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Opinion: Managing lender expectations in cross-border transactions

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The scope of legal opinions requested by foreign lenders in our cross-border practice has expanded in recent years, particularly in deals with Canadian lenders. Contrary to U.S. norms, foreign lenders are requiring that their own counsel provide opinions typically rendered by debtor's counsel and, with growing frequency, requesting additional opinions that might seem uncommon to U.S. practitioners.

Pushing boundaries

In lending transactions involving U.S. parties, opinions are almost exclusively provided by the debtor's counsel. Increasingly, foreign lenders require a perfection opinion from their own U.S. counsel. A perfection opinion that is strictly limited to the effects of filing a Uniform Commercial Code (UCC) financing statement should not be problematic for a practitioner familiar with secured transactions. It is imperative to convey to the client that an engagement solely for a perfection opinion does not imply that you will also render an opinion as to organization of the debtor or the authorization and enforceability of documents against the debtor (which may differ from custom in the foreign lender's jurisdiction).

The scope of a perfection opinion in this context should be limited to confirming that a UCC financing statement filed in the appropriate filing office is sufficient to perfect a security interest in collateral that may be perfected under Article 9 of the UCC. The opinion should also (1) note that the financing statement is valid for five years and must be continued within the six months leading up to the lapse date; and (2) describe circumstances that could cause a UCC financing statement to become "seriously misleading," requiring an amendment or new filing.

Practitioners may also include the full gamut of their secured transactions qualifications and exceptions.

A foreign lender might also engage its own U.S. counsel to provide a limited opinion on the organization of the debtor and authorization or enforceability of documents. As lender's counsel, it is critical that the opinion clearly states that the opinion giver is not counsel to the debtor and that it has not independently reviewed the debtor's minutes, books or records. The opinion should rely solely on information contained in an officer's certificate (attaching, at a minimum, formation documents, governing documents, authorizing resolutions and an incumbency) and a current certificate of good standing from the proper jurisdiction. Since a limited opinion involves additional review, preparation is usually more expensive and time consuming than a perfection opinion alone.

A little less common is an engagement where the foreign lender receives a separate corporate opinion from a foreign debtor's U.S. counsel where the foreign debtor's U.S. counsel cannot, or will not, opine as to enforceability of the documents in the governing law jurisdiction. In such a scenario, the foreign lender may ask that its own U.S. counsel provide an enforceability opinion. The practitioner should clearly indicate that the foreign lender is receiving an opinion from the debtor's counsel, that the foreign lender is relying on such opinion of debtor's counsel, and that the opinion letter assumes the due organization and formation of the debtor and due authorization execution of the documents based on the corporate opinion of the debtor's counsel.

The debtor's counsel opinion should also be addressed to the lender's counsel so the lender's counsel may rely upon it.

Foreign concepts

Under Section 5-1401 of New York's General Obligations Law, parties can choose state law to govern a contract as long as certain conditions are met, including the familiar requirement that the contract is valued at $250,000 or more. When foreign lenders request an opinion that a New York court will apply the laws of the state, opinion formulations have tended to directly track the factors set forth in Section 5-1401.

Foreign lenders take their demands one step further in requesting an opinion that no additional qualifications are required in order for the lender to make a loan in this state. Here, drafters can find themselves in a tricky situation because this opinion likely requires an analysis of whether the entity in question is "doing business" in New York. The guidance for this particular opinion is set forth in case law and requires a factual analysis of each situation.

Practitioners should carefully consider whether to offer this opinion based on the resources available to perform the necessary research and analysis, and their familiarity with the deal and the entity in question. Qualifications should be narrowly crafted to specify to the recipient which registrations and qualifications are being addressed.

A foreign lender might request an opinion that a New York court, or a federal court sitting in this state, would recognize and enforce a judgment rendered in a foreign court. The opinion here is also based on case law, though the principles of international comity are relatively clear and established. In our experience, lenders have accepted an opinion that courts "should" accept a judgment if certain outlined factors are met, which makes the opinion palatable for many practitioners. Opinions should be limited to monetary judgments, and qualifications should exclude judgments in a currency other than U.S. dollars and those that include fines and penalties.

Foreign lenders are typically eager to ensure that one or more documents in a transaction are governed by New York law. On the flip side, we have recently seen an increase in requests for an opinion that a state court, or a federal court sitting in this state, would recognize the choice of foreign law in specified loan documents. Such an opinion would likely have to reference factors outlined in case law, including the materiality of the relationship between the contract and the foreign jurisdiction; public policy concerns; and whether the documents expressly choose the foreign law.

Preparation of the opinions discussed above may require substantial legal research, or opinion committee consideration, all of which the opinion giver will want to incorporate into a fee estimate. Since a foreign client might not be familiar with U.S. opinion norms or the rules of secured transactions, educating the client in advance is critical to achieving a projected closing date and staying within a legal fee quote.

See the American Bar Association report titled “Cross-Border Closing Opinions of U.S. Counsel”.

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