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A Guide to the questions to be addressed when providing opinion letters on English law in financial transactions

Introduction

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to regulatory and governmental bodies, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a wide range of consultations on issues of importance to its members through its 18 specialist Committees. A working party of the CLLS Financial Law Committee, made up of solicitors who specialise in large and complex financial transactions and risk-management issues, has prepared this Guide to assist law firms practising in the City of London. The membership of the working party is set out on page 16 below.

Purpose of this Guide

1. Formal legal opinions are requested in numerous financial transactions. They can frequently involve considerable discussion and sometimes difficulty. The parties may have differing expectations as to who should give the opinion, in what terms and for whose benefit.

2. This Guide suggests the questions which a law firm practising English law should consider addressing when seeking or providing an opinion letter under English law in a financial transaction, and explains the key considerations which might be relevant in answering them. It seeks to save time and costs for law firms and clients by explaining the issues and how they might be dealt with. It is not intended to lay down rules or a code of conduct. It is expressly recognised that it is entirely for each law firm to decide on its own policy for providing opinion letters and that the practice of individual firms varies and will continue to evolve.

3. This Guide is concerned primarily with opinion letters delivered by a law firm to its client or, at its client's request, to a third party in relation to a financial transaction, with the intention that:

   (a) the opinion is to be relied upon, or capable of being relied upon, by its client or the third party, for example, in satisfaction of a condition precedent to the completion of a financial transaction or the advance of funds; or

   (b) reference will be made to the opinion in a public document or to obtain a debt rating.

4. This Guide does not extend to opinion letters on corporate or property transactions. Opinion letters or declarations requested in connection with an application for the listing of securities,[1] the satisfaction by an instrument or agreement of regulatory capital

[1] Paragraphs 2.2.1 and 2.2.2 of the UK Listing Rules or Rule 10(b) - 5 of the US Securities Act 1933.

requirements[2] or the criteria for contractual netting[3] or credit risk mitigation by use of financial collateral,[4] are outside the focus of this Guide. Certificates of title (and reports on title) relating to land, replies to auditor's enquiries and due diligence reports, also fall outside the scope of this Guide. Further, while many of the issues in this Guide will be relevant to in-house lawyers, additional factors may apply in relation to opinion letters requested from them[5].

5. This Guide relates to formal opinion letters of the type described above. There is an important distinction between a formal opinion letter and a letter of advice. A client may ask for an "opinion" when the client means a letter of advice (an "opinion" in the sense typically given by Counsel). Written advice to a client for its sole use on points of law or on its legal position also fall outside the scope of this Guide.

6. This Guide takes into account the English professional conduct rules which must be complied with by a law firm when considering whether to provide an opinion letter and, if so, in what terms. The professional conduct rules have the force of law and are an important factor in determining the approach to be taken when giving English law opinions.[6]

What type of opinion letters are covered and what is the general approach?

7. Opinion letters in financial transactions vary in scope but typically address one or more of the following:

   (a) Capacity and authority: for example, that a company is validly existing, that it has the necessary corporate power under its constitutive documents to execute and perform the transaction document to which the opinion relates, and that the necessary corporate action has been taken to authorise the execution of the transaction document by or on behalf of the company.

   (b) The legal effect of the transaction document: for example, that it creates valid, binding and enforceable obligations (which will usually require reservations).

   (c) Tax: for example, that the transaction document will not be subject to stamp duty.[7]

   (d) Governing law and jurisdiction: for example, that the law of the jurisdiction whose laws are selected to govern the transaction document has validly been chosen, that the submission by the relevant party to the courts of that jurisdiction is binding on it, and that a judgment obtained from such a court can be enforced or sued upon in the courts of the jurisdiction to which the opinion letter relates.

8. It is appropriate to consider, before requesting another law firm to provide an opinion letter or to address an issue in an opinion letter, whether, if the roles were reversed, the requesting law firm would itself be prepared (and permitted under professional conduct rules) to give the opinion requested or address the relevant issue in any particular form or at all. This approach – sometimes called the "Golden Rule" – can avoid many of the difficulties which arise and so save costs. The law firm acting for the recipient of the opinion would not be expected to press the law firm providing the opinion for an opinion that it would not be prepared to give itself. It is undesirable for an opinion provider to be put in the dilemma of being asked to provide an opinion which goes further than is justified, particularly where, if the law firm declines to give the opinion, this would jeopardise completion of the transaction.

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2 FSA Handbook GENPRU 2: Section 2.2.159

3 FSA Handbook, BIPRU, Sections 5.3.3 and 13.7.6

4 FSA Handbook, BIPRU, Sections 5.2.2 and 5.4.11.

5 The form of opinion letter sought from in-house counsel may differ from that which an external law firm may be required to give, because in-house counsel may have a greater knowledge of the company or the documents on which he or she is asked to opine.

6 See in particular paragraphs 14 to 26 below.

7 Opinions on withholding tax are less frequently requested and are given mainly in the case of structured financial transactions or transactions involving the issue of securities.

9. If a law firm is instructed to seek an opinion which goes beyond what that law firm itself would be willing to say, it might explain to its client that this approach would conflict with the above principle, that it might give rise to issues under professional conduct rules (see paragraphs 14 to 26), that it is unlikely to assist the client in practice and could lead to difficulty and greater costs. This could result in the scope of the opinion becoming part of the commercial negotiation which would rarely be appropriate. An attempt to press a law firm to provide a more robust opinion than it was comfortable to provide would not change the law and could make it harder for the recipient of the opinion to claim that it had relied on the opinion or that, in view of the opinion provider's reluctance, it was reasonable for it to do so.

10. Whilst differences of approach can cause different expectations, particularly in cross-border transactions, it is suggested that difficulties can be minimised in relation to English law opinions if law firms address the following questions:[8]

(a) what opinion letters are required, who should provide them and who may rely on them?

(b) what professional conduct rules must be observed when deciding whether to provide an opinion letter and, if it is appropriate to do so, to whom should the opinion letter be addressed?

(c) what issues need to be considered when a law firm is requested to provide an opinion letter to a third party?

(d) what is the purpose of the opinion letter?

(e) what is the proper role of the opinion provider?

(f) what general considerations apply when preparing an opinion letter?

(g) what approach should be taken in an opinion letter on factual issues?

(h) what is the proper scope of the opinion letter on legal issues?

(i) to what extent does the scope of the opinion letter differ in a cross-border transaction?

(j) how should differences in opinions practice be reconciled in cross-border transactions?

(k) to what type of legal entity does the opinion letter relate?

(l) what is best practice when settling the form of an opinion letter?

These key considerations are explained below.

What opinions are required, who should provide them and who may rely on them?

11. The approach to giving opinion letters may vary from jurisdiction to jurisdiction, because legal practitioners in each jurisdiction are bound by their own separate professional rules and because the practice of giving opinion letters may have developed differently. In particular, there is a significant difference of practice as between the USA and England. The US approach is to expect more from the borrower's legal advisers than the lender's.

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[8] For comparative purposes, useful articles on this subject include "Principles for giving opinion letters on English law in financial transactions" by Geoffrey Yeowart, Butterworths Journal of International Banking and Financial Law, May 2003; "It's Time To Streamline Opinion Letters" by Donald W. Glazer, Business Law Today, November/December 1999. "Opinion Letters: An English Viewpoint" by Martin Read, City Solicitor (circa 1990); "Legal Practice - Share Acquisitions", The Law Society's Gazette, 30 June 1993; "Opinion Letters: Practical Hints" by a Joint Working Party of the City of London Law Society's Banking and Company Law Sub-Committees, The Law Society's Gazette, 7 September 1988; "City Comment" by Jonathan M. Lewis, The Law Society's Gazette, 18 November 1987; "And If You Want My Opinion…." by Richard Youard, Euromoney, September 1982; "Legal Opinions in Business Transactions - An Attempt to Bring Some Order Out of Some Chaos" by James J. Fuld, The Business Lawyer, April 1973.

A lender in a US financial transaction (whether domestic or cross-border) will often require the borrower (as a condition precedent to closing or drawdown) to provide a legal opinion for the benefit of the lenders from the borrower's legal advisers on the enforceability of the financial documentation (a “third party opinion").[9] This is contrary to the English practice where the opinion is normally given by the lender's own legal advisers.

12. English law opinions practice is based on the expectation that, under the normal solicitor - client relationship, a law firm acting for one party will not be requested to provide an opinion letter to the other party to the transaction where that party is being separately advised. The other party's own legal adviser will be responsible for advice on legal issues affecting that party and third party opinions are warranted only in limited circumstances. Even if a party is not currently employing an English law firm, it may often be best for it to obtain full independent advice from an English law firm on matters affecting its position rather than expect them to be dealt with in an opinion letter from the law firm acting for the other side. This is generally in the client's interests as it avoids any confusion arising from inconsistent responsibilities. The client's law firm is likely to owe duties to its client which go well beyond what is stated in the opinion letter.

13. Exceptions to this general expectation may occur where it is convenient and saves costs or where market practice has adopted a different approach[10] and, in each case, where giving the opinion would be consistent with professional conduct rules. There are differing views as to the extent of the exceptions. One exception recognised by some (but not all) law firms is that, if one party requires an opinion letter only on the capacity and authority of the other party to enter into the transaction documents, it may in certain cases be most cost efficient for the law firm acting for that other party (or its in-house lawyer) to provide the opinion letter. An example is where the party requesting the opinion letter is incorporated overseas and has no English legal advisers of its own (see paragraph 30). Exceptionally, circumstances can also arise where it may sometimes be recognised as appropriate for the law firm that drafted certain types of document to opine on their validity in order to avoid disproportionate costs otherwise involved if another law firm had to do so.

What professional conduct rules must be observed when deciding whether to provide an opinion letter and, if it is appropriate to do so, to whom should the opinion letter be addressed?

14. A law firm must comply with applicable professional conduct rules and consider whether the giving of an opinion letter to a third party is in the best interests of its client and whether it would involve a conflict of interest or a breach of confidence.

15. The Principles and Code of Conduct for Firms (the “Code”) published by the Solicitors Regulation Authority[11] (“SRA") require, inter alia, that a solicitor will act with integrity and in the best interests of each client. The Code also requires that a firm of solicitors must not act where:

    (a) a firm's duty to act in the best interests of a client in relation to a matter conflicts, or there is a significant risk that it may conflict, with that firm's own interest in relation to the same or a related matter ("own interest conflict"); or

    (b) a firm owes separate duties to act in the best interests of two or more clients in relation to the same or a related matter and those duties conflict, or there is a significant risk that those duties may conflict, in relation to that matter or a particular aspect of it ("client conflict").

    These duties are mandatory. There are no exceptions to the ban on own interest conflict. In the case of client conflict, a firm may not act for both clients subject to two specified

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9 Sometimes referred to as an "across the table" opinion.

10 It is not appropriate to list examples as market practice may vary from market to market and may change with the passage of time.

11 The Code came into effect on 25th November 2019. See in particular paragraphs 6.1 and 6.2 *[link: www.sra.org.uk/solicitors/standards-regulations/code-conduct/].* The Code should be read in conjunction with both the Guidance *[link: www.sra.org.uk/solicitors/guidance/ethics-guidance/conflict-interest/]* and the Glossary *[link: www.sra.org.uk/solicitors/standards-regulations/glossary/].*

exceptions permitted by paragraph 6.2 of the Code. The SRA has issued Guidance to help firms understand their obligations and how to comply with them.[12]

16. The Code also provides that a firm of solicitors has an on-going duty to keep the affairs of current and former clients confidential except where disclosure is required or permitted by law or the current or former client consents.

17. An individual lawyer acting for a client on a matter has a duty to make the client aware of all information material to the matter of which the individual has knowledge, subject to the exceptions permitted by paragraph 6.4 of the Code. This might conflict with the duty of confidentiality to another client or former client. If these duties conflict, the duty of confidentiality takes precedence but does not prevent a breach of the duty to disclose. A firm may not act for a client in a matter where that client has an interest adverse to the interest of another current or former client for whom that firm holds confidential information which is material to that matter, unless effective measures have been taken which result in there being no real risk of disclosure of the confidential information or the current or former client has given informed consent in writing to the firm acting, including to any measures taken to protect their information.[13]

18. A solicitor is also subject to the general law protecting confidential information, under which a person who receives information in circumstances where he or she has notice that it is confidential can be restrained from disclosing it or from making use of it.

19. Care must therefore be taken that the giving of a third party opinion is in the client's best interests and would not of itself give rise to a possible conflict of interest. In addition, the opinion must not disclose any material information confidential to the client without the client's informed consent. An opinion should be given to a third party only where it is possible to do so in compliance with the Code. If a third party opinion involves extra time and cost, this should be discussed with the client.

20. The scope and content of a proposed third party opinion is an important factor in determining whether its delivery is in a client's best interests. The circumstances of the transaction may sometimes be such that the opinion may not be in the client's best interests, unless it is limited to matters of capacity and authority and possibly governing law and jurisdiction. Difficulties are most likely to arise where an opinion is sought from a law firm on the validity of the transaction documents against its own client. If, for instance, the opinion letter extends to the legal effect of a document, this might result in the opinion having to identify deficiencies or risks affecting the other party which it would not necessarily be in the client's interest to reveal. A failure to do so could render the opinion misleading to a third party by reason of the omission.[14]

21. A law firm should also consider whether the delivery of a third party opinion could affect its ability to act for its own client in the event of a dispute arising between the client and the third party under the agreements to which the opinion relates. For example, a third party opinion might compromise the law firm's ability to raise particular arguments on its client's behalf in any such dispute (or may be perceived as doing so). Whether the delivery of a third party opinion might create a conflict of interest in the future or otherwise inhibit the law firm's ability to act is another important factor to be taken into account in determining whether the law firm should deliver such an opinion.

22. If a law firm does provide an opinion letter to a third party, it may want the opinion letter to record that it has not advised the third party on its specific position or rights and obligations under the relevant documents (or on the contents of the opinion) and owes no duty of care or other responsibility to the third party except in relation to matters expressly covered by the opinion. Permitting a third party to rely on an opinion letter does not normally, depending on the context, imply a wider responsibility in relation to the transaction and its commercial and financial implications.

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12 The Guidance on conflict of interests and confidentiality was updated on 2nd March 2020.

13 Paragraphs 6.3 to 6.5 of the Code.

14 Paragraph 1.4 of the Code states: "You do not mislead or attempt to mislead your clients or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client)". Paragraph 2.4 also states, albeit in the context of court and resolution proceedings: "You only make assertions or put forward statements, representations or submissions to the court or others which are properly arguable."

23. If a law firm is requested to provide an opinion letter on the enforceability of a document that it did not prepare or advise on, it may legitimately question whether this is appropriate where the firm responsible for the document is capable of doing so, or where the document has been prepared by a party itself.[15] In addition, if a document is a standard form provided by a trade association or other body, it may be appropriate for the person requesting the opinion to rely on an enforceability opinion from the legal advisers to that trade association or body instead. If the law firm is willing to provide an opinion, it may wish to include a statement that it was not involved in the negotiation or preparation of the document (or the transaction to which it refers) and that it expresses no opinion as to whether the terms of the document are adequate to fulfil the intentions of the parties with respect to the document.

24. Where copies of an opinion letter may be made available by the addressee to third parties such as its auditors, a body regulating the conduct of its business or any rating agencies, the opinion provider will need to decide whether or not reliance by a non-addressee is permitted and, if so, to what extent. It may typically be sufficient for the auditors, regulatory authority or rating agencies to know that the addressee has obtained the opinion and to be aware of its contents. In such cases a law firm typically states in the opinion letter that its contents may be disclosed to such recipients for information only and may not be relied upon by them. In the case of a cross border transaction, the provider of the opinion may need to consider whether the distinction between disclosure for information only and reliance will be recognised under the law of other relevant jurisdictions.

25. Where the addressee requests a statement that it may disclose the opinion letter to its affiliates, the opinion provider will need to decide to what extent such disclosure is appropriate where the affiliates are not involved in the transaction. There are differing views on this question. Where disclosure to affiliates generally is permitted, it may still be questioned whether disclosure to professional advisers and auditors of an affiliate is also necessary.

26. Disclosure specifically to directors, officers and employees of an addressee or affiliate is unnecessary where the addressee or affiliate is itself entitled to disclosure.

What other issues need to be considered when a law firm is requested to provide an opinion letter to a third party?

27. If a law firm is asked to prepare a third party opinion, the following issues must be borne in mind so that the law firm's opinions do not go farther than appropriate:

    (a) applicable professional conduct rules must be observed where, for example, a request for a third party opinion may give rise to a possible conflict between the law firm's duty to its own client and the responsibilities assumed by it to the recipient of the opinion (see paragraph 20 above);

    (b) the opinion must adequately reflect the reservations expressed by the law firm orally or in correspondence to its own client (prior to the conclusion of the transaction) to ensure that the law firm does not accept a greater responsibility to the non-client addressee in the opinion letter than to its own client[16];

    (c) the giving of the requested opinion letter may have the effect that responsibility for advising the addressee in relation to certain features of the transaction is transferred inappropriately from the law firm acting for the addressee to the opinion provider (being the law firm acting for the other party); and

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[15] It may also be relevant to consider paragraphs 12,13 and 22 in this context.

[16] The opinion provider will rarely know to what extent the third party's own legal advisers have raised these issues with their own client. There may be a risk that the opinion provider's own client may ask or expect that certain issues not to be revealed or that, if they are revealed, they be treated in a minimalist way. If this would mislead, it would be contrary to paragraph 1.4 of the Code cited in the preceding footnote.

(d) the third party recipient of the opinion will not necessarily be bound by any limitations on the scope and extent of the law firm's responsibility which are contained in the opinion provider's letter of engagement with its own client[17].

The greater the number of parties permitted to rely on an opinion letter, the greater the consideration that needs to be given by the opinion provider to the question of its responsibility, particularly if the opinion letter is addressed to a class of persons who cannot be identified at the time that the opinion is given.

28. It should be borne in mind that, if the law firm issuing the legal opinion to the non-client and that non-client's own law firm are both negligent, issues of contribution may arise as to any loss arising from that negligence.

29. Where two law firms are involved in a financial transaction, it is unusual in England for the lender to ask for an opinion letter on the same legal questions from the borrower's solicitors in addition to the opinion letter that it would expect to receive from its own solicitors. If a law firm is requested to provide a "parallel" opinion to a third party, it may do so only in compliance with the professional conduct rules (described above at paragraphs 14 to 26).

30. Law firms may be asked to provide opinion letters on separate legal questions. For example, where an English borrower or guarantor is a party to documents governed by foreign law but no other English law firm is involved, it may be appropriate for the English law firm acting for a borrower or guarantor to deliver to the lender an opinion on the borrower's or guarantor's corporate capacity and (assuming the authenticity of board minutes and other documents supplied to it) the authority of relevant persons to execute the document on its behalf. If the law firm is asked to go further and opine on registrability of the documents, non-violation of law, effectiveness of the choice of law, reciprocal enforcement of court judgments, withholding tax and/or stamp duty, it may wish to consider whether it is appropriate for it to do so or whether the lender can take independent legal advice on these issues instead. A third party opinion limited to capacity and authority is accepted as sufficient in most such cases. Opinions dealing with the legal effect of a document may give rise to difficulty and a conflict of the kind referred to in paragraph 20 above.

31. A third party opinion may sometimes be requested in a transaction where the opinion relates to legal aspects which are peculiarly within the knowledge of the law firm acting for one party and which cannot be dealt with by the law firm acting for the other party without undue inconvenience and expense. So, for example, it may be appropriate to request from the law firm acting for a private equity investor or manager an opinion letter as to the constitution and powers of its client's investment fund where this is a limited partnership, trust or other non-corporate vehicle or where the constitutive documents include information which is not publicly available. There are differing views on the practice to follow.

What is the purpose of an opinion letter?

32. The primary purpose of an opinion letter is to state conclusions of law as to the ability of a party to enter into and perform its obligations under an agreement and/or the legal effect of the agreement. An opinion letter often serves to confirm that the assumptions about the legal position made by a party in deciding to enter into an agreement are well founded. It may also confirm what contractual relationship will be created by the documentation. Most opinion letters are subject to at least some qualifications. A qualification serves as an aid to risk management by assisting a party in the evaluation of the legal risk or legal uncertainties in the transaction. If a major problem is identified, it

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[17] An engagement letter may, for instance, include a proportionality provision to the effect that, where a client has a right to claim from the law firm and other advisers but its claim against the other advisers is subject to a limitation on liability, that will not increase the amount it can recover from the law firm.

may lead to the transaction being restructured so that the problem is avoided or it may lead to a commercial decision to proceed or not to proceed with the transaction.[18]

33. An opinion letter often states conclusions of law without explaining the legal analysis leading to those conclusions. Closing opinions in financial transactions do not normally address the legal consequences if, for example, the contracting party covered by the opinion were to enter into insolvency proceedings. The possibility of a party entering into insolvency proceedings would involve complex legal issues. The time and expense involved in the analysis of these issues may be disproportionate in the context of the transaction in question. Thus, the opinion letter will include a qualification that any opinion is subject to all provisions of insolvency law and other laws affecting creditors' rights generally.

34. An opinion explaining the legal analysis (a "reasoned opinion") may be requested in the case of securitisations or netting arrangements or otherwise to satisfy the requirements of rating agencies or regulators. A reasoned opinion may be required to address the impact of insolvency proceedings on the enforceability of contractual obligations, in which case specific qualifications will be necessary to identify the insolvency issues which may arise. A reasoned opinion may also be required to confirm that a disposal or transfer of an asset constitutes a valid sale or absolute title transfer, sometimes referred to as a “true sale opinion”. A reasoned opinion will state not only conclusions of law but summarise the legal analysis supporting those conclusions.

What is the proper role of the opinion provider?

35. The views contained in an opinion letter are expressions of professional judgment on the legal issues addressed and not guarantees that a court will necessarily reach any particular decision. The provider of an opinion letter may be liable to the addressee if the opinion is negligently given, but is not necessarily negligent merely because an opinion proves to be at variance with a decision ultimately reached by a court at a later date.

36. The provider of an opinion letter is not an insurer against risks which may affect the parties. The recipient of the opinion should not regard the law firm providing the opinion as effectively an underwriter of its client's contractual rights or obligations. A legal opinion cannot rectify a deficiency in a transaction.

37. The delivery of an opinion letter should not be regarded as an implied "representation" that the law firm is not aware of anything else which could be material to the transaction. The recipient of an opinion letter from a law firm should not regard the opinion as conferring that law firm's seal of approval on the legal aspects of the transaction. Equally, a recipient might be mistaken in assuming that a law firm would not give an opinion unless it was satisfied as to the legal aspects of the transaction or that there were no undisclosed potential problem areas. For example, the delivery of a legal opinion that a party's obligations under the transaction documents are "enforceable" does not mean that there can be no dispute as to their meaning.

38. Where a law firm has been instructed by the arranger of a syndicated loan or the lead manager of a bond issue, it will be customary for the opinion letter to be addressed to the original lending syndicate or the co-managers of the issue. Often the identity of the lending syndicate or the co-managers may not be known until shortly before signing (and, where the loan is underwritten, it may even be the case that the identity of the lending syndicate is not known until after signing). The syndicate members or co-managers may, however, incorrectly assume that the law firm is acting for them and that a solicitor/client relationship has been created with the consequential wider duties and responsibility of the law firm arising from that relationship. In practice the law firm may have given advice on specific issues which have arisen in respect of the transaction solely to the arranger or lead manager and acted solely on their instructions. These issues may not have been

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[18] In the case of an issue of securities, the legal opinion has an additional purpose. If the managers or underwriters of the issue were sued by an investor alleging negligence in their handling of the issue because of a legal problem, the fact that they had received advice or a legal opinion addressing the point in question should assist them in demonstrating that they had not been negligent in that regard, provided that they had relied on the opinion and that it was reasonable for them to have done so.

discussed or raised with the syndicate members or management group. A law firm may therefore choose, without derogating from the contents of the opinion letter itself, to identify clearly in the opinion its client or the entity on whose instructions it has acted or, where that entity has multiple roles in a transaction, the role or roles in relation to which the law firm has advised.

What general considerations apply when preparing an opinion letter?

39. In order to save time and costs, it is sensible for a law firm involved in a financial transaction to agree with its own client at an early stage the proper scope of the opinion letter to be given to the client and/or any third party by that law firm or, if appropriate, by the law firm acting for the other party. Experience shows that a failure to address this issue at the outset can lead to unnecessary complications later. The law firm from whom the opinion letter is requested should be given a reasonable opportunity to consider the questions on which it is to be asked to opine. The contents of the opinion letter should be thought out well in advance and not produced (and reviewed) under time pressure. Where giving a third party opinion, the opinion provider should always consider consulting its client and obtaining approval of the form of opinion to be issued to the third party before it is sent to the third party or its advisers for comment.[19]

40. As the issues involved are largely technical, the contents of the opinion letter can usually be settled between the opinion provider and an in-house lawyer or experienced officer of the client (or, where the opinion is being addressed to a third party, the law firm acting for it). While clients may wish to discuss the scope of an opinion letter, its contents and language are ultimately a matter for the opinion provider.

41. Where completion of a transaction is conditional upon the delivery of a law firm's opinion letter, it is sensible for the terms of the opinion letter to be finalised as to all matters of substance before the contractual documents are signed. Failure to do this could well place the law firm in an invidious position if the delivery of its opinion is the only outstanding condition precedent and its refusal to give an opinion in the form required by the other party would lead to the collapse of the transaction.

42. An opinion letter should be dated with the date of issue. An opinion letter speaks as to the law in force at its date. An opinion letter provider has no obligation to update an opinion to cover subsequent events or legal developments.

What approach should be taken in an opinion letter on factual issues?

43. An opinion letter should generally be given only on specific questions of law and not on questions of fact. The provider of an opinion letter is not a warrantor of factual matters. Similarly, in order to avoid the costs of investigating factual matters (which may often be disproportionate to the benefit), an opinion letter is invariably expressed to be based on relevant factual assumptions. Care should be taken that the assumptions are appropriate to the circumstances of the transaction. An assumption should not be made if the opinion provider knows or has reason to believe that it is factually untrue.

44. The distinction between law and fact is fundamental. Law firms should consider whether or not it is appropriate to provide an opinion letter in relation to matters of mixed fact and law or whether these should be more properly covered by assumptions in the opinion letter or warranties given by one party to the other in the transaction documents. For example, questions concerning title to assets or the status of shares, including whether they have been "validly issued" or are "fully paid", would usually be covered by warranties rather than a legal opinion. Equally, an opinion letter may contain an assumption as to the centre of main interests[20] of a party to the transaction documents. This may be supported by a warranty and/or an undertaking in the transaction documents. It would not

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[19] Paragraph 3.1 of the Code states: "You only act for clients on instructions from someone properly authorised to provide instructions on their behalf. If you have reason to suspect that the instructions do not represent your client's wishes, you do not act unless you have satisfied yourself that they do. However, in circumstances where you have legal authority to act notwithstanding that it is not possible to obtain or ascertain the instructions of your client, then you are subject to the overriding obligation to protect your client's best interests."

[20] This is relevant for the purposes of the Regulation (EC) No 1346/2000 on Insolvency Proceedings and other legislation which uses the concept of COMI but only for so long as it is applicable in English law.

normally be the subject of the opinion itself. Similarly, it is generally inappropriate for a law firm to be asked to give an opinion that a company is not engaged in litigation. In exceptional cases where an opinion as to litigation is given, it is usually limited to specific arbitration or court proceedings which the law firm is conducting on the company's behalf and, if appropriate, dealt with in a separate report.

45. The provider of an opinion letter will not normally have personal knowledge of all factual information relating to its client and will not be expected to conduct a factual enquiry for the purpose of giving the opinion letter. If a law firm is willing to address mixed questions of fact and law, it will wish to consider what assumptions are necessary to ensure that its responsibility is limited to its opinions on matters of law.

46. The practice of asking a law firm to give an opinion as to factual matters based on certificates or statements given to the law firm is not generally regarded as acceptable in England. If comfort is required on questions of fact by the party requesting the opinion, a common practice is for that party to seek a certificate from an authorised officer of the company or a certified copy of minutes of a board meeting of the company. The law firm acting for the company can advise its client on the form and content of the certificate or board minutes. If that law firm is itself asked to provide an opinion to the other party in reliance on a certificate or minutes from its client, the third party might wrongly assume that the law firm had itself verified the certificate or minutes. Moreover, it might be more difficult in those circumstances for the law firm independently to advise the company in relation to the certificate or minutes.

47. Although it is for each law firm to decide its own policy, a law firm should consider whether or not it is appropriate to provide an opinion on factual matters even if this is expressly limited to facts within the law firm's actual knowledge of a client's affairs. The factual statements requested may require a degree of knowledge of the client's affairs which the law firm does not possess. An opinion "to the best of the knowledge of the firm" still imposes responsibility for actual and imputed knowledge.[21] Further, except in a small law firm, such knowledge may be spread amongst many different partners and employees and it may not be practicable for them all to be consulted. If factual statements are to be included, it may also be necessary to carry out a detailed check of files covering a long period, perhaps involving offices in a number of jurisdictions; in such a case, the check could be time consuming and expensive and, at worst, impractical to perform.

48. An opinion letter usually focuses on specific legal questions and does not express general opinions. A law firm should seriously consider whether or not it is appropriate to provide an opinion that, for instance, an agreement 'does not infringe or conflict with any other agreement, instrument or court order or decree binding the company'. This statement would, if given in unqualified form, require an investigation of all relevant contracts of the company and involve questions of fact such as whether a borrowing limit or financial ratio has been complied with. Such a legal audit would add considerably to the expense of providing an opinion. As a matter of English legal practice, any statement of this type could be given only in an exceptional case, where the agreements or instruments (for example, trust deeds) are specified in the opinion, where they are governed by English law and where the law firm is fully familiar with their terms.[22]

49. The provider of an opinion letter in a transaction including a prospectus may be asked to confirm that certain sections of the prospectus relating to legal matters are an accurate summary. This is driven by the fact that issuers and managers may be liable to investors for misstatements in a prospectus. The opinion provider will normally wish to consider in each case whether it is appropriate for the opinion letter to give such confirmation, including whether the relevant sections deal only with matters of law, whether the sections

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21 The addition of the words "having made all reasonable enquiries" would be even more onerous, since it would extend to constructive knowledge.

22 In the United States, such opinions are given only with respect to specified contracts (usually listed in the opinion), only state that the agreement 'will not breach or constitute a default under the agreement', and are based on a customary practice understanding that the opinion provider is reading and interpreting all such agreements in accordance with their 'plain meaning' as they would be interpreted under the law covered by the opinion (rather than the law under which the agreement would actually be interpreted).

can be said to be sufficient to constitute a "summary" and whether the law firm should accept responsibility for their accuracy.

What is the proper scope of an opinion letter on legal issues?

50. An opinion that an agreement creates legally binding and enforceable obligations lies at the heart of most opinion letters, except those which are limited to formal validity.[23] Although a legal opinion may state that an agreement is "enforceable", English law would not generally enable an opinion to be given that an agreement is enforceable "in accordance with its terms"[24]. One reason is that specific performance is an equitable remedy and an English court has a discretion whether to order specific performance or award damages instead. An opinion that an agreement is "enforceable", without more, does not imply a view as to how its terms would be interpreted by a Court, nor imply that any obligations would be specifically enforceable.

51. It is often regarded as inappropriate for a law firm to give an opinion as to the nature and effect of security or its registrability, unless it has been or is responsible for preparing and, if applicable, registering the security documents. Even if a law firm has prepared the security documents, it may be unwilling to opine on priority, unless the legal position is capable of being established conclusively by priority searches at the relevant registry (as, for example, in the case of mortgages of registered aircraft or land). The priority of security can depend on whether such security is legal or equitable, whether it is fixed or floating, whether the party taking the security has notice of a negative pledge, whether notice of a charge over a debt (or other chose in action) has been given to the debtor, the nature and location of the assets secured and, where relevant, the time of its creation or registration. Whether security expressed to be fixed will be recharacterised as floating is a question of mixed law and fact and will not usually be the subject of an opinion, unless the factual matters are assumed. Equally, a law firm may be unwilling to give an opinion as to the ownership of charged assets, unless it has investigated title (which is only practicable in relation to certain types of asset).

52. A statement that a company's obligations under a financial document will rank pari passu with its other obligations is generally made only with qualifications and is often not made at all. It is not appropriate where the opinion relates to secured obligations, since those obligations will, subject to certain exceptions in the case of floating charges,[25] rank ahead of obligations owed to the general body of creditors (to the extent that those secured obligations are recoverable out of the relevant charged assets). In other cases, differing approaches may be taken. One approach is to give this opinion but qualified to the effect that the specified obligations will rank at least equally with the obligor's other unsecured and unsubordinated obligations except to the extent that those obligations are accorded preferential status by law and subject to applicable law relating to insolvency. These qualifications mean that the scope of the opinion is very limited.[26] Another approach is not to provide a pari passu opinion (except perhaps in a reasoned opinion), because the question of ranking is relevant only if the obligor becomes unable to pay its liabilities and most opinion letters include a general insolvency qualification (see paragraph 33) and because many opinions will not express a view on questions of priority (see paragraph 51). The question of ranking is often covered by a representation from a contracting party instead.

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23 A statement that an agreement is legally binding means that it must not be void or voidable because, for instance, it is ultra vires, or is unauthorised or improperly executed, or a necessary consent is lacking, or it conflicts with applicable law, or can be rescinded for misrepresentation, duress etc. A statement that an obligation is enforceable is generally accepted to mean that it is actionable before a court in the relevant jurisdiction. An agreement may be valid but not enforceable if, for instance, the agreement is stampable and has not been duly stamped.

24 This is another example of the differences between English and US opinions practice. Under US practice a statement that obligations are "valid and binding" or "valid, binding and enforceable" is sometimes considered to be the equivalent of "enforceable in accordance with its terms". Opinion providers often choose to make clear that an English opinion letter does not have that meaning.

25 Sections 176A and 176ZA and paragraph 99(3) & (4), Schedule B1, of the Insolvency Act 1986.

26 For instance, the claims of an unsecured creditor of a company would rank behind claims of its preferential creditors and behind administration expenses or winding up expenses in the event of a company entering into an English administration or winding up. The claims of unsecured creditors of an English insurer would also rank behind the claims of policy holders in respect of "insurance debts". In addition, a pari passu opinion would need to be qualified if the relevant documents included limited recourse or subordination provisions or provided for money obligations which mature first to be paid first even after the occurrence of a default.

53. The registrability of security requires to be carefully considered. For instance, in the case of an enforceability opinion, a failure to identify that a document is registrable and file prescribed particulars of it within the prescribed period[27] would result in the security created by the document being void. If the subject matter of the security includes land, aircraft, ships or intellectual property rights, it may also be necessary to file particulars of the relevant document at other appropriate registries, in order to protect the priority of the security fully.

54. The execution of documents involves a mixed question of fact and law. It is a legal question whether, if a document is executed on behalf of an English company by one or more authorised officers, it will have been validly executed. It is a factual question whether the relevant document has actually been signed by a person or persons authorised to do so in the board resolution produced to the opinion provider and whether the resolution was duly passed. It is normal practice to include in an opinion letter assumptions on these factual aspects. If an obligor is a foreign entity, it is usual for execution of the documents to be addressed in an opinion letter obtained under the law of the jurisdiction where the company is incorporated.

55. A law firm will not normally be willing to opine that an individual is the person who he or she purports to be, since this would raise issues as to identification. This would be a role for a notary public. Even if the lawyer knows the signatory or sees the signatory's passport, it is not possible to tell whether the signatory is the same person as that named (for example) in the relevant board resolution. An organisation may contain two people with the same name.

56. Where the opinion letter relates to an individual, it is often appropriate to include in the opinion letter suitable assumptions as to the age, mental capacity and solvency of the individual and the absence of undue influence.

57. Where electronic signatures are being relied upon for the execution of documents, the opinion provider may wish to consider whether any additional assumptions are necessary if the opinion extends to due execution.[28]

To what extent does the scope of an opinion letter differ in a cross-border transaction?

58. In a cross-border transaction, the scope of an opinion letter on English law will depend on the extent to which English law is relevant to the transaction.

59. Where the transaction documents are governed by foreign law but the company to which the opinion relates is incorporated in England, it is usual for an English legal opinion to address principally the questions of whether the company is incorporated and existing, whether it has the necessary corporate capacity to enter into the transaction, whether the necessary corporate action has been taken to authorise the execution of the documents and, if they include a security document, whether it is registrable in England[29]. The opinion may also deal with questions of whether the choice of foreign law to govern the documents will be recognised by the English courts and whether a judgment delivered in the foreign jurisdiction could be enforced in England. This should be sufficient in most cases. As the validity of obligations undertaken in an agreement governed by a foreign law will be determined by that law, an English law opinion cannot deal with the question of validity as such.

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[27] Part 25 of the Companies Act 2006 (where the chargor is a company or a limited liability partnership), or section 344 of the Insolvency Act 1986 (where the chargor is an individual or a partnership consisting of individuals) or the Bills of Sale Acts 1878 to 1890 (where the chargor is an unincorporated trader). The Companies Act requirement for registration of charges by overseas companies with a registered UK establishment ceased to apply in relation to charges created on or after 1st October 2011.

[28] See the Practice Note "Execution of a document using an electronic signature" prepared by a joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees and approved by Leading Counsel (Mark Hapgood QC) which sets out their views of good practice. *[Link: www.lawsociety.org.uk/en/topics/business-management/execution-of-a-document-using-and-electronic-signature*]

[29] Where the document has been executed under a power of attorney granted by an English obligor, the opinion may also address the authorisation, execution and delivery of the power of attorney.

60. The relevant law firm may be requested to opine on recognition of validity. The response to such a request may differ between law firms and may also depend on the foreign jurisdiction involved. Some law firms may be willing to say that, if the relevant agreement creates valid, binding and enforceable obligations under its governing law, such obligations will be recognised as valid and binding under English law (except to the extent that they are incompatible with applicable mandatory rules or public policy[30]). Other law firms may simply opine that, if there is an express governing law clause by which the parties have chosen a foreign law to govern the agreement, then English law will generally recognise that choice of law. This subject involves conflict of law questions which are outside the scope of this Guide.

61. An opinion provider may sometimes be asked to opine on whether any provision of the relevant documents is contrary to English public policy. Public policy is a changing and ill-defined concept on which it is not possible to opine with certainty. It may also overlap with any opinion expressed as to recognition of the foreign law governing the transaction document.

62. Where the transaction documents are governed by English law but one of the parties is a company incorporated in another jurisdiction, an English law opinion cannot address such questions as whether that company has corporate power to enter into the transaction, whether the documentation has been duly authorised, executed and delivered and whether particulars of it are registerable in that other jurisdiction. These matters will have to be the subject of assumptions. A separate opinion on these matters under the laws of the jurisdiction in which the company is incorporated may be obtained from lawyers qualified in that jurisdiction. In addition, where an obligation is to be performed by a person in a jurisdiction outside England, an English law opinion will typically include a qualification that the obligation may not be recognised as enforceable under English law to the extent that performance would be illegal or contrary to public policy under the law of that other jurisdiction.

How should differences in opinions practice be reconciled in cross-border transactions?

63. The "Golden Rule" referred to in paragraph 8 may appear difficult to apply in cross-border transactions where, for instance, both a law firm practising in England and a law firm practising in the USA are involved. A law firm practising in the USA may ask a law firm practising in England to give an opinion letter in wider terms than is normal under English practice because the US law firm would be willing to provide an opinion if the roles were reversed.

64. In practice, a common answer (which is consistent with professional conduct rules) is that the opinion letter should be given by reference to the practice generally applicable in the jurisdiction whose law is the subject of the opinion[31]. So, an opinion letter on English law

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30 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome 1), article 9, which forms part of English law.

31 The Legal Opinions Committee of the American Bar Association (ABA) has suggested the following similar guidelines for constructive engagement, which it believes will facilitate the giving of opinions in cross-border transactions, and often reduce friction and costs, if followed by all parties and their counsel: "First, lawyers give opinions in accordance with the customary practice of the jurisdiction in which they practice and should not be expected to know or take into account any other jurisdiction's practice. Second, the parties to a cross-border agreement and their counsel should consider whether the cost of preparing each opinion requested is justified by its benefit to the recipient in the specific transaction. Third, a non-U.S. recipient should not insist on receiving an opinion simply because U.S. lawyers give it in domestic U.S. transactions. If the opinion is one that a non-U.S. recipient does not regularly ask non-U.S. lawyers to give in comparable circumstances, questions can legitimately be raised why it is asking the U.S. counsel to give that opinion and whether the opinion's benefit to the recipient justifies the cost to the giver's client. Conversely, if the opinion is one that is both regularly requested in the recipient's jurisdiction and regularly given by U.S. lawyers in domestic U.S. practice, and the incremental cost of preparing it in a cross-border transaction is not significant, a question can legitimately be raised why a U.S. lawyer is refusing to give it to a non-U.S. recipient even though non-U.S. counsel for the recipient, acting under its jurisdiction's practice, would not give an analogous opinion if the roles were reversed. Fourth, opinion preparers and counsel for the recipient should always deal with each other professionally and should not treat a closing opinion as a bargaining chip in an economic exchange. Each side should work in good faith to bridge gaps in opinion coverage and achieve a sensible result for all parties under the circumstances. Gaps, however, cannot always be bridged; when U.S. counsel is unable to give a requested opinion, the non-U.S. party is put on notice that a legal issue may exist and faces a choice, with advice from its own counsel, between proceeding without a third-party legal opinion on the issue or changing the terms of the transaction to address the issue (if possible). The opinion process should not be approached as a game in which one side wins and

would take into account the normal approach that applies in England and an opinion letter on New York law would take into account the normal approach which applies in New York. The same transaction may involve documents governed by two or more jurisdictions, requiring different legal opinions. It does not follow that the same approach must necessarily apply to all legal opinions being given in the same transaction. Thus, if a transaction includes a loan agreement governed by New York law and a guarantee governed by English law, the New York legal opinion would follow the normal practice applicable in New York and the English legal opinion would follow the normal practice applicable in England. It is for each law firm to decide what policy to adopt in such cases.[32]

To what type of legal entity does the opinion letter relate?

65. The entities to which an opinion letter relates will in the great majority of cases be companies. In the case of companies incorporated under the Companies Act 2006 and its predecessors, the safeguards provided by sections 39 (*A company's capacity*), 40 (*Power of directors to bind the company*) and 41 (*Constitutional limitations: transactions involving directors or their associates*) of the Act will generally apply to them. They will not apply to entities such as a company incorporated by Royal Charter, or a building society, local authority, municipality, unit trust or non-incorporated trust fund. Different rules apply to charities.[33] Special considerations may also apply to an unlimited company.[34]

66. A law firm may occasionally be asked to provide an opinion in respect of individuals and partnerships of individuals. There is no reason in principle why a law firm cannot do this if it chooses to do so, provided that the form of opinion letter is suitably worded and includes appropriate assumptions and qualifications.

What is best practice as to the form of opinion letters?

67. It is good practice for an opinion letter to use a recognisable format and language which assists the reader to evaluate its contents and to identify any unusual assumptions or qualifications. The terms of the opinion letter should also be complete and self-reliant, since we are not aware of any reported English case law on the question whether it is possible to rely on "customary practice" being implied into an English opinion letter[35].

68. Unless a detailed, reasoned opinion is required, the purpose of an opinion letter lends itself to the use of language as concise as its subject matter permits. It is also good

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the other side loses. Fifth, non-U.S. counsel for the recipient should recognize that U.S. opinions are normally worded in particular ways and should not press U.S. opinion givers to deviate from commonly used language for which the U.S. customary practice supplies a well-understood meaning… Sixth, non-U.S. recipients should not treat an opinion given by U.S. counsel as providing anything more than U.S. counsel's professional judgment on the particular legal issues the opinion addresses. They should not expect U.S. opinion givers to provide confirmations of what are essentially factual, rather than legal, matters or to state a lack of knowledge of acts or events. The parties to a transaction should look to their counsel to advise them on legal matters, structure of the transaction, and negotiate documents." [The above extracts omit footnotes]. See *Cross-Border Closing Opinions of U.S. counsel, The Business Lawyer*, Vol. 71, Winter 2015-2016, pages 215-217.

32 A law firm may, if it thinks appropriate, choose to take into account the practice of the jurisdiction in which the financial transaction is taking place, as well as professional conduct rules. Thus, where a transaction is to raise funds in certain securities markets, a law firm acting for the issuer may be asked to give an opinion to non-client underwriters.

33 Special rules apply to companies that are charities: section 42 of the Companies Act 2006.

34 To give one example, a legal (as opposed to an equitable) mortgage over shares in an unlimited company is not normally taken, since this would otherwise involve the mortgagee (or its nominee) becoming the registered holder of the shares and being exposed under English law to unlimited liability for unpaid debts of the company (if it were to become insolvent).

35 In contrast, U.S. lawyers may rely on U.S. customary practice when giving U.S. opinions in cross-border transactions, just as they do in domestic U.S. transactions. The ABA Legal Opinions Committee has suggested that: "As a result, non-U.S. parties and their non-U.S. counsel must be prepared to commit the time and resources (possibly including retaining U.S. counsel to advise them) required for them to understand the opinions being given. Early in a cross-border transaction counsel for the parties should discuss: (1) the work required to deliver each requested opinion, (2) the cost of preparing each opinion requested compared to its benefit to the recipient, and (3) the assumptions, exceptions, and qualifications that are required to give the requested opinions. One way of reducing the risk of misunderstanding in cross-border transactions is for U.S. opinion givers to spell out in their opinion letters assumptions, exceptions, or qualifications that do not have to be stated in opinion letters in domestic U.S. transactions. The goal of doing so is greater clarity for the benefit of both non-U.S. opinion recipients and non-U.S. courts that later may be called upon to interpret the opinion letter." *Cross Border Closing Opinions of U.S. Counsel,* supra, page 217.

practice to adopt language which is easily intelligible and for the letter to be clearly laid out. For example, a key statement, such as that an agreement is valid, should not be buried in a mass of intricate legal technicalities. The reader may otherwise fail to detect the true message or to draw the correct conclusion. Unnecessary or irrelevant provisions should be avoided. Opinion letters are typically stated in fairly standardised format so that the opinion and any departures from that format can be more easily assessed by the recipient.

69. Care in wording assumptions and qualifications is important. Where an opinion letter is given to a client, this is helpful not only to the recipient but to the law firm providing it, since it defines the scope (and, at least in reasoned opinions, records the substance) of the opinions given. The addressee of an opinion letter may wish to consider whether material assumptions on which the opinion is based should be made the subject of appropriate warranties in the contractual documents.

70. The nature of the transaction must be considered in order to determine what assumptions and qualifications are appropriate and whether resolutions or minutes of a relevant company (or certificates from the relevant company's officers) should be obtained and assumed in the opinion to be accurate. Where the legal position is unclear because there is a paucity of case law on the subject or differing views exist, this should be explained in the opinion. Having stated that the position is not free of doubt, it will often be helpful to the client (in the case of a reasoned opinion) for the law firm to go on to state what it considers to be the better view.

71. Opinion letters of the kind discussed in this Guide are expressed to be given only on English law and not "UK law" or "British law".[36] There is no unified body of laws of "the United Kingdom" or of "Great Britain". An opinion on such laws is not normally given, since it would imply a knowledge of the individual legal systems in Northern Ireland or Scotland and (where applicable) legislation passed by the Welsh Assembly. As Scotland and Northern Ireland are separate jurisdictions, such an opinion should not be requested from a law firm that does not practise in the relevant jurisdiction.

72. It is not usual in an English opinion letter to state that a company is in "good standing", since this is not a recognised term of art in England. It has a special meaning in the United States, signifying that a corporation has filed an annual return and paid its corporate franchise taxes, which can be proved by obtaining an official certificate. Such an opinion serves no purpose in an English opinion letter, since the existence of a UK company does not depend on payment of franchise or similar taxes.

73. Separate opinion letters should be provided on the laws of different jurisdictions, even where the same law firm is giving the opinion. Where one law firm is giving an opinion under English law and another law firm is providing an opinion under the law of a different jurisdiction, it is normal practice for each opinion letter to stand on its own and not rely on the accuracy of the other law firm's opinion. It is not normal for an English law firm to be asked to verify the correctness of an opinion letter provided under the law of another jurisdiction.

74. Where an opinion letter on questions of English law is being provided in relation to a document governed by the law of another jurisdiction or written in a language other than English, the opinion provider may wish to state in the opinion letter that it has interpreted words and expressions (or their translation) as if they have the same meaning that they would have in an English law document and with no terms being implied under the governing law unknown to the opinion provider. It may also wish to include an assumption that the English language translation of the document being opined on is a correct and complete translation.

75. Where an opinion letter on questions of English law is addressed to, or may be relied upon by, a party in another jurisdiction, it may be considered prudent to state in the opinion letter that its contents and any non-contractual obligations arising out of the opinion letter are to be governed by and construed in accordance with English law. It is

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[36] A reference to "British insolvency law" may be appropriate where the opinion relates to the Cross-Border Insolvency Regulations 2006 as this is a defined term in the Regulations (see Article 2(a) of Schedule 1).

sensible that opinions given by reference to English law concepts be interpreted in accordance with English law.[37]

Financial Law Committee
The City of London Law Society

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Membership of the Working Party of the CLLS Financial Law Committee

This Guide was originally prepared in November 2011, on behalf of the Financial Law Committee, by the members of the following working party:

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The Guide was updated by the Chairman of the above working party in September 2017 and December 2020 and, as some members of the Working Party had retired by then, approved on behalf of the Financial Law Committee.

The views expressed in this Guide are the personal views of members of the working party and do not necessarily represent the views of the law firms to which they belong.

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[37] See also paragraph 24 above.

[38] When updating the Guide in September 2017, the most significant additions to the original text of the Guide were those that now appear as footnotes 31 and 35. Other changes were purely to update the Guide and make a few small consequential alterations. When updating the Guide in December 2020, the most significant changes were to paragraphs 15 to 26, 34, 39, 43, 72 and 73, new paragraphs 57 and 74, new footnotes 14, 15 and 28, an addition to footnote 16, and a fuller quote from the ABA Guidelines in footnote 31 with a few updates elsewhere.