

Due capacity and enforceability opinions – avoiding unnecessary completion confusion

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Service area / [Corporate](#)

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It has become common place in the universe of multi-jurisdictional transactions for parties to seek a legal opinion (“Opinion”) on entities domiciled in, or documents governed by the law of, the jurisdictions that are not “known” to the requesting party. These Opinions add an additional layer of comfort for the requesting party that their foreign law counterparts in the transaction are able/authorised to participate in the transaction. The types of transactions in which Opinions appear range from bank/institutional credit/financing through M&A and real estate acquisitions to investment fund launches/closings.

The following are some frequently asked questions in relation to the practical aspects of the issue of Guernsey law Opinions in connection with international transactions.

When are Opinions required?

From a Guernsey specific perspective, Opinions are generally requested from Guernsey counsel when an element/aspect of the deal has a Guernsey link. Normally this is because Guernsey registered entities are involved as parties to the transaction (i.e. they will enter into contractual obligations usually via contracts governed by the laws of another jurisdiction) in some capacity e.g. as a borrower, guarantor, purchaser, seller, investor etc. Equally, Opinions are utilised where documents to be entered into by various parties are governed by Guernsey law.

What does an Opinion cover?

The use of Opinions in transactions has evolved to the point where the content of them has been broadly established, including more specific “add-ons” depending on the transaction type.

Broadly, Opinions from Guernsey counsel on a transaction cover matters of law relating to either or both of (i) the valid existence of a Guernsey registered entity and its capacity to enter into certain transaction documents and/or (ii) the due execution, validity and enforceability of foreign law and/or Guernsey law transaction documents (in both cases entered into by the Guernsey entity).

The more specific standard opinions which would be given to get to capacity and/or validity and enforceability include that the:

- Guernsey entity:
 - Has been duly incorporated and validly exists;
 - Its constitutional documents do not prevent the actions it is taking;
 - Is subject to suit in its own name and can own its assets; and
- Relevant transaction documents:
 - Have been duly executed,
 - Do not conflict with law or the constitutional documents of the relevant Guernsey entity,
 - Choice of law provision is valid,
 - Submission to jurisdiction and enforcement provisions are valid.

In addition, specific opinions can be given that are agreed by Guernsey counsel as part of market practice for a particular type of deal e.g. how an investor is put on the register in the context of a fund closing.

What does the Opinion not cover?

Opinions are given as to matters of law and do not cover matters of fact. As external legal counsel, we are ‘outside’ of the relevant functioning/day to day activities of Guernsey entities. As such, factual matters concerning the running of an entity, such as whether an entity is solvent or whether it has complied with specific obligations under the Guernsey Companies Law, are not within our knowledge and therefore beyond the remit of an Opinion. It is market practice in Guernsey to have a director of the relevant Guernsey entity issue a certificate to confirm certain factual matters.

What are the first steps in the process of obtaining an Opinion?

Most importantly, advance notice is essential. Transactions in which Opinions are required are often highly complex and involve multiple aspects, parties or jurisdictions which may

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result in focus being put on the main transaction documents with ancillaries such as Opinions (while actually quite important to completing the transaction) being left until completion looms near. While understandable this can lead to a wholly avoidable “pinch point” on closing a transaction. More often than not the Opinion process can be run simultaneously with the main commercial transaction elements.

The following is very useful for us to know at the outset:

- the specifics of the transaction;
- the anticipated scope of work (i.e. in addition to providing an Opinion anything else e.g. prepare board minutes for a Guernsey entity and assist with arranging the board meetings, produce Guernsey law documents or review non-Guernsey documents from a Guernsey perspective);
- who the Opinion is to be addressed to;
- on which entities/documents will we be required to opine;
- whether the entities have corporate administrators and the contacts at the administrator; and
- timing for the issue of the Opinion.

What do we need to have in order to start preparing a draft Opinion?

As a starting point for the Opinion the following is required (although not necessarily at the same time):

- copies of the constitutional documents of the relevant Guernsey entities (e.g. memorandum and articles of incorporation, limited partnership agreements, certificates of incorporation or registration etc.);
- draft board minutes (and if applicable/required, draft shareholders’ resolutions for the shareholders) for the relevant Guernsey entity entering into the transaction documents being opined on;
- if applicable/required, any consents/authorisations/approvals from a regulatory body in respect of the transaction;
- the latest drafts of the transaction documents being entered into by the Guernsey entity; and
- registers of directors and secretaries and, if applicable, register of members of the relevant Guernsey entity.

What do we do to get the Guernsey process moving?

Shortly after getting our instructions, and receiving the documents above, we will conduct an initial search of the public records in order to determine whether there are any issues relating to the relevant Guernsey entities e.g. in the context of a company whether it has been struck-off the register of companies or whether there are any applications for its winding-up.

We will also establish contact with the relevant local administrator (if applicable) in order to obtain any documentation necessary (such as the abovementioned

constitutional documents and registers) and open communication lines to make any arrangements for board meetings, delivery of documents etc.

Are there other documents that are required in relation to the Opinion?

As touched on above the only other document that will be produced will be a director’s certificate which is to be signed by a director of the relevant Guernsey entity. This certificate is generally addressed to us as Guernsey counsel.

Often, we will be asked to produce the corporate authorisations required in order for the Guernsey entity to enter into the relevant transaction documents to which it is a party.

What does the director’s certificate cover?

The director’s certificate contains confirmation of certain facts relating to the Guernsey entity, such as solvency, compliance with laws, no resolutions for winding-up/administration, any board meetings were duly quorate and validly held and confirmation that the Guernsey entity is not involved in any litigation. This certificate will need to be delivered on the date on which the Opinion is to be issued.

What do the searches of the public records reveal?

Searches are done on the public records of the entity on file and available for the purposes of public inspection at the Registry of Companies and a search of the computerised records of matters raised in the Guernsey courts available for inspection at the Greffe (the equivalent of the court registry). This would include any resolutions filed at the Registry of Companies and details of proceedings commenced involving the Guernsey entity. It must be noted that these searches are limited in that there is no register of pending actions in Guernsey so any matters before the courts in Guernsey would have to have already been raised in order to appear on the search results. There is also the potential for a delay in matters which have been raised but have not yet been put in the records (caused by administrative delay).

How is the Opinion issued?

The practicalities of the transaction will dictate how and when the Opinion will be issued. On the day of issuing the Opinion, we will update the searches of the public records to ensure that the latest information available is relied upon. In addition, if we are liaising with the corporate administrators of the Guernsey entity, we will request updated registers of directors and secretaries (and, if applicable, register of members) dated the date on which the Opinion will be issued.

On a straightforward Opinion issue, we will need to have sight of the following documents:

- updated searches of the public records on the date of issue of the Opinion;
- registers of directors and secretaries (and, if applicable, registers of members) dated the date of issue of the Opinion;

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- fully signed and dated transaction documents which are being entered into by the Guernsey entities or which are being opined on (signed by all parties to those documents); and
- signed director's certificate dated the date of issue of the Opinion.

The specific circumstances of the transaction will determine whether additional documents are required (such as copies of any consents or regulatory approvals if relevant to the Opinion). Additionally, each transaction has its own requirements in terms of how the closing will be conducted and the issuing of the Opinion can be adapted to suit the closing mechanics e.g. delivering but the signed Opinion to be held in escrow subject to the occurrence of a particular completion event.

Confusion avoided

The Opinion, which is often a condition precedent to completion of a transaction, need not be that difficult last piece provided it is considered early on in the process and the mechanics and requirements are clearly understood. Our lawyers are experts at managing these transactions and we would be delighted to answer any queries.

Please get touch with a member of our [Guernsey team](#) should you have any questions.

Key contacts

For further information or professional advice please contact our lawyers below:



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