FROM THE CHAIR
By Nat Doliner

We are looking forward to a great Committee meeting in Scottsdale, Arizona, on Friday and Saturday, October 15-16, 1999. You should have received details by now by mail and email. If you are interested in attending and have not yet received information about the meeting, kindly contact Jean Higgins, (312) 988-6187, (higginsj@staff.aba.net) or me (813) 229-4208 (ndoli@carltonfields.com).

In Scottsdale, our newly formed Task Force on the Model Stock Purchase Agreement, chaired by Robert Harper (Pittsburgh, PA) will have its inaugural meeting. The purpose of the Task Force is to update the Model Stock Purchase Agreement and to prepare a seller’s response document. If you are interested in serving on the Task Force, contact Bob Harper (rharper@klettlieber.com).

I would like to thank David Gemunder (Cincinnati, OH) for promoting our Committee within the Young Lawyers Division. David, who holds a leadership position in the Young Lawyers Division, is responsible for a very nice profile of our Committee that has appeared in written materials of the Young Lawyers Division. One of our Committee’s goals is to add more younger members who are involved in the mergers and acquisitions practice.

If you are a mentor to a more junior attorney in your firm or company, you might wish to consider having that person become an active member of the Committee.

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Our thanks to Darrel Rice (Dallas, TX) and Lloyd Winans (New York, NY) for co-chairing an excellent panel at the ABA annual meeting in Atlanta on “Cross-Border Mergers and Acquisitions: Latin America and North America.” This program was co-sponsored by our Committee and the Committee on International Business Law. Other panelists included: Durval Noronha (Sao Paulo, Brazil), Julio Rivera (Mexico City, Mexico) and Alfredo Rovira (Buenos Aires, Argentina). I also want to acknowledge the excellent panel presentation in Atlanta chaired by Henry Lesser (Palo Alto, California) on “Confidentiality Agreements in the M&A Process: How to Get Your Deal Started the Right Way.” Other panelists included: Keith Flaum (Palo Alto, CA) and James Rill (Washington, D.C.).

At our committee meeting in Atlanta, Keith Flaum (Palo Alto, California) did an outstanding job reviewing the law on material adverse change clauses and Ian Fagelson (London) and Doug Rofe (London) made a terrific presentation on various aspects of mergers and acquisitions transactions in the UK.

Please remember the Fourth Annual National Institute on Mergers and Acquisitions will be presented by our Committee and representatives from the ABA Tax Section in Newport Beach, California on November 11-12, 1999. The Institute has been very successful over the years. For more information, contact Jackie Hill at the ABA (312) 988-6209.

FEATURE ARTICLE

PUBLIC COMPANY ACQUISITIONS IN THE UNITED KINGDOM

By: Ian Fagelson
Douglas Rofé
Warner Cranston Solicitors

We write to summarize some of the main areas in which UK rules, customs and practices differ from those prevailing in the USA in relation to public company acquisitions.

The overwhelming majority of public company acquisitions in the UK are accomplished by means of offers for shares (equivalent to US tender offers). Accordingly, this article concentrates on offers for shares. However, other structures are available and it is possible that, in the particular circumstances of a transaction, it might be appropriate to consider an alternative structure. Some alternative structures are, therefore, considered briefly at the end of this article.

1 Offer Documents and the Role of Financial Advisers

Invariably, an offer for shares is contained in a formal offer document issued by the offeror's financial adviser (normally an investment bank or stock brokering firm but sometimes the corporate finance department of an accounting firm or another appropriately regulated advisory firm).

Simultaneously with working on the offer document, the offeror will also be working on a press release containing the conditions of the proposed offer and certain other key information. Once this has been released, the offeror will normally be required to proceed to issue the formal offer within 28 days. Normally, the parties try to issue the formal offer document well within the 28 days and often it is issued simultaneously with the announcement.

The offeror's financial adviser takes the lead role among the offeror's professional team in relation to: negotiations with the target's financial adviser; drafting the offer document and formal announcements (delegating the technical legal sections to the lawyers); and conducting discussions with the principal regulator, the Panel on Takeovers and Mergers (see 2 below).

Where the consideration for the offer comprises or includes cash, the offer document must contain confirmation by an appropriate third party that resources are available to the offeror to pay for all of the shares. The offeror's financial adviser normally discharges this responsibility and to do so will require evidence that the offeror has the necessary cash resources. This commonly takes the form of a facility confirmation letter from the offeror’s commercial bankers. Such a letter will not be permitted to be conditional on any matter other than the offeror becoming obliged to pay for the shares.
In a “friendly” transaction, the teams representing the offeror and the target will work closely together to agree the documentation. Obviously, in a hostile transaction this will not be the case.

2 Regulatory Framework

Acquisitions of shares in UK public companies are governed not only by the relevant securities and corporate laws but also by two bodies of rules, the City Code on Takeovers and Mergers (the "Code") and the Rules Governing Substantial Acquisitions of Shares (the "SAR's"), administered by a body called the Panel on Takeovers and Mergers (the "Panel"). Although the Code and the SAR's (collectively known as the "Blue Book") are not legally binding, they are treated by all professional advisers and intermediaries as though they had the force of law. The Blue Book contains a warning that those who do not conduct themselves in accordance with the Code may find that they are effectively "blacklisted" so far as the London securities markets are concerned and that professional advisers and intermediaries who fail to comply with the Code might lose their securities licenses.

3 The Code

The Code is designed to achieve fairness and equality of treatment for shareholders in the context of a takeover transaction. It contains a number of rules that might be surprising to Americans. For example, rule 9 obliges any party who has acquired 30% or more of the voting rights of a public company to make an immediate offer (based on the highest price paid by the offeror in the previous twelve months) for the rest of the shares. This is buttressed by provisions that aggregate the shares held by persons deemed to "acting in concert".

Rule 2 governs secrecy and announcements. Rule 2.1 emphasizes the need for secrecy prior to announcement. It stresses the need to keep information about a proposed offer strictly confidential. Offerors quite often want to discuss a proposed bid with shareholders of the target or potential financiers. The Panel requires that it be consulted about any widening of discussions beyond the parties and their immediate advisers and may require a public announcement to be made before the discussions are widened.

However, the Panel operates a rule of thumb under which information about the proposed offer may normally be disclosed to up to six parties outside the offeror and its advisory team without a public announcement being made and will, on a case by case basis, consider permitting wider discussion without announcement.

Rule 2.2 establishes when an announcement must be made. You should note that, under rule 2.2 (a), once a firm intention to make an offer that is not (or is no longer) subject to any pre-condition has been notified to the target's board, an announcement is required. Rule 2.5 (b) governs the content of an announcement of a firm intention to make an offer. Further, under rule 2.7, once an offeror has announced a firm intention to make an offer, the offeror must, in general, proceed to make the offer even if there has been a change in circumstances.

Rule 8 requires detailed disclosure of financial information about the offeror even where the offer is entirely in cash and the offeror's financial adviser has independently established the unconditional availability of the cash. Where the offeror is a subsidiary company, the Panel will often require detailed disclosure of parent company financial information. Where the consideration includes securities, the extent of information required to be disclosed may be even greater.

Under rule 20.2 where the target company has provided information (e.g. in response to a due diligence checklist) to one offeror or potential offeror, it must give the same information promptly upon request to any other offeror or bona fide potential offeror. Rule 21 restricts the management of the target company from engaging in certain actions designed or likely to frustrate an offer. An offer for equity shares must always be subject to a minimum acceptance condition. Normally, this condition can be waived by the offeror. However, the Code will not normally allow the acceptance condition to be set at a level that would allow the offeror to wind up with less than a majority of the voting shares and the Panel will not.
normally allow the offeror to waive the condition to below that level. The acceptance level is normally set at 90% of the shares not already owned by the offeror in order to take advantage of the freeze out provisions discussed at section 6 below.

In appropriate circumstances, the Panel will sometimes waive strict compliance with the letter of the Code. Waivers will often be granted orally by telephone. The Panel will also give guidance over the telephone about the interpretation and application of the Code. Discussions with the Panel are normally conducted by the relevant party's financial advisers. However, lawyers are sometimes involved in discussions with the Panel - particularly on those, comparatively rare, occasions when it is necessary to communicate in writing.

4 Personal Responsibility and Verification

The Code provides (rule 19) that each document issued during the course of an offer must satisfy the highest standards of accuracy and that the information given must be adequately and fairly presented. The Code goes on to provide that each document issued in connection with an offer must state that the directors of the offeror accept responsibility for the information contained in the document. In the case of a friendly deal, the offeror's directors are normally able to limit their responsibility to information relating to the offeror on the basis that the directors of the target will accept responsibility about information relating to the target.

Directors signify their acceptance of personal responsibility by signing formal responsibility statements. Quite often, where the offeror is a subsidiary, the Panel will require the directors of the parent company to accept responsibility. This is sometimes problematic for US parent companies where the board of directors mainly comprises outside directors who are not taking a close personal interest in the UK documentation. In the past, we have overcome that problem, with the Panel’s consent, by having the parent company board appoint a committee of officer/directors to deal with and, on behalf of the whole board, to accept responsibility.

The accuracy of the information contained in the offer document is also important because the Financial Services Act 1986 makes it an offence to make a statement, promise or forecast which is known to be misleading, false or deceptive, to dishonestly conceal material facts or to be reckless about making such a statement, promise or forecast for the purpose of inducing (or being reckless as to whether it may induce) someone to buy or sell investments. A person guilty of this offence is liable to up to 7 years imprisonment and/or to an unlimited fine.

To minimize the risk of issuing a misleading offer document, all of the information in it should be verified. This involves, but is not limited to, the production by the relevant lawyers of a document known as “verification notes”. The verification notes re-state all of the assertions of fact and opinion in the document, ask questions designed to test their accuracy and foundation and indicate who is accepting responsibility for verifying each such assertion. The answers, and supporting documentation, are compiled and the notes are worked through, and signed by the relevant persons, at a verification meeting. In a hostile transaction, the verification of the entire document will be handled by the offeror’s lawyers. In a friendly transaction, those parts of the document that relate to the target will commonly be dealt with by the target’s lawyers.

5 Stake Building

The ability of an offeror to buy shares in the target during the period of the offer process is affected by the provisions of the Code, the SAR's and the law relating to insider dealing. In circumstances where the offeror is free to buy shares, it may choose not to do so for tactical reasons. See for example, the discussion of the freeze-out provisions of English law (at section 6 below). Stakes of 3% or more and changes of 1% or more in such stakes must be publicly disclosed. It is essential that the offeror receives both legal and financial advice in relation to any purchases of shares in the target.

6 Freeze Out

Where an offer is accepted by the holders of 90% of the shares to which it relates, the offeror can acquire
the remaining shares compulsorily at the offer price. There is no requirement for an appraisal.

The rules governing the freeze out are contained in Part XIII A of the Companies Act 1985 and are quite complex. Where the offeror already owns shares at the time the offer is made, it must obtain 90% of the shares it does not already own in order to be able to take advantage of the freeze out rules. For this reason, among others, where an offeror is in a position to "lock in" a shareholder before the general offer is made, it will normally do so by taking an irrevocable undertaking from the shareholder to accept the offer rather than by buying, or agreeing to buy, the shares in advance of the offer being made.

7 Irrevocable Undertakings

Quite often, the offeror will reach agreement, in advance of making the offer, with key shareholders committing them to accept the offer. These agreements are typically recorded in forms of "irrevocable undertaking" in which the shareholder agrees to accept the offer if it is made at a stated price by a stated time. Institutional shareholders will often insist on a clause releasing the undertaking if a higher offer is made by a third party. The offeror must be careful to ensure that any discussions with shareholders before the offer is announced are on terms of absolute confidentiality and making it clear to the shareholder that he is now privy to inside information and must not deal in the shares of the target or the offeror or encourage anyone else to do so.

8 Paper Alternatives

Quite often, even where the offeror really wants to offer cash only, it is sometimes necessary to include an alternative consideration whereby selling shareholders can accept securities (such as loan notes) instead of shares. This is because shareholders can defer, or sometimes completely avoid, UK capital gains taxation by exchanging shares for securities instead of cash.

Often, the consideration in loan notes will be cosigned by a bank by way of guarantee to make them more attractive to shareholders. US banks do not typically sign as guarantor and tend to issue standby letters of credit instead.

9 Anti-trust

European Union law requires compulsory anti-trust filings to be made in relation to transactions where the relevant figures are large enough. If the numbers are not above the EU filing thresholds, the offeror needs to consider whether to seek anti-trust clearance in the UK and, if so, what type of clearance to seek. There is no obligation to file for anti-trust clearance under UK domestic law but the consequences of not obtaining anti-trust clearance before closing can be catastrophic if the competition authorities are unhappy with the merger.

A takeover offer is normally expressed to be conditional upon obtaining satisfactory anti-trust clearance or the expiration of the relevant waiting periods.

10 Leverage

English law generally prohibits a public company from providing financial assistance for the purchase of its own shares. This rule can be problematic if a leveraged acquisition is contemplated. Following the acquisition, it is normally possible to convert the target from a public company to a private company so as to enable it to pledge its assets as collateral for the repayment of acquisition debt. However, even a private company is restricted in its ability to pledge its assets in this way. It may only do so if its directors file a declaration confirming its ability to pay its debts as they fall due and that declaration is supported by an external auditor’s opinion. Furthermore, the earliest time at which the target will be in a position lawfully to pledge its assets as collateral for the acquisition finance is likely to be several months after the date on which the bulk of the purchase money must be paid to selling shareholders.

11 Deal Protection and Break-up Fees

It is still relatively unusual for the target of a friendly takeover offer to agree to any measure of deal-protection (even in cases where management of the target is wholly enthusiastic for the bid to succeed) or for the offeror or to agree to pay a break-up fee if the transaction aborts. Break up fees are however now beginning to be seen in the UK market. In response to
this the Code is to be amended so that break up fees will generally not be permitted to exceed 1% of the total offer value. Any such break up fee arrangements will have to be fully disclosed and the documentation made available for public inspection.

Apart from the Code there is still room for debate as to whether and to what extent such arrangements are technically permissible under general law. The law requires the Board of the target to act in the best interests of the target's shareholders as a whole and not in the interests of management. The law prohibiting a company from providing financial assistance for the purchase of its own shares, as discussed in the previous section, is also relevant to break up fees. However, within the limits of the Code, there should, in theory, still be scope to negotiate an agreement whereby the target meets reasonable expenses incurred by a friendly bidder in the event that the transaction fails to be consummated.

12 Hostile and Competitive Situations

There is little scope for litigation or legal maneuvering in hostile or competitive situations. Basically, the battle is fought to win the support of shareholders by persuading them of the merits of the rival proposals. Public relations and financial advisers play a major role. It is not unusual for the parties to engage in advertising and telephone campaigns. Of course the parties will watch each other's conduct to ensure that the rules are not broken and, in appropriate cases, will complain to the Panel or (less frequently) to the Courts. The Panel will normally deal quickly and relatively informally with complaints.

13 Alternative Structures

Because of its relative speed and simplicity, the overwhelming majority of UK public company acquisitions are accomplished by way of offers for shares. However, there may be reasons for considering alternative structures.

If the stamp duty, which is 0.5%, is thought to be an obstacle, the transaction can be structured by way of a court approved scheme of arrangement whereby the target company issues new shares to the offeror and the existing shares are cancelled in consideration of the offeror’s subscription moneys being paid over to the existing shareholders pro rata to their holdings that are being cancelled. This can be structured on a stamp duty exempt basis.

Another advantage of a scheme of arrangement is that the acceptance threshold is not 90%. The scheme must be approved by a shareholder resolution adopted by a three fourths majority of those voting. The prime disadvantage of a scheme of arrangement structure is that it generally involves a longer, and less flexible, timetable. A variant of the scheme of arrangement would be for the target to issue new shares to the bidder for cash which, subject to the same three fourths majority vote of the target’s shareholders, would be used to redeem the existing shares. No court sanction would be required but the transaction would not be exempt from stamp duty.

Finally, it might be worth considering whether the UK “target” should in fact be the surviving entity under a US style merger transaction. This would involve the UK “target” incorporating a US acquisition subsidiary as English law does not provide a ready mechanism for effecting a US style merger.

We hope the above information is useful to you. Please feel free to call if you have any questions or comments.

TASK FORCE REPORTS

Asset Acquisitions Task Force

The Asset Acquisitions Task Force is down to the “lick log” in its effort to complete its Model Asset Acquisition Agreement (“MAPA”) project. For those of you who continue to question the meaning of the term, “lick log” is defined in the recently published Random House Historical Dictionary of American Slang as follows:

lick log n. [fr. S.E. sense ‘a salt lick for cattle’; though this use is not attested until 1851, this is
presumably due to a gap in the evidence] 1. a gathering place; point of contention or decision; in phr. stand to (one's) lick-log, salt or no salt to stand firm; act decisively; come to the lick-log to face facts; make a difficult decision; down to the lick-log down to business.

Random House cites the following examples of uses of the term, some of which are old and some of which are not:

1834 Crockett Narrative: I was sure I would do a good business among them. At any rate, I was determined to stand up to my lick-log, salt or no salt. 1840 [Haliburton] Clockmaker (Ser. 3) 175: I like a man to be up to the notch, and stand to his lick-log; salt or no salt, say the word, or it's no offer. 1982 in DARE: One of the men said, “we are at the lick log” (meaning we must now decide.). 1992 in DARE: Texas Gov. Ann Richards...said Democrats were encouraged that Clinton had proved to be a fighter on the campaign trail. “When it really gets down to the licklog, we're going to have somebody in the Democratic Party who's going to get in there and slug it out with them.” 1992 Launer My Cousin Vinny (film): Let's get down to the lick log.

In this endeavor, the Task Force continues to function through three groups: (1) the Editorial Group, chaired by Byron Egan, which is working to complete MAPA’s text and commentary; (2) the Ancillary Documents Group, chaired by Larry Tafe, is preparing the exhibits and other ancillary documents to the MAPA; and (3) the International Task Force, chaired by John Leopold and Guy Weijer, which is preparing an annex to the MAPA on international aspects of asset acquisitions. Other annexes to the MAPA will relate to taxation of asset acquisitions, successor liability and special issues involving acquisition of divisions.

Each of the three Groups worked on its assignments at the ABA’s Annual Meeting in Atlanta in August and separately thereafter. The result of these efforts are the three volumes of MAPA being distributed for review at the Task Force and Committee meetings in Scottsdale.

International Transactions Task Force

The International Transactions Task Force met on August 7, 1999 in Atlanta.

At the meeting, a status report was provided on the publication of the international overview of asset transactions. The work product was submitted to the ABA Business Section for editorial review in October, 1998. Feedback has been positive to date and we expect the editorial review to be completed shortly. Because publication is now anticipated to be some time in the year 2000, we will have to send responses for update by the end of 1999 or the beginning of 2000 since our work product dates back to the summer of 1998.

The main part of the meeting was devoted to a review of the latest draft of the stock purchase questionnaire, which was presented to the meeting by Norman Rishikof and Douglas Rosé. The issues discussed included whether tax matters, structuring issues and other matters such as pre-contractual letters of intent should be included in the questionnaire. These issues will be the major focal point of the discussion at the stand-alone meeting in Scottsdale in October.

On the program front, Darrel Rice provided an overview of the program that he would be co-chairing in Atlanta entitled "Cross Border Mergers and Acquisitions: Latin America-North America". An overview was also provided of the program scheduled for New York/London in 2000 which would have a transactional focus, the intent being to do a program both in New York and London.

Joint Venture Agreements Task Force

The Task Force based its discussions at the August 8 meeting on three questions raised in the memorandum from the Editorial Committee dated July 23, 1999.

Byron F. Egan
H. Lawrence Tafe, III
Co-Chairs

John W. Leopold
Guy-Martial A.X. Weijer
Co-Chairs
1. Should the draft Model Joint Venture Agreement be governed by the Revised Uniform Partnership Act?

The consensus was that RUPA should be the governing law. The Task Force discussed in detail three particular aspects, as follows:

(a) Duty of Care/Fiduciary Duty. RUPA explicitly addresses the fiduciary responsibilities of partners to each other, providing for express obligations of loyalty, due care and good faith and thus explicitly displaces the fiduciary duties developed under the Uniform Partnership Act caselaw. RUPA also provides that certain duties are contractual rather than fiduciary and allows partners, within limits, to define the standards by which those duties are discharged.

(b) Termination. RUPA adopts different terminology and applies different mechanics to the termination of a partnership (see attached memo for discussion).

(c) Other. There was a discussion on the enforceability of a partnership agreement not governed by the laws of a RUPA state but which purported to adopt RUPA as its governing law. The Task Force agreed that while this was an issue, on balance it was preferable to draft the agreement under RUPA but to provide commentary on the sections where the application of RUPA might produce different results in a State that had not adopted RUPA.

2. Should any matters require the action of the partners rather than the action of the Management Committee?

As stated in the memo (reproduced below), the latest draft Agreement provides that certain listed actions by the management committee should be decisions management can make only having to take into account the interest of the partners, other listed actions need the unanimous vote of the managers but having to take into account the interest of the partnership. Finally there are listed actions where the managers can agree by majority vote, taking into account the interest of the partnership.

There was extensive discussion around the concern that as a practical matter based on our fact pattern, it is more likely that the partners themselves would make most decisions through their representatives at the partnership level rather than at the management level. The relative bargaining power of Large Company and Small Company would, in reality, impact on the Management Section of the Agreement. It was, however, agreed that as model language it would be more useful to the reader to see the alternatives, provided there is commentary to focus the reader on the applicability of the model to any particular fact pattern. The tiered approach also minimizes the difference between the LLC structure and the pure partnership structure.

One of the concerns expressed regarding the proposed revised language was that the revised management language, when combined with exculpatory language that would be required by the managers to protect themselves against potential liability, could arguably create additional duties of care. It was agreed that the Agreement would reflect the tiered approach to decision-making and to provide corporate exculpatory language and commentary but also to ensure that the language does not create duties in excess of those mandated by RUPA.

There was discussion surrounding the issue of whether or not, given the duty of loyalty in RUPA, the language regarding non-competes was needed. It was agreed that for avoidance of doubt the model agreement should contain specific language rather than leaving it to statutory interpretation - particularly as a party may seek to enforce the covenant in a non-RUPA state. This addition should be accompanied by commentary.

3. Who should control the Budget and the Business Plan - Large Company only or both partners?

There was discussion surrounding the issue of who should control the budget and the Business Plan. (See Memo). The discussion revisited whether Small Company should effectively have the ability to veto additional partner loans or additional capital contributions not covered by a budget or Business Plan. The Task Force agreed that, for drafting purposes, the language would stay as is, but the issue would be addressed as part of the commentary.
Next Steps - Focus on the Commentary

Attached to the minutes is a list of the various sections needing commentary and the parties who have agreed to work on the commentary. Additional Volunteers are welcome. Please contact Alison Youngman at ayoungman@tor.stikeman.com if you cannot assist with previously committed tasks, if you need help for your section or if you are willing to volunteer to assist the existing volunteers with the commentary.

DRAFTING ASSIGNMENTS AS OF
AUGUST 8, 1999

I. Definitions Editorial Committee
II. Establishment of the Partnership - Copeland*
   2.9(g) Representations and Warranties
      - Bybelezer*, Humes
III. Capital Contributions - Oliver, Friedman, Prokop*
IV. Shares of Profits and Losses - Koerber, Prokop*
V. Management - McKenzie*, Kazanjian, Van Dyke, Parrott
VI. Establishment of Targets - Bess*, Weinberg
VII. Dissolution - Cooper*, Park*, Baldanza
VIII. Transfer of Partnership Interests - Patrick*
IX. Accounting and Tax - Thompson, Prokop
X. Dispute Resolution - Brown, Meyer*; Hoyt
XI. Indemnification - Absher*, Lewis, Downey
XII. Competition - Swords*, Thorburn, Chavez
XIII. Obligations Between Partners
   14.1 RUPA
   14.2 - 14.4 - Scott Echlin, Allan Donn Miller
XIV. Miscellaneous - Hyman*; Brockmeyer

Exhibits
Form of Opinion of counsel - Bess
Form of Technology License Agreement - Youngman*, Zilber, Douh, Cunningham
Form of Confidentiality Agreement - Walton
Choice of Entity - Keating, Parrott, Prokop

* Leader

MEMORANDUM
TO
JOINT VENTURE TASK FORCE
July 23, 1999

The Editorial Committee of the Joint Venture Task Force has noted the following issues that it hopes the entire Joint Venture Task Force will address at upcoming meetings. The Editorial Committee has also made some clarifying changes to the draft Model Joint Venture Agreement, the most significant of which are pointed out in Part B below.

1. Should the draft Model Joint Venture Agreement be governed by the Revised Uniform Partnership Act? With minor variations, all states other than Louisiana have adopted either the Uniform Partnership Act (the “Original Act”) or the Revised Uniform Partnership Act (the “Revised Act”).

Two of the most important differences between the Original Act and the Revised Act concern the duties of the partners to each other and the mechanics and terminology applicable to the termination of a partnership. Thus, a choice between the two Acts will affect the drafting of the model Joint Venture Agreement and, most likely, some of the commentary in each of these areas.

Unlike its predecessor, the Revised Act by its terms explicitly displaces the common law of fiduciary duties among partners and provides that it is an exclusive statement of those duties. The partners in a partnership governed by the Revised Act have broader powers to reshape their fiduciary duties than they did under the Original Act. The Revised Act also provides that certain duties are contractual rather than fiduciary and allows partners, within limits, to define the standards by which those duties are discharged. (The ABA program book Fiduciary Duties in Partnerships, LLCs and Unincorporated Businesses: Can They Be Rationalized? contains a very good summary of these issues. The book was distributed at the program of the same name presented by the ABA Committee on Partnerships and Unincorporated Business Organizations at the 1998 St. Louis Spring meeting and is available on the ABA’s web site.)
The Original Act and the Revised Act also use different terminology and apply different mechanics to the termination of a partnership that affect the substantive provisions of the Agreement. For example, unless the partnership agreement is for a stated term or for a duration tied to a specific purpose, the Original Act permits a partner to dissolve the partnership at will and such an act is neither wrongful not triggers remedies for premature dissolution. The remaining partners can elect to continue the business of the partnership under the Original Act, but only in a new partnership. By contrast, the Revised Act treats the Partnership as a separate entity that can survive the withdrawal of a member. A withdrawing partner “disassociates” from a partnership and does not dissolve it. A partner’s disassociation from a partnership governed by the Revised Act can be treated as wrongful and can give rise to contractually stipulated damages whether or not the partnership is stipulated to exist only for a stated term or project.

So far, the drafts of the Model Joint Venture Agreement have not specified any governing law or statute. The Editorial Committee suggests that the draft Agreement would be more helpful to its readers if it states that the Revised Act applies to it, uses the Revised Act’s terminology and if the commentary points out the relevant differences between the Original Act and the Revised Act.

2. Should any matters require the action of the partners rather than the action of the Management Committee? Section 5.5 of the March 1999 draft of the Model Joint Venture Agreement allowed only the partners to act on certain matters. These matters, which required the unanimous approval of the partners, were the amendment of the Joint Venture Agreement, the admission of additional partners, the merger or consolidation of the Joint Venture, the sale of all or substantially all of the Joint Venture’s assets and the dissolution or liquidation of the Joint Venture (using in the latter case a provision not appropriate under the Original Act discussed above).

As a practical matter, the partners act only through their representatives, and partnership action merely becomes a question of the corporate rank of the representatives involved. The reservation of certain actions to the partners was originally thought to be a way to ensure that these most significant actions gain the attention of the appropriate personnel at each corporate partner. However, the Editorial Committee believes that it is unlikely that a member of the Management Committee would take any major action without consulting with appropriate superiors. (In point of fact, the partners will probably be special purpose corporations whose highest officers may not necessarily be those individuals in the parent companies who make the final decisions on the most important matters.)

Accordingly, the Editorial Committee proposes a modification of the governance structure that brings all major decisions within the purview of the Management Committee but places those decisions in categories according to the vote required and the persons to whom the members of the Management Committee owe their duties when they make their decisions.

Section 5.4(a) lists those matters that require the unanimous approval of the Committee but must be decided in the best interests of the partners. Section 5.4(b) lists other matters that require the unanimous approval of the Committee but must be decided in the best interests of the partnership (an appropriate distinction because the fact pattern contemplates that the partnership is intended to become a free standing, independent entity). Finally, Section 5.4(c) lists actions that require only a majority vote of the Committee and must also be decided in the best interests of the partnership.

3. Who should control the budget and the Business Plan - Large Company only or both partners? The current draft of the model Joint Venture Agreement requires the unanimous consent of all members of the Management Committee for the approval of any Business Plan or any budget. (See Section 5.5(a)(viii)). This gives Small Company a veto over these crucial economic decisions. Should that continue to be the case or should the Large Company retain control of these matters since it has the greater economic share of the joint venture?

This question is closely tied to the issue of corporate governance more generally. Although Large Company
is contributing more in value to the venture and has a greater economic share in it (as determined by its capital account), each of Large Company and Small Company has equal representation on the Management Committee. The categories of Management Committee decisions described above give Small Company a veto over all issues requiring unanimity. Although there is equal representation on the Management Committee, decisions requiring majority approval of the Management Committee do not necessarily give Small Company the same veto right. Section 5.2 (b) gives Large Company the right to appoint the Chairman who is given a casting vote by Section 5.3(b) in the event of a deadlock on the Committee.

A related question is whether this management structure reflects the balance between the partners that the Task Force wishes to achieve. The Editorial Committee notes that the current draft contemplates that any additional capital contributions or partner loans will be included in the budget or Business Plan. A failure to agree on any partner loans or additional capital contributions not covered by a budget or Business Plan constitutes a Critical Target Failure giving rise to a possible dissolution of the partnership. (See Sections 3.2(a) and (b)). The provision in the earlier draft that allowed either partner to make optional loans in the case of a capital shortfall has been moved to a new optional section 3.2(b). The role of the Management Committee in making additional capital calls is limited to implementing the requirements of the Business Plan rather than initiating capital calls on its own motion. Does the full Task Force believe that this approach is adequate to deal with budget shortfalls?

Footnotes. The Editorial Committee has noted additional matters for discussion and decision by the Task Force in the footnotes to the draft Agreement.

Alison Youngman

Acquisitions of Public Companies Task Force

We had a great four-hour meeting on Sunday, August 8, 1999 in Atlanta. As is our custom, we opened our meeting with introductions. Present were Steve Knee (Co-chair), Diane Frankle (Co-chair), Nelea Absher, Gary Apfel, Neal Brockmeyer, David Bronner, Richard Climan, Bryan Davis, Keith Flaum, Drew Fuller, Stephen Glover, Joel Greenberg, David Katz, Edward Kerwin, Peter Koerber, Henry Lesser, William McGrath, Mark Morton, William Old, Darrel Rice, and Franziska Ruf. On the administrative front, we confirmed our next two meetings: (1) at the Committee Standalone meeting at the Princess Hotel in Scottsdale, Arizona during the weekend of October 15-16, 1999 and (2) our third annual full day standalone task force meeting in Wilmington, Delaware on Saturday, January 22, 2000, courtesy of Mark Morton of Potter Anderson & Corroon. Mark will be sending out details of our January 2000 visit, including a dinner Saturday night with a member of the Chancery Court and our hotel (Hotel Dupont) well in advance of the meeting. We hope to see you all at each of these!

We will be creating a task force list serve in the next month and all task members should send email addresses to Pilar Alcantara, Diane Frankle’s secretary, at palcantara@graycary.com. We are transmitting drafts of the model agreement and ancillary documents and commentary solely by email.

Diane Frankle asked the members if any were seeing practice evolve regarding “no shops” in light of John Johnston’s insightful articles on “fiduciary outs”. The members noted that practice had not changed as yet and that the standard formulation for buyers first draft remained that the Board would need to have determined in good faith based on advice of [or after consultation with] outside legal counsel that [the desired action] was required by the Board’s fiduciary duties to the stockholders. The members agreed that John Johnston’s issue and possible alternative formulations [e.g., “substantial risk not in compliance with” or “inconsistent with”] to be proposed by targets should be included in commentary. Rick Climan led a discussion on negotiation of capped options. Rick also led a discussion concerning the value of adding “knowledge” qualifiers to representations when the representations were to be true only at closing and only willful breaches resulted in contract liability.

Diane Holt Frankle, Co-Chair
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