1986) (preemptive right that served a beneficial purpose and was reasonable in terms of duration and price was enforceable); *see also Dixie Pipe Sales*, 834 S.W.2d at 494 (a right of first refusal that advanced the legitimate objectives of both the corporation and its individual shareholders, where only a few shareholders of the corporation were active in the business and were also members of the same family, was reasonable).

73. *See, e.g.*, Lam v. Li, 635 N.Y.S.2d 26, 27 (App. Div. 1995).

74. *See* U.C.C. §§ 9-406 to -408 (2013). Among other things, subject to certain limitations, these provisions render ineffective contractual provisions that prohibit or restrict the assignment or transfer of, or the creation, attachment, or perfection of a security interest in, accounts, chattel paper, promissory notes, lease agreements, health-care-insurance receivables, and general intangibles (including payment intangibles) to the extent that such restrictions are set forth in an agreement with an account debtor (which is defined in section 9-102 to mean a person obligated on an account, chattel paper, or general intangible) or a person otherwise obligated on such assets. A negative pledge covenant in a credit agreement restricting a borrower's ability to dispose of or grant liens on its assets would not typically be invalidated under sections 9-406 through 9-408, since those restrictions are not set forth in an agreement with an account debtor or a person otherwise obligated on such assets (as the lenders would usually not qualify as such). While sections 9-406 through 9-408 may bear on opinions relating to collateral grants made in favor of the lenders, qualifications taken in commercial loan transactions with respect to the creation or perfection of security interests are beyond the scope of this article.

Comments

As confirmed in many bar reports on third-party legal opinion practice, an enforceability opinion rendered in a commercial loan transaction covers matters relating to usury, as well as other laws governing charges for the use, forbearance, or detention of money, unless the opinion giver expressly disclaims an opinion as to such matters.[75] A number of states have generous usury statutes that exempt commercial transactions over a certain size (and that satisfy certain other statutory requirements) from civil and criminal usury regulation.[76] In these jurisdictions, usury qualifications are typically not required in remedies opinions on commercial extensions of credit meeting the applicable statutory requirements. Other states, such as California, Florida, and Texas, have complicated usury

75. *See, e.g.*, *1998 TriBar Report*, *supra* note 11, at 628 (§ 3.5.2(a)(iii)); *see also infra* note 77 (listing other bar association reports).

76. *See, e.g.*, DEL. CODE ANN. tit. 6, § 2301(c) (2013) (providing that there is no limit on the rate of interest which may be legally charged for the loan or use of money where the amount of money loaned or used exceeds $100,000 and where repayment thereof is not secured by a mortgage against the principal residence of any borrower); N.Y. GEN. OBLIG. LAW § 5-501(6) (McKinney 2010) (providing an exemption from civil usury limits (16 percent per annum) for any obligation over $250,000, and an exemption from criminal usury limits (25 percent per annum) for any obligation over $2,500,000); N.C. GEN. STAT. § 24-9 (2013) (providing that a lender may charge interest at any rate and fees and other charges in any amount that the borrower agrees to pay in an exempt loan transaction (where an "exempt loan" means a loan in which (i) the amount of the loan is $300,000 or more, (ii) the borrower is a person other than a natural person, or (iii) the loan is obtained by a natural person for a purpose other than a personal, family, or household purpose)). In addition, section 2306 of title 6 of the Delaware Code provides that no corporation, limited partnership, statutory trust, business trust or limited liability company, and no association or joint stock company having any of the powers and privileges of corporations not possessed by any individuals or partnerships, shall interpose the defense of usury in any action. DEL. CODE ANN. tit. 6, § 2306 (2013).

In Illinois, the Interest Act, 815 ILL. COMP. STAT. 205/1–205/11 (2012), addresses civil usury. In addition, the Criminal Code of 2012 includes a criminal usury provision. 720 ILL. COMP. STAT. 5/17-59 (2012). Neither statute includes an exemption based on transaction size, but they do exempt, among other things, "any loan made to a corporation," 815 ILL. COMP. STAT. 205/4(1)(a); 720 ILL. COMP. STAT. 5/17-59(d) and, subject to certain qualifications, they exempt "any business loan to a business association or copartnership or to a person owning and operating a business as a sole proprietor or to any persons owning and operating a business as joint venturers, joint tenants or tenants in common, or to any limited partnership, or to any trustee owning and operating a business or whose beneficiaries own and operate a business." 815 ILL. COMP. STAT. 205/4(1)(a); 720 ILL. COMP. STAT. 5/17-59(d). In *Bowman v. Neely*, 37 N.E. 840, 841 (Ill. 1894), the Illinois Supreme Court held that to enforce an agreement to add interest accruing in the future to principal would violate Illinois public policy. While *Bowman* has never been overruled, subsequent case law indicates a shift in public policy as exemplified in *Joliet Federal Saving & Loan Association v. Bloomington Loan Co.*, 265 N.E.2d 400, 403 (Ill. App. Ct. 1970), where the court approved a note provision adding interest to principal in the event a monthly payment was missed. Moreover, the Illinois General Assembly approved interest on interest in a section of the Illinois Savings and Loan Act of 1985, 205 ILL. COMP. STAT. 105/5-1 to 105/5-16 (2012), addressing loans and investments that an Illinois savings association may make. The statute reads:

> Usury law inapplicable. No interest, premium, or interest on such interest or premium, or charge which may accrue to an association under the provisions of this Act shall be deemed to be usurious; and the same may be collected in the same manner as other debts in accordance with the laws of this State.

205 ILL. COMP. STAT. 105/5-10.

Accordingly, the Illinois Supreme Court might well decline to follow *Bowman* in a newly arising case. Nevertheless, on the strength of *Bowman*, some Illinois lawyers continue to include a qualification for provisions for compound interest or interest on interest.

laws (and extensive case law interpreting those laws) that may require state-specific provisions in the credit documents, as well as assumptions, exceptions, or qualifications to a remedies opinion addressing their enforceability.[77] It is beyond the scope of this article to try to characterize all of the various state-specific usury requirements and related opinion qualifications that are commonly given and received, which is why the authors have not included a sample qualification relating to usury in the sample language set out above.

However, in many states, including those with very generous usury statutes, other laws related to liquidated damages and similar types of damages resolution may require qualification of the remedies opinion if the agreement provides for charges of this nature. The enforceability of these types of clauses usually turns on their "reasonableness," a matter as to which opinion givers generally are unwilling to opine. Opinion givers commonly qualify the opinion accordingly, unless the opinion giver concludes either that such a qualification is implicit and need not be expressly stated or that the economic remedy at issue is reasonable under the law of the jurisdiction whose law is covered by the opinion.[78]

77. It is common for California opinion givers to assume the existence of those facts necessary to satisfy the requirements for one of the constitutional or statutory exemptions from California usury law. *See, e.g.*, CALIFORNIA SAMPLE OPINION, *supra* note 10, at 6–7 n.16 (discussing the inclusion of assumptions relevant to the enforceability opinion, as it relates to usury law). Where no exemption is available, the practice among California opinion givers is to include a qualification to the effect that "no opinion is expressed with respect to compliance with usury laws or the effect of non-compliance" on the parties to the loan transaction, since, absent any qualification, "an opinion that a loan is enforceable includes an opinion that it is not usurious." *Id.* at 7 n.16 (citing CALIFORNIA OPINION REPORT (EXCLUDING REMEDIES), *supra* note 21, at 20) (cautioning that, where the opinion preparers conclude, in their professional judgment, that the loan *is* usurious, they should consider whether it would be appropriate to give any enforceability opinion at all).

On opinions addressing, respectively, Florida and Texas usury law issues, see FLORIDA REPORT, *supra* note 10, at 163; *Supplement No. 1 to the Report of the Legal Opinions Committee Regarding Legal Opinions in Business Transactions*, BULL. BUS. L. SEC. ST. B. TEX. (Tex. State Bar Bus. Law Section Legal Opinions Comm., Austin, Tex.) Dec. 1994, at 1.

78. *See 2004 TriBar Report*, *supra* note 23, at 1492–93 (stating that when some opinion preparers conclude that the reasonableness of an economic remedy cannot be determined as a practical matter, they routinely include an express exception or assumption in their opinion, whereas other opinion preparers, in like circumstances, regard their inability to make a determination of reasonableness to be so well understood that they follow the practice—unless they have serious doubts about the reasonableness of a particular remedy—of not taking an exception). The TriBar Opinion Committee further concludes that the preferred course is for opinion preparers to deal with the issue of reasonableness explicitly in the opinion. *Id.* at 1493. *Contra* 2007 CALIFORNIA REMEDIES REPORT EXCEPTIONS APPENDIX, *supra* note 10, at A-3 (stating that "such provisions are subject to a test of reasonableness, which is beyond the scope of a legal opinion. An exception with respect to the reasonableness of economic remedies is implied by customary practice and need not be expressly stated."). The *2007 California Remedies Report Exceptions Appendix* goes on to state:

> Nevertheless, if an opinion giver has determined that a particular economic remedy would be unenforceable, an appropriate express exception should be stated; opinion givers do not customarily rely on an unstated exception for purposes of a provision that is clearly unreasonable. An opinion giver should expect to address whether a default rate of interest (e.g., 95% per year), or a provision for the acceleration of future interest without appropriate discount to present value, would be clearly unenforceable, as well as whether any specific requirements for enforceability other than reasonableness—for example, that the provision be separately initialed, or that it be printed in a specified font size (and some of which apply even to commercial transactions)—have been satisfied.

Id.

In some states, acceleration of future amounts due (other than principal) without appropriate discount to present value, late charges, prepayment charges, make whole premiums, and default interest are specifically subject to a reasonableness standard—again, a matter as to which opinion givers commonly are unwilling to opine. In these states, the sample qualification set out above may be expanded to take account of any of these matters provided for in the covered agreement.[79]

C. Qualifications Relating to Federal Law and International Matters

1. Patriot Act[80]

Sample Qualification:	**We express no opinion with respect to the USA Patriot Act of 2001 or any laws relating to foreign assets control or any rules, regulations or orders relating to any of the foregoing.**

Comments

Some credit agreements contain covenants relating to the Patriot Act, such as:

> Each Lender and the Agent (for itself and not on behalf of any Lender) hereby notifies the Borrower that pursuant to the requirements of the Patriot Act, it is required to obtain, verify and record information that identifies the Borrower, which information includes the name and address of the Borrower and other information that will allow such Lender or the Agent, as applicable, to identify the Borrower in accordance with the Patriot Act. The Borrower shall, and shall cause each of its Subsidiaries to, provide such information and take such actions as are reasonably requested by the Agent or any Lender in order to assist the Agent or such Lender in maintaining compliance with the Patriot Act.

Some lawyers are concerned about the enforceability of broad covenants, such as the example set out above, relating to the Patriot Act. They are concerned that such broad covenants, like the last sentence contained in the sample covenant set out above, might be too indefinite to be enforced by a court. They are also concerned that a transaction might violate the Patriot Act if the transaction is funded with funds from any one of a number of specified unlawful activities when the borrower has a certain kind of knowledge about those funds. Other opinion givers do not believe it is necessary to take a Patriot Act qualification because opinion givers commonly assume, without expressly so stating, the absence of fraud or criminal activities, unless the opinion giver has knowledge or notice to the contrary.[81]

79. *See 2004 TriBar Report*, *supra* note 23, at 1491–93 & n.49.

80. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 357 (codified as amended in scattered sections of the U.S.C.) [hereinafter Patriot Act].

81. In lieu of taking a Patriot Act exception to the remedies opinion, some opinion givers take this qualification more broadly as part of their list of excluded laws not covered by the opinion letter in its entirety. Furthermore, some opinion givers take a qualification for the Patriot Act, without making express reference to the Act, by taking a broader exclusion for "any laws, rules or regulations relating to terrorism or money laundering."

2. Comity

Sample Qualification:	**Our opinions are subject to possible judicial action giving effect to governmental actions or foreign laws affecting creditors' rights and remedies.**

Comments

This qualification applies only in transactions in which one or more of the relevant parties is, or is controlled by, a non-U.S. person. This comity exception covers two types of legal qualifications: (1) In *Allied Bank International v. Banco Credito Agricola de Cartago*,[82] the U.S. Court of Appeals for the Second Circuit indicated in dicta that in appropriate circumstances (not present in the *Allied Bank* case) "comity" to the governmental actions or laws of another country could justify a declination by a U.S. court to hear an otherwise appropriate U.S. claim against such foreign country or a national thereof; and (2) the President of the United States has powers under the Trading with the Enemy Act[83] and the International Emergency Economic Powers Act[84] in national emergencies to regulate or prohibit (a) transactions involving property in which a foreign country or a national thereof has an interest and (b) foreign exchange transactions and transfers of credit or payments involving a banking institution.

3. Sovereign Immunity Waivers

Sample Qualification:	**To the extent that the borrower is now an agency or instrumentality of a foreign state that is entitled to immunity from jurisdiction of any court or from legal process with respect to itself or its property, any waiver by the borrower of such immunity is subject to the limitations imposed by the United States Foreign Sovereign Immunities Act of 1976. Further, we express no opinion as to the enforceability of any such waiver if the borrower is not now such an agency or instrumentality, but becomes one at some time in the future.**

Comments

This qualification relates to two concerns relating to a waiver of sovereign immunities under a credit agreement or other document: (i) the limitations on such a waiver under the United States Foreign Sovereign Immunities Act of 1976, as amended ("FSI Act"),[85] and (ii) the uncertainty of a waiver of sovereign

82. 757 F.2d 516 (2d Cir. 1985).

83. Trading with the Enemy Act of 1917, Pub. L. No. 106-1, 40 Stat. 411 (codified at 12 U.S.C. §§ 95a–95b & 50 U.S.C. app. §§ 1–44 (2012)).

84. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701–17 (2012)).

85. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332(a)(2)–(4), 1391(f), 1441(d), 1602–1611 (2012)).

immunities by an entity that is not, at the time of execution and delivery of such agreement or document, an agency or instrumentality of a foreign state, but that does become such an agency or instrumentality thereafter.

Regarding the limitations on a waiver of sovereign immunities under the FSI Act, the Act initially grants to a "foreign state" (which term includes a political subdivision of a foreign state and an agency or instrumentality of a foreign state) a general immunity from "the jurisdiction of the courts of the United States and of the States."[86] The Act then provides that a foreign state will not have such immunity in any case, among others, in which the foreign state "has waived its immunity either explicitly or by implication."[87] However, the Act provides that a foreign state (other than an agency or instrumentality) will not be liable for punitive damages.[88] In addition, the Act prescribes how service in such courts shall be made, and allows the parties to provide for service "in accordance with a special arrangement for service between the plaintiff and the foreign state."[89]

The FSI Act also grants to a foreign state a general immunity "from attachment, arrest and execution."[90] The Act then provides for a foreign state to waive (i) its immunity from attachment in aid of execution or from execution, either explicitly or by implication, but only with respect to "property in the United States of a foreign state . . . used for a commercial activity in the United States" and (ii) its immunity from attachment prior to the entry of judgment explicitly and only with respect to "property of a foreign state . . . used for a commercial activity in the United States" and only if the purpose of the attachment is to secure satisfaction of a judgment and not to obtain jurisdiction.[91]

Finally, the FSI Act provides that certain property of a foreign state is absolutely immune from attachment and from execution: (i) property of a foreign central bank or monetary authority, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution or from execution and (ii) property used, or intended to be used, in connection with a military authority and of a military character or under the control of a military authority or defense agency.[92]

Regarding the uncertainty of a waiver of sovereign immunities by an entity that is not, at the time of execution and delivery of the credit agreement or other document, an agency or instrumentality of a foreign state, it is not clear that, if, as and when such entity thereafter becomes such an agency or instrumentality, the entity's earlier waiver, when such entity was *not* such an agency or instrumentality, will be given effect by a court.

86. *See* 28 U.S.C. § 1604 (2012).
87. *See id.* § 1605(a)(1).
88. *See id.* § 1606.
89. *See id.* § 1608(a)(1).
90. *See id.* § 1609.
91. *See id.* § 1610(a)(1), (d).
92. *See id.* § 1611(b).

4. Judgment Currency

Sample Qualification:	**Although the agreement provides for obligations of the borrower denominated in [a] currenc[y] [ies] other than United States dollars, we express no opinion as to whether a court would award a judgment in a currency other than United States dollars or as to any rate of exchange that might be applied.**

Comments

This qualification applies if the agreement creates or provides for obligations in a currency other than United States dollars ("foreign currency"). The traditional rule in the United States for courts to render judgments on an obligation in a foreign currency is the so-called "home-currency rule," which requires that all awards be denominated in U.S. dollars.[93] Under this rule the question becomes: On what date should the court convert a foreign currency obligation into U.S. dollars? Courts have commonly used one of three dates: (1) the date of the breach of the foreign currency obligation (the "Breach-Day Rule"), (2) the date of the court judgment on the foreign currency obligation (the "Judgment-Day Rule"), or (3) the date of the payment by the debtor of such court judgment (the "Payment-Day Rule").[94] Various courts use various of these rules, although U.S. federal courts have often used the Judgment-Day Rule.[95]

The State of New York, taking a somewhat different approach, amended its laws in 1987 to provide expressly, for the first time, that judgments on a foreign currency obligation are to be rendered in the currency of the obligation; however, the amendment goes on to require the conversion of any such foreign currency judgment into U.S. dollars using the Judgment-Day Rule.[96] Thus, a New York lawyer might express a New York currency exception this way:

> We point out, with reference to obligations stated to be payable in a currency other than U.S. dollars, that (i) a New York statute provides that a judgment rendered by a court of the State of New York in respect of an obligation denominated in any such other currency is to be rendered in such other currency but is then to be converted into U.S. dollars at the rate of exchange prevailing on the date of entry of the judgment and (ii) a judgment rendered by a federal court sitting in the State of New York in respect of an obligation denominated in any such other currency will be expressed in U.S. dollars, but we express no opinion as to the date of the rate of exchange such federal court will apply. Further with respect to both a New York State court or a federal court, we express no opinion as to any rate of exchange that might be applied.

93. *See* Crystal Beal, Comment, *Foreign Currency Judgments: A New Option for United States Courts*, 19 U. PA. J. INT'L ECON. L. 101, 102 (1998).

94. *Id.*

95. *See* Jennifer Freeman, *Judgments in Foreign Currency—A Little Known Change in New York Law*, 23 INT'L LAW. 737, 741 (1989); *see also* Agfa-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518, 1524 (7th Cir. 1989).

96. N.Y. JUD. LAW § 27(b) (McKinney 2002).

Starting in 1989, numerous states have adopted the Uniform Foreign-Money Claims Act[97] ("UFMCA") in substantial part. The UFMCA requires a court judgment on a foreign currency obligation to be rendered in the foreign currency of the obligation, but then gives the debtor the option to make payment on the judgment in U.S. dollars using the Payment-Day Rule.[98] Thus, an example of an opinion qualification under the UFMCA might be:

> We point out, with reference to obligations stated to be payable in a currency other than U.S. Dollars, that (i) pursuant to the [State] Uniform Foreign-Money Claims Act (the "UFMCA"), a judgment on any claim in any foreign currency entered by a [State] court is to be stated in an amount of such foreign currency, except that assessed costs are to be entered in United States dollars, and such judgment is then payable, at the option of the debtor, in either the foreign currency of such claim or in the amount of United States dollars that will purchase that foreign currency on the "conversion date" at a "bank offered spot rate" (as each such term is defined in the UFMCA), and (ii) we express no opinion as to whether a federal court sitting in [the State] will award a judgment in a currency other than United States dollars or as to any rate of exchange that may apply.

There are other issues relating to a court judgment on a foreign currency obligation. What is the exact exchange rate? New York Judiciary Law section 27(b) does not say. The UFMCA says that, if the debtor elects to pay the foreign currency judgment in U.S. dollars, the exchange rate will be "the spot rate of exchange at which a bank will sell foreign money at a spot rate."[99] But what bank to choose? And at what time of day? A possible solution to such questions is given by the UFMCA, which permits the parties to vary the effect of the UFMCA "by agreement of the parties made before or after commencement of an action or distribution proceeding or the entry of judgment."[100] And, finally, for purposes of the U.S. federal courts, are the state currency choice rules substantive or procedural—or so important that currency choice rules warrant the development of controlling federal common law?[101]

5. Currency Indemnity

Sample Qualification:	**We express no opinion with respect to the enforceability of any indemnity against loss in converting into a specified currency the proceeds or amount of a court judgment in another currency.**

97. Unif. Foreign-Money Claims Act §§ 1–19, 13(II) U.L.A. 17 (2002) [hereinafter UFMCA]. As of 2014, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, U.S. Virgin Islands, Utah, Virginia, Washington, and Wisconsin had all enacted such Act in substantial part. 13(II) U.L.A. 2014 Cum. Ann. Pocket Part 13.

98. *Id.* §§ 1(3), 7(b).

99. *Id.* §§ 1(2), 7(b).

100. *Id.* § 3(a).

101. Beal, *supra* note 93, at 114–20.

Comments

This qualification applies if the agreement contains a currency indemnity clause. A currency indemnity clause relates to the desire of a lender of a foreign currency to get repaid in the currency and in the aggregate amount that the lender lent. However, as we have seen in the foregoing part of this article concerning the judgment currency exception, if the borrower fails to repay a foreign currency loan and the lender brings an action against the borrower to collect the loan in a court in the United States, such court may render a judgment in favor of the lender in an amount in U.S. dollars that, when paid and converted into the foreign currency, does not repay in full the loan in the foreign currency. In an effort to protect themselves against this risk, lenders frequently include in their credit agreements a currency indemnity clause. In its typical form, this clause will provide that a borrower's obligation under the credit agreement may be discharged by the payment of a currency other than the foreign currency only to the extent that the lender may, following receipt of such payment, purchase therewith an amount of the foreign currency equal to the full amount of the foreign currency loans. The credit agreement then commonly provides that, to the extent the amount so purchased falls short of the foreign currency amount originally due to the lender, the amount of the shortfall is due and payable by the borrower to the lender as a "separate and independent" obligation.

It is not clear, however, that a federal or state court in the United States would enforce such a "separate and independent" obligation. In the United States, the judicial doctrine of "merger" provides that a plaintiff's original claim under a contract will be extinguished at the time the plaintiff obtains a final judgment on the contract from a court, and the plaintiff's rights under the judgment are then substituted for the original contractual claim. The original claim is thus said to be merged in the judgment.[102] To the extent that a currency indemnity clause purports to create a separate and independent claim under an agreement after a judgment has been rendered on the agreement, such an indemnity clause may raise an enforceability concern in light of the doctrine of "merger."[103]

* * *

102. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. a (1982).

103. *See id.* § 24(1). Opinion givers opining as to the law of a state that has adopted section 5(c) of the UFMCA, such as California, Delaware, Illinois, and North Carolina, might consider adding, at the end of the sample qualification set out in the text in boldface type above, an exception such as the following:

> except to the extent authorized by [Section 5(c)] of the Uniform Foreign-Money Claims Act, as enacted in the State of _____.

Section 5(c) of the UFMCA as adopted in California and Illinois provides: "If, because of unexcused delay in payment of a judgment or award, the amount received by the creditor does not equal the amount of the foreign money specified in the agreement, the court or arbitrator shall amend the judgment or award accordingly." CAL. CIV. PROC. CODE § 676.5(c) (West 2009); 735 ILL. COMP. STAT. 5/12-635(c) (2012). Comment 3 to that section 5(c) of the UFMCA expressly states that the purpose of the provision is to prevent application of the merger doctrine where the cause of a discrepancy between the amount received and the agreed-upon amount is the payor's unexcused delay in paying the judgment.

Conclusion

The authors hope the foregoing discussion will help both opinion givers and opinion recipients when considering third-party opinions to be rendered in the context of U.S.-based commercial loan transactions. While the experiences of the authors are likely to differ from those of some readers, the authors believe that this article reflects the widespread experience of many lawyers in the states in which they practice. Since there are other common qualifications often seen but not addressed in this article, and since opinion practice does change over time, we recognize there is still much more work to be done on this subject.