FROM THE CHAIR

By Nat Doliner

Our Committee's stand-alone meeting will be in Paris on Friday, October 19 and Saturday, October 20. This is our Committee's first meeting outside North America and it is an historic event for our Committee. It also promises to be an absolutely spectacular weekend. You should have received information about the meeting by email and regular mail. Hotel rooms are limited, so I urge you to make your reservations as early as possible. We are expecting a large turnout for the stand-alone meeting. Many thanks to Reid Feldman (Paris) and Sarah Bolm, of the Business Law Section staff, for making the arrangements. They have provided for your selection a number of fine hotels at various room rental rates. They have also made arrangements for some great tours and marvelous dinners. I am confident that you will love the weekend in Paris and remember it for many years.

Our Committee will present an international institute on cross-border mergers and acquisitions in Paris on Thursday, October 18, at the Maison du Barreau. The institute co-chairs, Guy Weijer (Amsterdam), Henry Lesser (Palo Alto), David Katz (New York), Rick Climan (Palo Alto) and John Leopold (Montreal), have been working very hard to plan and present an excellent institute with outstanding speakers. Many of our Committee's
members have participated in institutes in Europe and the Far East, but this institute will be the first one outside North America sponsored by our Committee.

At the Spring Meeting of the Business Law Section in 1996, Vince Garrity and Steve Weise, who was then Chair of the Section's Programs Committee, decided that it would be a good idea to present a national institute on negotiating business acquisitions. The first institute was held at the Waldorf Astoria in New York City in the Fall of 1996. Subsequent institutes have been held in Chicago, New Orleans, Newport Beach and Boca Raton. This year's institute returns to New Orleans at the brand new and beautiful Ritz Carlton Hotel, on Thursday, November 15 and Friday, November 16. The national institute has received rave reviews each time it has been presented. Lawyers from across the spectrum of experience, and from law firms and in-house legal departments, among others, have found the institute to be extremely worthwhile.

The Model Asset Purchase Agreement, with Commentary, has been published and is available for purchase. It promises to be a best seller for the ABA and will be widely used by attorneys throughout the world. Our thanks to Byron Egan (Dallas) and Larry Tafe (Boston), co-chairs of the Asset Acquisitions Task Force, and to Jon Hirschoff (New Haven) and David Albin (Stamford), who served as the reporters. This publication was recognized at the Section Lunch during the Spring Meeting in Philadelphia.

Also published and available for sale is International Asset Acquisitions - Summaries of 33 Countries' Laws, prepared by our Task Force on International Transactions. This work is also available at a discount as a companion to the Model Asset Purchase Agreement, with Commentary if you purchase both publications. Many thanks to John Leopold (Montreal) and Guy Weijer (Amsterdam), the co-chairs of the International Transactions Task Force, and to Howard Barnhorst (San Diego), who served as a reporter for this project.

**TASK FORCE REPORTS**

**Acquisitions Of Public Companies Task Force**

We met, courtesy of Art Miller, at the offices of Blank Rome Comisky & McCauley, LLP, One Logan Square, Philadelphia, PA 19118. from 9:00 a.m. to noon on Friday, March 23, 2001. In attendance were Stephen Knee (Co-chair), Diane Frankle (Co-chair), Steve Bigler, David Bronner, Rick Climan, Joel Greenberg, Scott Irwin, David Katz, Edward Kerwin, Peter Koerber, Bill McDermott, Jim Melville, Art Miller, Mark Morton, Eileen Nugent, Jon Perry, Mike Pettinger, Eliot Robinson, Franziska Ruf, Lorna Telfer, Sam Thompson, and Leigh Walton. David Katz and Jon Perry joined by teleconference.

After introductions, we confirmed our future meetings. We will meet in Chicago at the offices of David Bronner, Jenner & Block, One IBM Plaza, Chicago, IL 60611. The Chicago meeting is scheduled for Saturday, August 4, 2001 from 9:00 a.m. to 12:00 noon. The Paris Committee meeting is scheduled for October 19-20, 2001. We will meet in Paris; David Katz offered to arrange meeting offices for us after plans for the October meeting are confirmed. We will also meet, courtesy of Peter Koerber, at the offices of Lemle & Kelleher, Pan-American Life Center, 601 Poydras Street, 21st Floor, New Orleans, LA 70130, on a date to be determined around the time of the National Institute, being held November 15-16, 2001, in New Orleans. We are meeting courtesy of Joel Greenberg at the offices of Kaye Scholer, Fierman, Hays & Handler, 425 Park
Avenue, New York, NY 10022 for our full day stand-alone Task Force meeting on Saturday, January 12, 2002, from 9:00 a.m. to 5:00 p.m. We will plan dinners to be held in conjunction with these future meetings. Thanks to all our members for their generous hospitality!

Mike Pittenger, Joel Greenberg and David Bronner agreed to put together commentary on Section 5.7 (the directors’ indemnification covenant) in time for our November meeting. Eileen Nugent, Rick Alexander and Peter Koerber agreed to put together commentary on the corporate governance and social issues arising in a “merger of equals,” along with sample provisions. We took note of the program at 10:30 a.m. on Saturday, March 24, 2001 co-sponsored by our Task Force and the Federal Regulation of Securities’ Subcommittee on Proxy Statements and Business Combinations. David Katz was Program Chair and Rick Climan was a panelist; the program, entitled “Marketable Securities in Public Company Mergers” covered various issues in mixed consideration and stock deals, including exchange ratios, tax issues, the effect of Regulation MA and director’s fiduciary duties in stock deals. We agreed to request that the Chair of the Committee try to avoid scheduling conflicts between our Task Force and the Subcommittee, particularly given the frequent attendance of SEC representatives at the Subcommittee meetings.

We took note of the expected standard use of subsequent offering periods in future tender offers. We also noted the expected target position that the bidder should not have the right to extend the offer if the minimum condition was not met, but rather should rely on the new subsequent offering period mechanism. We noted that the exchange offer structure was still not being used very often in public stock deals, and speculated that it might be due to the requirement of pooling that at least 90% of shares be acquired, a condition which was risky in a two step deal. Task Force members knew only a dozen such deals in 2000.

The Task Force then discussed the organization and presentation of commentary relating to deal lock-ups. The Task Force agreed that the introduction to the agreement would have an explanation of the differences between a private and a public company acquisition, which would include cross references to key provisions in the model agreement, and provide a segue to a discussion of principles of fiduciary duty under Delaware law. Mark Morton has already prepared the latter section; Diane Frankle offered to modify Joel Greenberg’s excellent article included in the National Institute materials to provide the introduction.

The Task Force then agreed that the introduction would include sections on basic deal lockups, like what is a no shop, the role of walk rights, termination provisions and break up fees, the recommendation and stockholder meeting covenants, and voting agreements. Finally, the Task Force determined that the actual language of the provisions would be addressed (in each case, with related definitions and alternative provisions) in the section commentary. The Task Force asked the transactions lawyers to commence the detailed section by section commentary. Keith Flaum is responsible for no shops and meeting covenants; Darrel Rice, Jim Melville and Bryan Davis are responsible for the termination and breakup fee sections. The Task Force commended them for excellent commentary outlines. The Delaware sub task force (Mark Morton, Steve Bigler and Rick Alexander) are going to add their commentary to the work product of the transactional lawyers. We then discussed Joel Greenberg’s representations and warranties at length; a revised draft will be circulated to the Task Force members.

Diane Holt Frankle and Stephen H. Knee, Co-Chairs
International Transactions
Task Force

The International Transactions Task Force had a very successful meeting in Philadelphia with very high attendance.

We spent the initial part of the meeting dealing with the international overview of a private company stock acquisition, the project on which we have been working for the last eighteen months. The questionnaire portion of the project has been finalized and we are now ready to proceed to the next step, which is to retain foreign correspondents and co-ordinate responses from the different jurisdictions. An editorial committee was formed at the meeting for that purpose and will be chaired by John Grossbauer. Other members of the committee are Franziska Ruf, John Swan, Reid Feldman and Daniel Rosenberg.

The principal focus of the meeting was on our current project of the committee which is an international overview of public company stock acquisitions in a number of jurisdictions. Like our other projects, the basic objective is to provide an overview of the key issues in doing a cross-border acquisition. We have decided in this project to focus on less jurisdictions but provide a more detailed overview of the key issues. We discussed at our meeting a revised draft of a model questionnaire which will be submitted to our correspondents to generate their responses. The discussion focused on differences in a number of the jurisdictions on certain key issues and we agreed that this is a format that we would continue to follow at future meetings so that participants would benefit from some of the substantive issues on which so much time outside the task force meetings is spent. We encourage all members of the committee to join us in this new project: in particular, we welcome all members of the public company task force given the subject matter of this project.

On the program front, we will be putting on a program in Chicago which will focus on cross border asset acquisitions.

John W. Leopold
Guy-Martial A.X. Weijer
Co-Chairs

Joint Venture Agreements
Task Force

The Joint Venture Task Force met in Philadelphia for four hours on March 23, 2001. The discussion focused on the first part of the Model Joint Venture Agreement, specifically:

Introduction -- including Choice of Entity
Definitions [Article 1]
Establishment of the Joint Venture [Article 2]
Capital Contributions [Article 3]
Allocation of Profits & Losses [Article 4]

The discussion of the Choice of Entity involved the "chart of differences" between various entities that was prepared by representatives of the Partnerships and Unincorporated Business Organizations with input from representatives of the Joint Venture Task Force.

As usual, the discussion was spirited and underscored the different perspectives that the joint venturers bring to the negotiation of the agreement, including tension between the "deep pocket" venturer and the "the concept" venturer.

The Chicago meeting -- from 9am until 1pm on Saturday August 4 -- will focus on the next articles, as follows:

Management [Art 5]
Termination in Absence of Default [Art 6]
Termination and Other Rights Upon Default [Art 7]
Dissolution Procedures [Art 8]
But-Sell Upon Default [Art 9]
Buy-Sell in Absence of Default [Art 10]
Transfer of Partnership Interests [Article 11]

Articles 6 through 11 reflect a restructuring by the Editorial Committee of what was previously Articles 6, 7 and 8. The Editorial Committee concluded that placing the dissolution events and the related remedies in separate articles resulted in substantial improvement in clarity.

The results of the Philadelphia discussions and the restructuring of Articles 6 through 8 into Articles 6 through 11 will be reflected in a revised Joint Venture Agreement that will be circulated before the Chicago meeting.

The Editorial Committee has met twice this year, each time for two days. It intends to meet again for two days shortly after the Chicago meeting.

We look forward to seeing you in Chicago Saturday morning.

Alison Youngman and Stikeman Elliott, Co-Chairs

Asset Purchase Agreement Task Force

We are pleased to submit the final report of the Model Asset Purchase Agreement Task Force. We have recently received the final publication volumes – both the loose leaf and paperbound versions – and they look terrific! By the time of the annual meeting in Chicago, the books will be available and we would expect them to be the “hot” item in the Business Section this year. We will run a program on Monday, August 6, 2001 which will feature various issues in asset acquisitions and the manner in which the Model Agreement deals with them.

We started on this project over six years ago. While a few folks have come and gone in that period, we were fortunate to have a solid contingent of very dedicated players who have put in countless hours to bring this project to a successful result. We would ask for a little extra space in this edition of Deal Points to list those who worked so hard for so many years on this project:

David I. Albin Samuel S. Friedman
Tracy A. Bacigalupo Vincent F. Garrity, Jr.
Cameron Baker David A. Gemunder
Neal H. Brockmeyer Joel I. Greenberg
David A. Bronner Robert T. Harper
Eric V. Brown, Jr. Jon T. Hirschoff
Charles H. Brownman Theodore W. Lenz
Henri M. Bybelezer Henry Lesser
Richard E. Climan John P. Lowe, Jr.
Joseph J. Connolly Arthur H. Miller
Robert G. Copeland Martin C. Oetting
Nathaniel L. Doliner Samuel W. Oliver, Jr.
Gregory S. Feis Gordon A. Park

Special thanks to John Hirschoff and David Albin who were the Reporters for the Agreement and Ancillary Documents volume, respectively. They were key players in bringing the project from almost - done to the final books that you will see in Chicago.

In addition to the professional satisfaction of working with lawyers of the caliber of those above-mentioned, we have developed wonderful friendships in our Committee activities over these past several years. We did a lot of hard work, but we also had some fun in the process.

Byron F. Egan
H. Lawrence Tafe
Co-Chairs
At the Philadelphia Spring meeting, the Task Force continued the process of reviewing and discussing topic outlines prepared by Task Force members. A gathering of over 25 members, including a number of new recruits, focused on David Albin's revised outline "From Agreement to Close," Rick Brown's revised "Letters of Intent," Norm Zilber's "Who is the Client?" and Dan Minkus' outline on "Price Negotiations." A number of additional outlines were assigned for the Chicago meeting in August. We are gradually filling out the dance card on available topics, but a few remain for those interested in getting involved.

The Task Force will continue to discuss, digest, argue about and refine these outlines until a comprehensive list of the topics to be included in the Manual is developed. The Task Force meetings have proven to be lively and essential brainstorming sessions on the topic outlines and have spawned new topics and approaches.

The one standing agenda item at our meetings remains the title of the Manual/Book.

Tom Thompson and Vince Garrity, Co-Chairs

A Committee Forum was held during the meeting in Philadelphia in March 2000. At that Committee Forum, Elizabeth Dellinger (a partner in the Cleveland, Ohio office of Baker & Hostetler LLP), George Taylor (a partner in the Birmingham, Alabama office of Burr & Forman), Scott Irwin (a partner in the Cleveland, Ohio office of Baker & Hostetler LLP), and David Sykes (a partner in the Philadelphia, Pennsylvania office of Duane, Morris & Heckscher), discussed issues unique to acquisitions of financially troubled companies, including fraudulent conveyance and successor liability issues.

A Committee Forum will be held during the annual meeting in Chicago on Sunday, August 5, 2001, at 2:00 p.m. At that Committee Forum, Keith Flaum (a partner in the Palo Alto, California office of Cooley Godward LLP), Richard Climan (a partner in the Palo Alto, California office of Cooley Godward LLP), Franziska Ruf (a partner in the Montreal, Canada office of Stikeman Elliott), James Melville (a partner in the Minneapolis, Minnesota office of Kaplan, Strangis and Kaplan, P.A.) and Scott Whittaker (a partner in the New Orleans, Louisiana office of Stone, Pigman, Walther, Wittmann & Hutchinson, LLP), will discuss current trends in negotiating indemnification provisions in acquisitions of private companies. The panelists will discuss various ways in which sellers seek to limit buyers’ indemnification rights, by means of “anti-sandbagging” and “waiver of consequential damages” provisions and by other comparable provisions.

Keith Flaum, Chair
The Negotiated Acquisitions Committee Newsletter is published approximately three times a year by the American Bar Association, Section of Business Law, Negotiated Acquisitions Committee. The views expressed in the Negotiated Acquisitions Committee Newsletter are the authors’ only and not necessarily those of the American Bar Association, the Section of Business Law or the Negotiated Acquisitions Committee. If you wish to comment on the contents, please write to the Negotiated Acquisitions Committee, Section of Business Law, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois, 60611.