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### **THIRD PARTY OPINIONS ON FOREIGN LAW DOCUMENTS: TOROG RECOMMENDED LANGUAGE**

The Toronto Opinions Group is a group of lawyers, primarily from the Toronto offices of the larger Canadian law firms, with an interest in third party (or transaction) opinions and who have been meeting regularly since 2001 to discuss current opinion issues. While occasionally the Ontario Bar Association creates a subcommittee to deal with particular opinion issues (as it did in developing the Ontario *Personal Property Security Opinion Report*), there is no standing OBA committee that deals with opinions. The American Bar Association and various state bar associations, including the New York Tri-Bar Committee, have been very active in setting opinion guidelines and standardizing opinion language, with both the ABA and the Florida bar having developed a Legal Opinion Accord at one point. While it lacks the formality (and range of membership) of these types of bar association groups, TOROG does on occasion commit to writing and publish what its members believe are acceptable positions on an opinion issue or appropriate language for a particular assumption, opinion or qualification. These written positions assist the member firms to streamline the opinion process, especially when dealing with each other on transactions.

TOROG members agreed that the practice around providing the standard choice of law and enforcement of foreign judgments opinions was inconsistent and somewhat misunderstood. Without relatively consistent and generally accepted language, the opinion negotiation was often unnecessarily complicated. Consequently, TOROG developed a form of standard wording for the choice of law and enforcement of foreign judgements opinions, together with some basic annotations to guide users. TOROG member firms that have been using this language since 2005 have found that it has simplified the process and that this or similar language is acceptable in most situations.

We are publishing the language for these opinions with the thought that lawyers and firms that are not TOROG members might find it helpful. Given that the opinions are based on common law principles, the language should also be useful for lawyers practicing with respect to the laws of other provinces. The opinions were, however, drafted with Ontario law in view.

## **Cross Border Opinions**

A third party (or transaction) opinion is a legal opinion that counsel for one party to the transaction delivers at closing to the other parties reporting on certain legal issues that affect the transaction. Generally these legal opinions deal with the circumstances existing at the date of closing and legal matters that are directly relevant at that date (e.g., the corporation is in existence and it validly executed the transaction agreements). The choice of law and enforcement of foreign judgment opinions are different from most other opinions *in that they express a view about what a court would do at a time in the future*. In that sense they are more hypothetical than other opinions. They are essentially a description of the current law as it might apply to the particular transaction documents or to a judgement of a particular foreign court were one to be rendered. It is therefore important to be quite explicit and comprehensive about what assumptions are being made and what qualifications might be relevant.

The draft language developed by TOROG is intended to provide comprehensive wording for the choice of law and enforcement of foreign judgments opinions discussed in W. M. Estey, *Legal Opinions in Commercial Transactions*.<sup>1</sup> We consider that these two opinions, in the recommended forms, fully address the issues covered by them and that it is not necessary or appropriate to request or give additional or alternative opinions on these matters.<sup>2</sup>

## **Choice of Law Opinion**

The draft language addresses two basic opinions. The first is the choice of law opinion. This opinion is given by the Ontario lawyer with respect to an agreement governed by non-Ontario law. Usually non-Canadian law is the chosen law, but occasionally firms do get asked to provide the choice of law opinion where the chosen law is the law of another province. The opinion is generally to the effect that an Ontario court would apply the chosen law to issues that under Ontario law would be characterized as contract law matters. It then sets out the conditions and limitations in general terms. The suggested language is annotated with footnotes to the leading case law. These may be useful to the opinion giver when explaining the opinion to foreign counsel.

## **Enforcement of Foreign Judgment Opinion**

### *General*

The second opinion is the enforcement of foreign judgment opinion. Typically the agreements being opined upon will provide that the parties submit to the jurisdiction of a particular court in a particular foreign jurisdiction, normally the same jurisdiction as the chosen law. The opinion describes the circumstances in which an Ontario court would enforce a final judgment of that foreign court for a sum certain with respect to the agreements. Unlike some other traditional formulations of the opinion, the TOROG form sets out separately (1) the preconditions to

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<sup>1</sup> 2d ed. (Toronto: Butterworths, 1997) at pages 378 ff. and 383-4, respectively.

<sup>2</sup> Such as the other forms of opinions discussed in Estey, *op. cit.*, at pages 372 and 377.

enforcement, and (2) the defences to a claim for enforcement. TOROG members considered that this was a more informative way of presenting the opinion.

*“Without Reconsideration of the Merits”*

Some TOROG members noted that there were lawyers who refused to expressly state that the court would enforce the judgment “without reconsideration of the merits”. Knowing that the court will enforce the judgment without a consideration of the case on the merits is the entire point of obtaining this opinion, and indeed of having a law with respect to the enforcement of a foreign judgment. You will see, therefore, that this language is included in the TOROG draft; an opinion without this language is not acceptable.

*“Final and Conclusive” and “Sum Certain” Preconditions*

The opinion also applies only to a “final and conclusive” judgment and one for a “sum certain”. While it is generally accepted that our courts will only enforce foreign judgments that are final and conclusive,<sup>3</sup> a recent Ontario Court of Appeal case has held that finality of the judgment may not be required in all cases. In considering recognition of an order of a U.K. court commencing a plan of arrangement proceeding, Goudge J.A. in *Re Cavell Insurance Company* stated:

However, in an age where the rules of private international law are evolving to accommodate the increasingly transnational nature of commerce, I see no reason why this result (i.e., recognition of the foreign order) should be precluded by those rules just because the foreign order to be recognized is not final. In my view the want of finality carries with it no substantive effect that should deny recognition. I would therefore conclude that the appellant’s finality argument fails.<sup>4</sup>

The “sum certain” requirement that the judgment must be for a sum of money or must include a formula by which a sum can be easily determined<sup>5</sup> has also recently been relaxed by the Supreme Court of Canada in *Pro Swing Inc. v. ELTA Golf Inc.*<sup>6</sup> The Supreme Court of Canada was unanimous in holding that the longstanding common law rule preventing courts from enforcing foreign non-monetary judgements (such as an injunction) was no longer necessarily a bar to enforcement in Canada. The decision does not, however, give *carte blanche* to enforcing all foreign non-monetary orders. In a 4-3 majority split, the Supreme Court set out a number of factors to be taken into account by a court in assessing whether or not to give effect to a foreign non-monetary order. These include consideration of whether the terms of the order are

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<sup>3</sup> *Four Embarcadero Centre Venture v. Mr. Greenjeans Corp.* (1988), 27 C.P.C. (2d) 16 (Ont. C.A.).

<sup>4</sup> 2006 CanLII 16529 (ON C.A.) at para. 56.

<sup>5</sup> *CIBC v. Sebastian* (1984), 44 C.P.C. 207 (N.S.Co. Ct); *British Linen Co. v. McEwan* (1892), 8 Man. R. 99 (C.A.).

<sup>6</sup> November 17, 2006; 2006 SCC 52.

sufficiently clear and specific to ensure that the defendant will know what is expected of it; whether the foreign order is appropriately limited in scope and final; whether enforcement is the least burdensome remedy for the Canadian justice system; whether the defendant is exposed to unforeseen obligations; whether third parties are affected by the order; and whether the use of judicial resources is consistent with what would be allowed for domestic litigants. In other words, unlike the situation of a monetary judgment, there is a great deal of judicial discretion involved with respect to non-monetary judgments. For that reason, a prediction as to the enforceability of a non-monetary judgment is not, at this point in the law's development, a reasonable opinion request in a transaction opinion context.<sup>7</sup>

### **Submission to Jurisdiction**

Foreign counsel sometimes ask for a separate opinion to the effect that the submission of the party to the jurisdiction of a particular court is enforceable. In other words, if a party in Ontario agrees to submit to the exclusive or non-exclusive jurisdiction of the courts of the State of New York, Ontario counsel is asked to opine that the submission is valid and would be given effect by an Ontario court.<sup>8</sup>

The effectiveness of the submission to jurisdiction is already covered, at least in part, by the enforcement of foreign judgment opinion. One of the requirements for enforcement of a foreign judgment is that the foreign court had jurisdiction over the party against whom the judgment would be enforced. The submission clause is what the Ontario lawyer would rely on as the basis for his or her opinion that the foreign court would have jurisdiction. This opinion is expressed either implicitly (by not stating any requirement or condition that the court have jurisdiction) or expressly (by stating in the opinion that jurisdiction is a requirement for enforcement of the judgment and that the court would have jurisdiction on the basis of the submission). The attached suggested TOROG language takes the former approach.<sup>9</sup>

Having already addressed the significance of the submission to the enforcement of a judgment, does the separate opinion on the validity and effectiveness of the submission add anything?

Obviously counsel is not asking the Ontario lawyer to opine that the court submitted to would take jurisdiction based on the clause as that would be a matter for the law of the court's jurisdiction, not Ontario law.

The only topic remaining that the opinion could be addressing is whether the Ontario court would decline jurisdiction on the basis of the clause. If the submission is to the non-exclusive

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<sup>7</sup> Of course, it is perfectly reasonable of a client to request its own lawyer to explain to it, in writing or otherwise, the current law on the enforcement of a non-monetary order.

<sup>8</sup> Eg. "The submission by the Company to the non-exclusive jurisdiction of the courts of New York (and the federal courts of the United States of America sitting in New York) contained in Section ● of the [INSERT NAME OF AGREEMENT], would be recognized and given effect by the courts of Ontario as a valid submission to the jurisdiction of such courts, provided that the provisions of the [INSERT NAME OF AGREEMENT] respecting service of process on the Company are complied with."

<sup>9</sup> See also footnote 23.

jurisdiction of the court, then no such opinion could be given as the clause does not purport to deprive the Ontario court of jurisdiction. Therefore, in the context of non-exclusive submission clauses the additional opinion adds nothing to the express or implied opinion that is part of the enforcement of foreign judgments opinion.

If the submission is to the exclusive jurisdiction of the court, then an opinion might address whether the Ontario court would decline jurisdiction on the basis of the clause. However, only a qualified or reasoned opinion could be given on this subject because ultimately the Ontario court retains the discretion to accept jurisdiction even in the face of such a clause. The law is that the Canadian court needs “strong cause” to take jurisdiction where there is an exclusive submission to another jurisdiction. If this is the opinion that is in fact being requested, it should *not* be framed as an opinion on the “effectiveness” of the clause or whether an Ontario court would recognize the clause. Rather, it should expressly address the issue of whether an Ontario court would decline jurisdiction on the basis of the clause. This would have to be a qualified or reasoned opinion.

### **Other Opinions**

In the context of cross-border transactions, other opinions are often requested and given that are generally thought of as the “conflicts” or “cross-border” opinions because they tend to be asked for or are relevant only in that context. These include the no immunity from suit and the no stamp tax opinions. TOROG has not addressed these additional opinions yet. Also, an opinion is sometimes requested that, if a document governed by non-Ontario law were governed by Ontario law, it would be enforceable. Although not normally recommended or given, there may be unusual circumstances where this opinion may be of some value and where it could be given with appropriate assumptions and qualifications. TOROG has not considered standard language with respect to this opinion.

**Recommended Language for Conflict of Laws Opinions**  
**(Choice of Law and Enforcement of Foreign Judgments)**

The purpose of these two opinion paragraphs is to provide comfort to the recipients that, in the application of Ontario law to a dispute or in an action to enforce a judgment in Ontario, they will encounter no surprises.

At the start of a transaction, you must consider whether any other jurisdictions are involved (including jurisdictions where collateral is located).

It is generally not necessary to review documents governed by foreign law if the only opinions being given are those set out in paragraphs 1 and 2, unless comfort is being given on the public policy issues.<sup>10</sup>

The first paragraph of this opinion should not be taken to imply that an Ontario Court will take jurisdiction. We do not think a specific cautionary note is needed, but see Estey, *Legal Opinions in Commercial Transactions*, 2nd ed. (Toronto: Butterworths, 1997), at 380.

1. In any proceeding in a court of competent jurisdiction in the Province of Ontario (an “Ontario Court”) for the enforcement of the [**Agreement**], the Ontario Court would apply the laws<sup>11</sup> of [**the State of New York (“New York Law”)**]<sup>12</sup>, in accordance with the parties’ choice of [**New York Law**] in the [**Agreement**], to all issues which under the laws of the Province of Ontario and the federal laws of Canada applicable therein (“Ontario Law”) are to be determined in accordance with the chosen law of the contract,<sup>13</sup> provided that:
  - (a) the parties’ choice of [**New York Law**] is *bona fide* and legal and there is no reason for avoiding the choice on the grounds of Ontario public policy, as such term is interpreted under Ontario Law (“Public Policy”);<sup>14</sup> and

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<sup>10</sup> But see footnote 23 if you are not reviewing the documents.

<sup>11</sup> American lawyers sometimes say in a choice of law clause that the choice of the governing law is that law, “excluding its choice of law rules”. That language is intended to exclude the doctrine of *renvoi*. While the phrase would certainly exclude that doctrine, there is no need to do so as there is ample authority for the proposition that *renvoi* will not be applied in contracts cases. In the language of this paragraph of the opinion, the choice of the foreign law will be that law as it would be applied by the foreign court in domestic cases, not as it might be applied were the foreign court faced with a conflicts case. It is best not to ponder the deep illogic of this analysis and approach: imagining, let alone believing that traditional conflict rules are logical or make sense is a sure path to serious cognitive dissonance and profound despair.

<sup>12</sup> New York is used here for convenience. Substitute the appropriate chosen law.

<sup>13</sup> The law chosen by the parties or, absent their stated choice, the law applied by the courts, is often called the “proper law” of the contract.

<sup>14</sup> This phrase is, like many legal phrases, standard, pleonastic and unclear. The phrase comes originally from the opinion of Lord Wright in *Vita Foods Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277 at page 290, [1939] 1 All E.R. 513 at page 521 (P.C.) and his judgment has been universally accepted as establishing the test for the

- (b) in any such proceeding, and notwithstanding the parties' choice of law, the Ontario Court:
  - (i) will not take judicial notice of the provisions of **[New York Law]** but will only apply such provisions if they are pleaded and proven by expert testimony;<sup>15</sup>
  - (ii) will not apply any **[New York Law]** and will apply Ontario Law to matters which would be characterized under Ontario Law as procedural;<sup>16</sup>

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recognition by Canadian courts of a choice of law clause. The complete sentence reads: "But where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy." No one knows what Lord Wright might have had in mind, particularly since there was absolutely no need to consider any choice of law rule in the case as the choice of any of the possibly applicable rules would not have changed the outcome of the litigation. In those situations (and agreements) where transaction opinions are likely to be given, it is hard to see what constraints a court would impose. Since a choice of law clause does and can do nothing more than indicate the background law against which the contract was drafted, the choice of one law rather than another is likely to make very little difference.

Experienced commercial law practitioners generally look for either a commercial reason for the choice (e.g., New York law for certain transactions) or a connection with one or more of the parties. However, as a result of the 2004 Alberta Queen's Bench decision in *Castle Building Centres Ltd. v. 699702 Alberta Ltd.*, 2004 ABQB 616, there may be some doubt on how the "classic" test is to be applied. The case dealt with the application of the Alberta *Guarantees Acknowledgement Act*, and concluded that a two part test should be applied – whether there was some connection to the chosen jurisdiction and whether there was any public policy reason to invalidate the choice. There are two general points to be kept in mind: (i) the ineffectiveness of any choice of law clause to protect the parties or the agreement from a rule that any court with jurisdiction over the parties considers should be applied and (ii) the possibility that any choice may be ineffective if a court thinks that giving effect to it would lead to a result that the court does not like. A case like *Castle Building Centres* can be seen as an illustration of the last sentence of the preceding paragraph of this note.

This paragraph may not be necessary or appropriate if the opinion giver is satisfied that the parties' choice of law would not be set aside on any grounds (e.g., where the parties choose New York or English law in accordance with industry practice or the jurisdiction chosen has significant connections to the parties). As a matter of practice, lawyers give opinions on Ontario governed documents without including this qualification. Some versions of this opinion refer to Ontario conflict of laws rules for the criteria for public policy. However, that is incorrect since those criteria come from Ontario law as it would be applied in any proceeding before an Ontario court. While the standards of public policy come from Ontario domestic law, i.e., the law applied by an Ontario court, Ontario courts may be prepared to apply that law differently when there are foreign facts. Cases illustrating this point are referred to in note 20 below. The mere fact that the provisions of an Ontario statute might apply to the facts does not necessarily mean that an Ontario court would consider that those provisions either (i) had to be applied or (ii) necessarily represented Ontario "public policy". See, e.g., *Society of Lloyds v. Meinzer* (2001), 55 O.R. (3d) 688, where the Court of Appeal held that Ontario public policy did not require the application of the *Securities Act* to make an agreement unenforceable in the circumstances. For an interesting discussion of public policy, see the decision of the Ontario Court of Appeal in *Qu<sup>u</sup>bec (Sa Majest<sup>e</sup> du Chef) v. Ontario Securities Commission* (1992), 10 O.R. (3d) 577, 97 D.L.R. (4th) 144 (*sub nom. The Queen in right of Quebec and Ontario Securities Commission (Re)*).

<sup>15</sup> Though there are exceptions, in general, the only person qualified to give expert evidence of a foreign law is a person entitled to practise law in that jurisdiction. See, e.g., *Gold v. Reinblatt*, [1929] S.C.R. 74, [1929] 1 D.L.R. 959; *Eitel v. Kertesz*, [1960] O.R. 672; 26 D.L.R. (2d) 209 (C.A.).

- (iii) will apply provisions of Ontario Law that have overriding effect;<sup>17</sup>
- (iv) will not apply any **[New York Law]** if such application would be characterized under Ontario law as the direct or indirect enforcement of a foreign revenue,<sup>18</sup> expropriatory, penal **[or other public]** law<sup>19</sup> or if its application would be contrary to Public Policy;<sup>20</sup> and

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<sup>16</sup> We believe this statement of the scope of Ontario “procedural law” and the restrictions on foreign “procedural law” is an accurate and clear formulation of what is a necessary qualification to the opinion. See, e.g., *Brown v. Flaharty*, [2004] O.J. No. 5278 (S.C.J.).

<sup>17</sup> If asked to explain this proviso, you may refer to examples of laws that could potentially be held to have overriding effect, including insolvency statutes, the PPSA, the *Criminal Code*, employment legislation, consumer protection legislation, competition law, Section 8 of the *Interest Act* in the context of real property mortgages and common law doctrines relating to the enforcement of creditors’ rights. It is impossible to provide an exhaustive list. Laws may have overriding effect by virtue of specific statutory provisions (e.g., the PPSA, the *Limitations Act, 2002*) or because a court determines that they apply regardless of the intention of the parties. If you are asked to provide comfort on laws of overriding effect you will have to closely review the documents governed by **[New York Law]** as if you were giving an enforceability opinion.

<sup>18</sup> The scope of the “revenue law” limitation is generally unclear and is made even less clear in the light of the decision of the Alberta Court of Appeal in *Stringham v. Dubois* (1992), [1993] 3 W.W.R. 273. In that case the court denied a trustee reimbursement of a tax claim incurred in Arizona on the ground that, in giving the trustee a right to an indemnity, the court would be indirectly enforcing a foreign tax claim. It is hard to see how denying a trustee an indemnity or a buyer of a business an indemnity from the seller with respect to unpaid taxes forwards whatever policy might now justify the “foreign revenue law” restriction. The attitude expressed in the decision of the Ontario Court of Appeal in *United States of America v. Ivey* (1996), 30 O.R. (3d) 370, 139 D.L.R. (4th) 570, 27 B.L.R. (2d) 243, would appear to be at least inconsistent with that of the Alberta Court of Appeal.

<sup>19</sup> The broad expression “or other public law” is sometimes included in this proviso. It is not clear precisely what will be regarded as objectionable to “public law”. Given the extent to which the laws of most jurisdictions in North America and Europe deal in similar ways with similar problems, it is probable that the “public law” exception will be very narrowly confined. The decisions of Sharpe J. and of the Ontario Court of Appeal in *United States of America v. Ivey* (1995), 26 O.R. (3d) 533, 130 D.L.R. (4th) 674, 27 B.L.R. (2d) 221, aff’d, (1996), 30 O.R. (3d) 370, 139 D.L.R. (4th) 570, 27 B.L.R. (2d) 243, provide an illustration of the Ontario courts’ willingness to recognize a foreign judgment for clean-up costs incurred by a foreign government. The court noted the parallels between United States law and Ontario law as a justification for enforcing the judgment. The New South Wales Court of Appeal recently confirmed that “public laws” is something different than penal laws in *Robb Evans v. European Bank Limited*, [2004] NSWCA 82 (25 March 2004). The case includes a good discussion of what “other public law” means.

<sup>20</sup> If you are asked to provide comfort on public policy, the following language may be used: “assuming that the same meaning would be given to the terms used in the Agreement under **[New York Law]** as under Ontario Law, none of the provisions of the **[Agreement]** would violate Ontario public policy.” Including this statement requires the opinion giver to review the documents governed by foreign law. Areas of potential concern in commercial transactions include criminal interest and non-competition covenants. See comment by Estey: “Canadian courts have traditionally held that foreign law would be contrary to public policy only if it offended some ‘essential public or moral interest’ of the forum or the forum’s ‘conception of essential justice or morality’, or was ‘inconsistent with the good order and solid interests of society’, or was ‘founded in moral turpitude’ (at 264). See *Great America Leasing Corp. v. Yates* (2003), 68 O.R. (3d) 225 (C.A.); *Society of Lloyd’s v. Saunders* (2001), 55 O.R. (3d) 688 (C.A.), leave to appeal denied [2001] S.C.C.A. No. 527; *Boardwalk Regency Corp. v. Maalouf* (1992) 6 O.R. (3d) 737 (C.A.); *Beals v. Saldanha*, [2003] S.C.R. 416.

- (v) will not enforce the performance of any obligation that is illegal under the laws of any jurisdiction in which the obligation is to be performed.<sup>21</sup>
2. An Ontario Court would give a judgment based upon a final and conclusive *in personam* judgment of a court exercising jurisdiction in the [State of New York (a “New York Court”)]<sup>22</sup> for a sum certain, obtained against [the Corporation] with respect to a claim arising out of the [Agreement] (a [“New York Judgment”]), without reconsideration of the merits.<sup>23</sup>
- (a) provided that:
    - (i) an action to enforce the [New York] Judgment must be commenced in the Ontario Court within any applicable limitation period,<sup>24</sup>

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<sup>21</sup> The various qualifications attached to the statement that an Ontario court will apply the law chosen by the parties can all be seen as examples of public policy, i.e., the unwillingness of an Ontario judge to reach a result that he or she finds offensive. It is unlikely that questions of “public policy” would arise in the context of the kind of agreement where a transaction opinion will be given, but each of the qualifications highlights or illustrates a separate basis for the Ontario court’s concern. The qualification in paragraph (v) is based on the decision of the English Court of Appeal in *Ralli Bros. v. Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287 (C.A.). That case has been followed in Canada. See, e.g., *Montreal Trust Co. v. Stanrock Uranium Mines Ltd.*, [1966] 1 O.R. 258, 53 D.L.R. (2d) 594 (H.C.) and *Gillespie Management Corp. v. Terrace Properties* (1989), 62 D.L.R. (4th) 221, 39 B.C.L.R. (2d) 337 (B.C.C.A.).

It can be argued that this qualification is unnecessary because an enforceability opinion limited to Ontario law cannot readily be construed as saying anything about the laws of another jurisdiction, including the possible violation of the laws of other jurisdictions through the performance of the agreement. The underlying legal principle is equally applicable to an agreement governed by Ontario law, yet the assumption is not usually seen in an enforceability opinion on an Ontario agreement. The assumption may be intended to function as a kind of advisory warning to the opinion recipient of an issue that could potentially arise in a cross-border transaction.

<sup>22</sup> The description of the foreign court should track the language of the submission to jurisdiction in the relevant agreement.

<sup>23</sup> This form of the foreign judgment opinion is appropriate *only* if there is an express submission to the jurisdiction of the [New York Court] in the transaction documents. *If there is no express submission to jurisdiction in the transaction documents or if you are not reviewing the document in which the submission appears*, include the following proviso: “that the [New York] Court had jurisdiction over the [Corporation] as recognized under Ontario Law for purposes of enforcement of foreign judgments.” Some versions of this opinion include an assumption that the [New York] Court had inherent jurisdiction or jurisdiction under [New York] law. This assumption is not necessary. In drafting jurisdiction clauses, state explicitly whether they are intended to be exclusive or non-exclusive (see *B.C. Rail Partnership v. Trenton Works Ltd.* (2003), 38 B.L.R. (3d) 168 (B.C.C.A.)). When drafting jurisdiction provisions selecting courts in the U.S., you should consult with U.S. counsel (re federal courts or state courts, etc.).

<sup>24</sup> It is not clear whether Ontario limitations law would apply or the limitations law of the jurisdiction of the judgment. If Ontario law applied, under the *Limitations Act, 2002* (Ontario), the better view is that the limitation period would generally be two years in respect of a foreign judgment rendered after January 1, 2004. However, it has also been suggested that there is no limitation period under the *Limitations Act, 2002* (Ontario) for the enforcement of a foreign judgment.

- (ii) the Ontario Court has discretion to stay or decline to hear an action on the [New York] Judgment if the [New York] Judgment is under appeal or there is another subsisting judgment in any jurisdiction relating to the same cause of action;
  - (iii) the Ontario Court will render judgment only in Canadian dollars; and
  - (iv) an action in the Ontario Court on the [New York] Judgment may be affected by bankruptcy, insolvency or other [similar]<sup>25</sup> laws affecting the enforcement of creditors' rights generally; and
- (b) subject to the following defences:
- (i) the [New York] Judgment was obtained by fraud or in a manner contrary to the principles of natural justice **[but the [New York] Judgment would not be contrary to natural justice by reason only that service of process was effected on the agent for service of process appointed by the [Corporation] pursuant to Section [●] of the [Agreement]]**;<sup>26</sup>
  - (ii) the [New York] Judgment is for a claim which under Ontario Law would be characterized as based on a foreign revenue, expropriatory, penal **[or other public]**<sup>27</sup> law;
  - (iii) the [New York] Judgment is contrary to Public Policy<sup>28</sup> **[or to an order made by the Attorney General of Canada under the *Foreign Extraterritorial Measures Act (Canada)* or by the Competition Tribunal under the *Competition Act (Canada)* in respect of certain judgments referred to in these statutes]**<sup>29</sup>; and
  - (iv) the [New York] Judgment has been satisfied or is void or voidable under [New York] Law.

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<sup>25</sup> "Similar" is sometimes included and sometimes not. It should not be included unless the practice in the opinion giver's firm is to include "similar" in its general insolvency qualification.

<sup>26</sup> The bracketed language is optional but may be requested by U.S. counsel. The Ontario Court of Appeal held, in [\*United States of America v. Yemec\*](#) (2010 ONCA 414 (CanLII)), that no new defence was available to an action to enforce a foreign judgment (overruling the decision of the motions judge who had found a new defence based on a "loss of a meaningful opportunity to be heard").

<sup>27</sup> See footnote 19, above.

<sup>28</sup> It is not appropriate to ask counsel to opine that enforcement of the judgment would not be contrary to public policy. Unless one sees the judgment, one cannot comment on it.

<sup>29</sup> The words in brackets are often omitted, depending on the fact situation.