Message from the Chair

Dear MMSB Committee Colleagues:

I hope you are all having an enjoyable Summer.

I am pleased to report that your Middle Market and Small Business Committee is doing very well. Our Committee membership has grown by more than 100 over the past several years, and we had a sold-out Committee dinner at our April meeting in Montreal.

As indicated by the reports in this newsletter, we have a number of very active subcommittees doing important work. Your participation is welcomed and encouraged, and you should not hesitate to contact me, or any of the subcommittee chairs, if you want to get involved. Kudos to our newsletter editors Mark Hobson and Andy Kostoulas for their hard work on this robust newsletter, which I hope you will find helpful to your practice and to keep informed on the Committee's activities.

If you have not yet registered for the ABA Fall Meeting in Boston, DC, now is the time to do so: come participate in our CLE programs and informative meetings, and have the opportunity to enjoy one of America's best college towns and its multitude of museums. For the most up-to-date Master Chronological Schedule for the Boston meeting, and to register, see here.

You certainly won't want to miss our Committee dinner on Thursday, September 8 at Top of the Hub, which is on the 52nd floor of the Prudential Center and offers walls of windows that provide panoramic views of Boston. For the Zagat review, see here. Thanks to our generous dinner sponsors-Stout Risius Ross and IncNow-our dinner cost is only $130. You can register for our dinner by clicking on the following link dinner registration.

With your participation, the Middle Market and Small Business Committee will continue to be "the best damn committee in the whole ABA." Please attend our Committee meeting which will take place from 4:30 - 6:00p.m. on Friday, September 9. This is a great opportunity to learn about the Committee, to meet other middle market and small business professionals, and to learn how to get more involved.

Until we meet in Boston, all the best!
What is the Middle Market and Small Business Committee, and What Do We Do?

A. Our Mission

The mission of the Middle Market and Small Business Committee ("MMSB Committee") is to serve, educate, and bring together corporate, transactional, and securities lawyers in an effort to improve the legal profession who regularly counsel and advise small and mid-sized entities and business ownership groups controlled by matriarchs and patriarchs of family offices, entrepreneurs, private equity groups, venture capital firms, and other groups, and smaller publicly-held companies.

B. Committee Facts

Some interesting facts about the MMSB Committee are:

- The MMSB Committee comprises over 1,300 members, both in the United States and abroad.
- The MMSB Committee holds live and in-person meetings 3 times a year in conjunction with the ABA Business Law Section Meetings.

C. Areas of Expertise

Some of the specific areas that are frequently covered by the MMSB Committee in our panel presentations, programs (CLE and otherwise) and workshops include the following:

- Entity organization and owner agreements
- Capital formation, financing, and strategic partnering
- Employment and compensation matters
- Intellectual property protection and transference
- Corporate governance
- Securities law compliance
- International expansion and cross-border transactions
- Business combinations and M&A activities
- Business divorces, breakups, and restructurings

Trans-Border Perspectives

As noted above, a new series was launched with our last issue of the Business Visions Newsletter to include one or more articles from members that discuss and analyze various legal issues facing smaller and mid-sized companies doing business in foreign jurisdictions or involved in cross-border deals. This newsletter features an article regarding some recent changes to France's contract law.

Recent Contract Law Developments in France

By: Hermann Knott, Partner, Luther, Germany

Introduction
With the publication of Ordonnance n° 2016-131 dated February 10, 2016, for the reform of the law of contract, the general regime of obligations, and proof of obligations (the "Ordonnance") in the Official Journal on February 11, 2016, French Private Law experienced the most fundamental transformation since the French Civil Code was first enacted in 1804. The provisions of the Ordonnance shall apply from October 1, 2016 onward, subject however to ratification by the Parliament within six months from its publication date. The Ordonnance is a somewhat surprising form of enabling legislation because it allows the government to enact regulations into law without following the full and customary Parliamentary procedure. This reform raised fears of contract chaos in France by enabling more judicial intervention and thus weakening the ability of private economic operators' possibilities to regulate their own affairs through a strong and secure bargain and agreement. Against this background, it is worth examining the most important changes brought by the Ordonnance.

Read more...

New Laws, Proposed Legislation, and Pertinent Case Law

A. Delaware Case Law

Better Pay Attention to Logistics

By: Andy Kostoulas, Associate, Young Conaway Stargatt & Taylor, LLP, Wilmington, DE

Earlier this year, the Delaware Court of Chancery held in FdG Logistics LLC v. A&R Logistics Holdings, Inc., 131 A.3d 842 (Del. Ch. 2016), that a seller could be sued for fraud despite the merger agreement's disclaimer of warranties and integration clause, adding to the series of Delaware cases that address when a party can sue for fraud post-closing. In that case, FdG Logistics, LLC ("FdG") owned a majority interest in a corporation ("Old A&R") that was acquired by A&R Logistics Holdings, Inc. (the "Buyer") through a merger. The merger agreement contained a disclaimer of warranties that clearly stated that Old A&R was not making any representations and warranties other than those expressly made in the merger agreement, including any representations and warranties with respect to any information or documents made available to the Buyer. The merger agreement also contained an integration clause that stated that the merger agreement and other transaction documents contained the entire agreement between the parties, superseding any prior understandings, agreements, or representations.

Following the closing of the merger, the Buyer alleged that FdG had provided Buyer with documents during its due diligence that contained misrepresentations and omissions. For example, the Buyer alleged that truck drivers employed by Old A&R's operating subsidiary had systematically falsified their hours-of-service logs. In reviewing a motion to dismiss the fraud claim, the court noted that it needs to strike a balance between holding sophisticated parties to the terms of their agreements and guarding against fraud as a matter of public policy. In FdG Logistics, the disclaimer of warranties in the merger agreement was made from the perspective of the company being acquired and there was no affirmative statement from the Buyer that it was not relying on claims made outside the four corners of the merger agreement. Because there were no statements by the Buyer in the merger agreement limiting the scope of Buyer's reliance, the court denied the motion to dismiss.

Although integration clauses and disclaimers of representations and warranties are often considered boilerplate provisions, this case serves as a reminder to attorneys that every provision of an agreement is important. Moreover, attorneys representing a seller should try to negotiate the inclusion of an explicit statement
in an acquisition agreement limiting the universe of information upon which a buyer is relying in an acquisition rather than merely including on a disclaimer of representations and warranties made by their client.

B. Delaware Statutory Update

Recent Amendments to Delaware's Entity Laws

By: John J. Paschetto, Partner, Young Conaway Stargatt & Taylor, LLP, Wilmington, DE

The Delaware legislature recently adopted amendments to the State’s entity laws that should, among other things, help to deter “nuisance” actions for appraisal of corporate stock and simplify governance of limited liability companies ("LLCs") and limited partnerships ("LPs"). The amendments include (i) a mandate that appraisal actions involving publicly traded corporate stock be dismissed when a tiny proportion of the shares is at stake; (ii) changes that will make it easier to acquire corporations by means of two-step, tender-offer-plus-merger transactions; and (iii) a new default rule under which the assignee of all the interests of an LLC in a voluntary transaction will automatically be admitted as the LLC’s sole member. Unless otherwise stated below, all of the amendments took effect on August 1, 2016.

Read more...

Meetings Information

A. Recap of Spring Meeting in Montreal, April 2016

1. Thursday, April 7, 2016

(a) Program: ADR in Action: How Arbitration and Mediation Clauses Work on Paper and in Practice

Co-Chairs: Patricia Barclay and Michael Connolly

Panelists: Eric Graben and E. Norman Veasey

Description: Businesses often want to avoid heading to court to resolve disputes arising from their commercial contracts. This panel explored the use of alternative dispute resolution provisions in commercial contracts, including negotiating and drafting ADR clauses, enforcing ADR provisions, the process of mediating or arbitrating claims, and unique considerations in international ADR process and practice.

Co-Sponsors: Dispute Resolution Committee and Corporate Counsel Committee

Program Materials

(b) Program: Corporate Structures, Instruments and Other Things to Know When Representing Entrepreneurs

Co-Chairs: Monique Hayes, Deborah Reed, and Michael Vargas

Panelists: Kara Greuel and Kimberly Lowe

Description: This program addressed issues faced by attorneys representing start-ups and entrepreneurs. Topics discussed included entity formation, new corporate structures for the socially conscious entrepreneurs, and succession planning.

Program Materials
(c) International Expansion and Cross-Border Transactions Meeting

Michel Gelinas discussed the subcommittee's recent activities, including a discussion of articles that were written by subcommittee members in the last newsletter. To the extent that anyone is interested in writing an article for an upcoming newsletter on a cross-border transactional issue, subcommittee members are encouraged to reach out to Andy Kostoulas or Mark Hobson.

Alexandra Rohmert and Joerg Lips from CMS discussed differences between purchase price & MAC clauses in European and North American M&A deals and the reasons for those differences. European deals tend not to have purchase price adjustments with the same frequency as deals in North America. The likely reason for this is that European deals tend to favor a "lockbox" system, which imposes substantial restrictions on the seller between the lockbox date and closing. European deals also often tend not to contain MAC clauses with the same frequency as deals in North America. One possible explanation for this is that the lockbox system gives the seller more certainty on overall price, while the lack of MAC clauses gives more certainty that the deal will close. Another thing worth noting is that very few cases have found that a materially adverse change had occurred within the meaning of a MAC clause. While the lockbox method has the advantage of lowering closing costs, where there is a lot of uncertainty with respect to a company's working capital, the lockbox method may not work well.

Hermann Knott from Luther briefly discussed reform of French contract law under the ordinance of February 10, 2016, which applies to all contracts that go into effect after October 1, 2016. The new law would potentially allow a judge to strike certain provisions from a contract or otherwise amend a contract. Please see Hermann's article above.

(d) Emerging Companies Meeting

Sara Stock discussed the status of planning for a program to be presented at the Boston meeting in September, the first in a series targeted at lawyers who represent emerging companies. One of the topics that was discussed on a planning call concerned the existing resources available to incubators across the United States. Those resources vary widely across the country, and there's nothing that attempts to tie start-up activities across geographies. The attendees also discussed potential topics to incorporate into the emerging company programming series. If you are interested in helping to plan, or speak on a panel for, a future program in the series, please contact Sara Stock or Elizabeth Bleakley.

(e) Private Placement Broker Task Force Meeting

The Task Force members discussed developments at the SEC level prompted by the efforts of the authors (the "Authors") of the M&A Brokers No-Action Letter Request (the "Request") to seek clarification from Trading & Markets regarding the extent of permissible activities of finders that will not result in a requirement to register as a broker because the finder is "engaged in the business of effecting transactions in securities." The Task Force members were informed by the Authors that at the request of the SEC's Trading & Markets Staff, a letter (the "Scenarios Letter") was submitted by the Authors describing various levels of activity by finders and technology providers for the purpose of the Staff's publishing its views on which activities require registration and which do not. The Staff informed the Authors that further rule making or No-Action Letters on the subject were unlikely, but that FAQs might be a vehicle for delivering such advice.

The Authors explained that after not obtaining a response from the Staff, on March 23 of this year they held meetings with Commissioner Kara M. Stein and her counsel and with counsel to Commissioner Michael S. Piwowar to determine how to move the matter along. Both Commissioner Stein and counsel to Commissioner Piwowar suggested that because the SEC Chair sets the agenda
for the SEC, we attempt to meet with Chair Mary Jo White. To that end, Faith Colish reached out to Chair White's Chief of Staff to arrange a meeting, which has been scheduled for May 18.

The Chair informed the Task Force members that the Authors have been asked to support an M&A Brokers bill (the "Bill") currently pending in the Senate (already unanimously approved by the House). The Bill differs from the M&A Brokers No-Action Letter in that it contains a $25 million transaction cap, which was included, according to those lobbying for its passage, to avoid complaints from mid-market broker-dealers. The consensus of the members of the Task Force was that the cap on transaction size is not desirable. In response to a suggestion that the Authors attempt to persuade those lobbying for the Bill to drop the cap, the Chair stated that such attempts have been made, but met with no success. The Authors reviewed their discussions with the SEC at the time the Request was made and stated that the Staff had not at any point requested a transaction cap. It was also noted that the NASAA Model Rule contains the same size limitation as the Bill.

Only one state, Florida, has adopted a version of the model rule, which will become effective on July 1, 2016. Florida's rule requires that following the completion of the transaction the M&A Broker must obtain written representations from the largest interest holder of both the buyer and seller that any person who acquired securities or assets of the seller, acting alone or in concert, will be a control person of the acquired company or the business conducted with the acquired assets. Obtaining such representations may prove to be a challenging wordsmithing exercise for M&A Brokers, especially in situations where the entire company has been sold and the seller has no control over what the buyer does with the company, and even more challenging when there are multiple buyers. Texas and California have rules in place predating the model rule. Illinois is considering adopting the Model Rule.

The final item discussed was FINRA's Capital Acquisition Broker ("CAB") rule that was submitted to the SEC. Chair White informed the Task Force members that Counsel to Trading & Markets, Heather Seidel, stated in the Trading & Markets meeting held earlier that day that the proposed rule was "in proceedings" and seemed to open the door to receiving additional comments on the proposed CAB rule beyond the stated cut-off date. The Task Force itself will not be commenting on the CAB rule, as it addresses only a very limited aspect of the finders issue, but Task Force members were encouraged to do so.

Members of the Task Force were asked to submit to the Chair, Linda Lerner, at llerner@crowell.com, any items they wish placed on the agenda for the Annual meeting in Boston.

2. Friday, April 8, 2016

(a) Short Form M&A Documents Task Force Meeting

The Task Force continued its work on the Model Short Form Stock Purchase Agreement. Subcommittee chair Eric Graben circulated updated drafts of the model stock purchase agreement and optional provisions to the attendees. The attendees discussed potential ways to improve the documents, which included adding an anti-sandbagging provision as optional language, creating an alternative financial statement representation for companies whose financial statements are not prepared in accordance with GAAP, adding commentary with respect to rescission risk associated with using a finder who is an unregistered broker-dealer, adding an optional provision for a sellers' representative, and adding a provision clarifying the attorney-client relationship. The Task Force would like to have the model stock purchase agreement, optional provisions, and commentary finalized by the end of 2016. The Task Force is also starting to prepare a model short form asset purchase agreement, a draft of which is expected to be circulated to the Task Force members prior to the Boston meeting in September. If you are interested in assisting with either the stock purchase
agreement or asset purchase agreement documents, please contact Eric Graben.

(b) Program: Expanding Abroad From the United States: What You Don't Know May Hurt Your Business

Co-Chairs: Michel Gelinas and David B. Jaffe

Panelists: Dr. Hermann J. Knott, Kenneth S. Levinson, and Ava J. Borrasso

Description: American businesses expanding abroad often encounter unexpected difficulties that can result in costly mistakes. The program presented legal issues arising in that context and practical solutions, so that attendees had take-aways that they could put to use in their practices. The program also featured U.S. and foreign attorneys with experience in guiding American companies in their international expansion.

Co-Sponsors: Corporate Counsel Committee and International Business Law Committee

Program Materials

(c) Family-Owned Businesses Meeting

The Subcommittee had an interesting discussion at its meeting regarding a portion of the ongoing and public succession and governance saga involving Sumner Redstone, Viacom, Inc., and CBS Corp. Mr. Redstone owns approximately 80% of the voting shares of both companies through his company National Amusements, Inc. As of the time of the meeting, there was a lawsuit pending in California concerning Mr. Redstone's competency in connection with certain health care directives and estate planning decisions. That case has since been dismissed, with the judge ruling that the plaintiff (one of Mr. Redstone's former girlfriends) had not proven that Mr. Redstone lacked capacity in revising certain estate planning documents. If the court had ruled that Mr. Redstone did in fact lack capacity, that ruling may have had broader effects on the decisions Mr. Redstone recently made as Chairman of Viacom and as its majority shareholder. The use of trusts in connection with corporate ownership, succession, and governance was also discussed, such as the seven-trustee trust that Mr. Redstone set up to manage his share ownership after his death or incapacity, and the potential problems facing trustees for such trusts. Finally, the group discussed potential ideas for a CLE for an upcoming meeting, and potential topics included conflicts of interest in succession planning, trusts in family owned businesses, and mechanisms for transfer of family-owned business.

(d) Securities Regulation Joint Meeting

Sebastian Gomez, Chief of the SEC's Office of Small Business Policy, attended by conference telephone call and gave another insightful presentation on various matters in which his office is involved. He reported first on crowdfunding, noting that a number of funding portals had begun the process of registering as crowdfunding portals. Chief Gomez noted that the SEC was working on a Small Business Compliance Guide for Crowdfunding Issuers. (This can be found here.) See also the Corporation Finance Division's section of the SEC website for other Small Business Compliance Guides.

Sebastian Gomez also noted that the Staff of the SEC had recently completed a study of the "accredited investor" standard, as required by the Dodd-Frank Act, and that the Staff's report was available on the SEC website.

The members attending the meeting then discussed the proposed amendments to Rule 147 and Rule 504, to facilitate intra-state crowdfunding.

Sebastian Gomez then reported on the number of filings that had been made thus far under newly revised Regulation A-79 in total with a relatively even split between Tier 1 and Tier 2 offerings. Although 26 of those offerings had been
qualified, only 3 had thus far officially reported the completion of the offering.

Finally, Pierre-Yves LeDuc, of Stikeman Elliott LLP in Montreal, provided everyone with a report on small company offering issues in Canada.

B. Overview of Annual Meeting to be held in Boston, September 2016

1. Thursday, September 8, 2016

(a) Program: Accelerators and Incubators for Early Stage Startups: What's Happening and Where Do the Lawyers Fit In?, 8:00 a.m. - 10:00 a.m.

(b) Contractual Governance of Business Entities Joint Task Force Meeting, 9:30 a.m. - 10:30 a.m.

(c) Program: Why Insurance Is Only Boring Until It Matters - Insurance Law for the Generalist (Corporate Counsel Triage Series), 10:30 a.m. - 12:30 p.m.

(d) Middle Market & Small Business Luncheon, 12:30 p.m. - 2:00 p.m.

(e) International Expansion & Cross Border Transactions, 2:00 p.m. - 3:00 p.m.

(f) Business Entities Governance Subcommittee Meeting, 2:30 p.m. - 3:30 p.m.

(g) Emerging Companies, 3:00 p.m. - 4:30 p.m.

(h) Private Placement Broker Task Force, 4:30 p.m. - 5:30 p.m.

2. Friday, September 9, 2016

(a) Short Form M&A Documents Task Force, 10:00 a.m. - 11:00 a.m.

(b) Family-Owned Businesses, 11:00 a.m. - 12:00 p.m.

(c) Program: Coming to America: What Your Foreign Clients Need to Know, 2:30 p.m. - 4:30 p.m.

(d) Meeting of Subcommittee Chairs, Task Force Chairs, and Vice Chairs, 3:30 p.m. - 4:30 p.m.

(e) Middle Market and Small Business Committee Meeting, 4:30 p.m. - 6:00 p.m.

3. Saturday, September 10, 2016

(a) Securities Regulation Joint Meeting, 2:00 p.m. - 3:00 p.m.

Leadership list of Middle Market and Small Business Committee

The following is a list of the MMSB Committee leadership. Please contact the Chairs or Vice Chairs of our MMSB Committee or any Subcommittee, or of our Task Forces or any of our Liaisons, to get involved in the particular MMSB Committee activities that interest you and which can benefit you, your practice and your clients. All levels are welcome, and we hope to see you soon in Boston!

Read more...

Contact Information; Disclaimers

The MMSB Committee prepares and delivers the Business Visions Newsletter to its members and the public to enhance our members’ understanding of, and
access to, the MMSB Committee's abundant programs and activities. This is a free service that is continually under development. While we try to keep the information timely and accurate, we cannot make any guarantees. We will and do strive to rectify all errors brought to our attention, and we ask for your vigilance in bringing to our attention any inaccuracies. Readers of our Business Visions Newsletter should be aware that information available in our newsletter may not reflect official positions of the ABA, the Business Law Section, the MMSB Committee or its members, or any regulatory agency or authority. Additionally, the views expressed in any article in the Business Visions Newsletter may not necessarily be the views of any organization with which the author is affiliated. Neither the ABA nor the MMSB Committee is responsible for the content or accuracy of any articles or other submissions included in our newsletter.

The Business Visions Newsletter may contain links to information or websites created and maintained by other public and private organizations. Our newsletter also contains links that direct the reader to other websites, both ABA websites and third-party websites. By clicking on any links provided in the Business Visions Newsletter, you assume any risks associated with accessing a website controlled by a third party, and you further agree to hold the ABA and the MMSB Committee harmless from any damage you may suffer as a result of going on or surfing such third-party websites. Please be aware that the MMSB Committee does not control or guarantee the accuracy, relevance, timeliness, or completeness of any information provided by any source other than the MMSB Committee.

If anyone has any ideas concerning future editions of the MMSB Committee's newsletter, or would like to get more involved with the Newsletter Subcommittee, please contact Evangelos "Andy" Kostoulas (at EKostoulas@ycst.com) or Mark D. Hobson (at markhobson@hobsonfirm.com), Co-Chairs of the Newsletter Subcommittee.

**Listserve Protocols**

a) **Listserv.** The MMSB Committee encourages all of its members (especially those who have recently joined) to become active participants in all committee activities, including participating in discussions on our Listserv. It is a great way to learn about current legal issues affecting your practice. The Listserv provided by the MMSB Committee ("MMSB Listserv") is a great medium with which to solicit the advice of your peers, benefit from their experience and participate in an ongoing conversation about relevant topics. To be able to send a message through the MMSB Listserv, however, you must first be a member of the MMSB Committee. Everyone who is a registered member of the MMSB Committee can sign up to begin receiving and sending emails on the MMSB Listserv, by sending an email requesting Listserv access to SMBIZ@mail.americanbar.org. All Listserv participants must abide by the Rules & Etiquette Guidelines described below.

b) **Listserv Archive.** Members of the MMSB Committee who are fully signed up for the Listserv, are also able to access the extensive MMSB Listserv archive at the following link: Listserv Archive

c) **How to Manage Listserv Emails:** The following link provides instructions on how to set up a subfolder on your computer and have all emails that you receive from the MMSB Committee Listserv automatically filed into that subfolder: Managing Listserve E-Mails

d) **Rules & Etiquette Guidelines for Use of the MMSB Listserv.**

The MMSB Committee has established Rules & Etiquette Guidelines that will govern all participants' use of the MMSB Listserv. If a participant fails to adhere to these Rules & Etiquette Guidelines, the MMSB Committee may suspend or terminate that person's future participation on the MMSB Listserv.
The Rules & Etiquette Guidelines for use of the MMSB Listserv can be found here: [MMSB Listserve Rules & Etiquette](#). If you have questions, contact Evangelos "Andy" Kostoulas at [EKostoulas@ycst.com](mailto:EKostoulas@ycst.com), Co-Chair of the Newsletter Subcommittee.

### Requests for Submissions/Sponsors

Dear Middle Market and Small Business Committee Members:

Our Committee is always actively seeking sponsors and volunteers, and we need your continued help. Please continue reading below to learn how you can contribute to our Committee's success.

Having sponsors will provide a financial contribution to help fund Committee dinners. But perhaps more importantly, sponsors can provide a strategic relationship with our committee and provide substantive content and market intelligence during Committee meetings as well as participate in our CLE programs. Efforts to secure additional sponsors are being led by Michel Gélinas ([mgelinas@stikeman.com](mailto:mgelinas@stikeman.com)). If you have any leads or suggestions, please let Michel know.

We want to continue to express profuse thanks to our two current sponsors: IncNOW and Stout Risisus Ross, Inc. Please be sure to thank their representatives in person when you see them at our meetings, lunches, and dinners. The last two pages of this newsletter contain more information about our current sponsors. Please check them out!

If you are interested in preparing a short, substantive article on a topic that is relevant for our Committee, please contact contact Evangelos "Andy" Kostoulas (at [EKostoulas@ycst.com](mailto:EKostoulas@ycst.com)) or Mark D. Hobson (at [markhobson@hobsonfirm.com](mailto:markhobson@hobsonfirm.com)), Co-Chairs of the Newsletter Subcommittee.

All articles for the newsletter should be minimal in length (up to 2,000 words). In addition to being circulated to our approximately 1,300 members, your article may also be eligible for publishing in the Business Law Section's *Business Law Today*, a monthly publication circulated to approximately 37,000 members.

Thanks to everyone for your support!

Thomas J. Walsh, Jr.
Chair, Middle Market and Small Business Committee
Business Law Section

### Law Student Committee Associate Program

**ABA Committee Associate Program**

The [ABA's Committee Associate Program (*CAP*)](#) is designed to build relationships between law students and members of the ABA Business Law Section (the "Section"), by giving students the opportunity to gain experience through substantive and administrative projects with committees of the Section.

The MMSB Committee is continually seeking up to 3 associates to help write (i) articles and (ii) summaries of the various activities of the MMSB Committee's subcommittees and task forces for inclusion in our newsletter. Articles and summaries will be based on live programs from the MMSB Committee's Fall, Spring and Annual Meetings as well as other MMSB Committee meetings, webinars, and lunches that feature one or more speakers. CAP Associate(s) will
work with the program presenters and speakers to write certain articles, and also have the opportunity to work with program presenters and speakers to help draft and eventually possibly submit article(s) for publication in the ABA’s *Business Law Today*. Published articles will be drafted primarily by the program presenter or speaker. Attending meetings is required and since travel is not reimbursable, the MMSB Committee is seeking primarily law students who are local to each of the next Fall, Spring and Annual Meetings. The date and location of upcoming meetings are:

- Annual Meeting 2016 - September 8-10, 2016 - Boston, MA
- Fall Meeting 2016 - November 18-19, 2016 - Washington, DC
- Spring Meeting 2017 - April 6-8, 2017 - New Orleans, LA

The duration of the position is for at least the applicable meeting and completion of article(s) arising from the same meeting that the CAP Associate(s) attended.

Law students may apply by visiting the [CAP website](http://capwebsite.com) for an application.

If you are interested in participating in the CAP and helping the MMSB Committee, please contact Evangelos "Andy" Kostoulas at EKostoulas@ycst.com.

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A. **Our Mission**

The mission of the Middle Market and Small Business Committee ("MMSB Committee") is to serve, educate, and bring together corporate, transactional, and securities lawyers—in an effort to improve the legal profession—who regularly counsel and advise small and mid-sized entities and business ownership groups controlled by matriarchs and patriarchs of family offices, entrepreneurs, private equity groups, venture capital firms, and other groups, and smaller publicly-held companies. To achieve this objective:

- The MMSB Committee provides a forum for its members to share information, to deliver and receive continuing legal education, to address current and practical legal issues affecting smaller and mid-sized businesses, and to learn best practices concerning relevant areas of law, legal ethics, and technology applicable to the delivery of legal services in the 21st Century.

- The MMSB Committee zealously advocates before various regulatory agencies, and has been doing so for decades. Such advocacy concerns current issues and laws that relate to specific problems and needs of small businesses, including smaller public companies. Agencies before which the MMSB Committee and its members regularly advocate include, among others, the Securities and Exchange Commission ("SEC"), the Internal Revenue Service, the Financial Industry Regulatory Authority ("FINRA"), and the National Association of Securities Dealers. For example, our Private Placement Broker Task Force and some of its individual members lobby the SEC, FINRA, and other regulatory agencies to implement a simplified registration system for finders of financing for early-stage companies.

- The MMSB Committee brings scrutiny and discourse to the entire business “life cycle” of our member’s clients with expert panels focused on highly relevant topics such as:
  
  (i) entity organization and owner agreements  
  (ii) capital formation, financing, and strategic partnering  
  (iii) employment and compensation matters  
  (iv) intellectual property and trade secrets protection  
  (v) corporate governance  
  (vi) securities law compliance  
  (vii) international expansion and cross-border transactions  
  (viii) business combinations, restructuring, and breakups

- The MMSB Committee commenced a “Corporate Counsel Triage” series at the Spring Meeting in San Francisco in 2015. The first program under this series was titled “Avoiding Hiring and Firing and Wage and Hour Problems: A Program of the Corporate Counsel Triage Series.” This program was subsequently reproduced as a webinar in November of 2015 and can be accessed [here](#). At the upcoming Annual Meeting in Boston, the Corporate Counsel Triage Project will conduct its latest program titled “Why Insurance Is Only Boring Until It Matters – Insurance Law for the Generalist.” You can find more information about that program below.
The MMSB Committee recently launched a new series in the *Business Visions* Newsletter featuring articles from our members that address legal issues in foreign jurisdictions or cross-border deals facing smaller and medium-sized companies. In this issue, the MMSB Committee is happy to feature an article discussing French law. The MMSB Committee is grateful to its members for their contributions. We hope you will read and enjoy this article along with the other articles featured in this newsletter.
Some interesting facts about the MMSB Committee are:

- The MMSB Committee comprises over 1,300 members, both in the United States and abroad.

- The MMSB Committee holds live and in-person meetings 3 times a year in conjunction with the ABA Business Law Section Meetings. For 2016, these meetings include:
  - the Spring Meeting, which was held from April 7-9 in Montreal,
  - the Annual Meeting to be held from September 8-10 in Boston, and
  - the Fall Meeting to be held from November 18-19 in Washington, D.C.

- Meetings of the MMSB Committee typically feature a mini-presentation on a substantive practice area and provide an opportunity to share practical advice relevant for smaller and medium-sized companies as well as the lawyers who counsel them.

- An area in which a great deal of the MMSB Committee’s efforts are directed involves the federal and state securities regulations that affect smaller public companies and capital-raising activities of private companies, including qualifications for exemptions from registration, qualifications for exemptions from registration for private placement brokers, and implementation of scaled disclosure regulations to help smaller and medium-sized businesses be able to raise legally the capital they need to expand their operations and without the need to comply with unnecessary, burdensome, and expensive regulatory requirements.

- Membership in the MMSB Committee provides numerous opportunities to participate in CLE panels and workshops, writing opportunities, and opportunities to comment on regulations proposed by the SEC and other regulatory agencies. Participation is strongly encouraged and the MMSB Committee welcomes all levels of experience. Come learn why the Middle Market and Small Business Committee is called *The Best Damn Committee in the whole ABA!* Please see the Leadership List in **Section VI** for people you can contact to get more involved.
Introduction

With the publication of Ordonnance n° 2016-131 dated February 10, 2016, for the reform of the law of contract, the general regime of obligations, and proof of obligations (the “Ordonnance”) in the Official Journal on February 11, 2016, French Private Law experienced the most fundamental transformation since the French Civil Code was first enacted in 1804. The provisions of the Ordonnance shall apply from October 1, 2016 onward, subject however to ratification by the Parliament within six months from its publication date. The Ordonnance is a somewhat surprising form of enabling legislation because it allows the government to enact regulations into law without following the full and customary Parliamentary procedure. This reform raised fears of contract chaos in France by enabling more judicial intervention and thus weakening the ability of private economic operators’ possibilities to regulate their own affairs through a strong and secure bargain and agreement. Against this background, it is worth examining the most important changes brought by the Ordonnance.

The principle of good faith and its consequences

First of all, the principle of good faith is enshrined in the new Article 1104 of the Civil Code in relation to the formation and the execution of contracts. This provision is of mandatory nature. One of its consequences is that the principles that govern the pre-contractual stage of negotiations are now being regulated in the Civil Code by reference to established French Case Law. These principles are freedom of contract and good faith. The Cour de Cassation in its decision of 26 November 2003 in the Manoukian-case (Cour de cassation Cass. Nov. 26, 2003 Bull. civ. IV, No. 186) held that an unfair break-off of pre-contractual negotiations entitled the party hoping to conclude a contract to compensation. Codifying this decision, the new Article 1112 Code Civil reads as follows:

“The commencement, continuation and breaking-off of pre-contractual negotiations are free from control. They must satisfy the requirements of good faith. The person who is at fault in the conduct or breaking-off of the negotiations must make reparation on the basis of extra-contractual liability. Damages are not calculated so as to compensate the loss of profits which were expected from the contract that has not been concluded.” (translation of the proposed text by J. Cartwright, B. Fauvarque-Cosson and S. Whittaker).

Another consequence of the principle of good faith is the introduction of a general duty to disclose crucial information (the new Article 1112-1 of the Civil Code), which is now mandatory. This general duty to disclose crucial information has been progressively developed by the Cour de Cassation. In conformity with the case law of the Cour de Cassation, this duty does not relate to the estimation of the value of the performance (new Art. 1112-1 paragraph 2 Civil Code) (“ne porte pas sur l’estimation de la valeur de la prestation”). Furthermore, this general duty to disclose is now subordinated to several conditions: the decisive importance of the information for the consent of the other party, the notion of decisive importance being defined in the new Article 1112-1 paragraph 3 Civil Code as information that have a direct and necessary link with the content of the contract or the quality of the parties; knowledge of the information by one side, and ignorance by the other side, whereas this ignorance must be legitimate, or legitimate trust in the other party. The central question will be when ignorance of an information or trust in the other party will be considered legitimate. So the duty to disclose crucial information will certainly
find its limit where parties are under an obligation to inform themselves, which will regularly be the case
in contracts between professionals whereas contracts between a professional and a consumer are likely
to trigger more extensive duties to disclose crucial information.

Another new obligation is found in the new Article 1112-2 Civil Code, which imposes on the
negotiating parties a duty of confidentiality: “A person who without authorization makes use of or divulges
confidential information obtained in the course of negotiations incurs extra-contractual liability”.

Duress

French case law has recognized economic violence or duress (e.g., in the Bouygues-case, Cour de
cassation, civile, Chambre civile 1, 4 February 2015, appeal n°14-10.920). The new Article 1143 Civil
codifies this case law:

“There is also duress where one party exploits the other’s state of necessity or dependence in order
to obtain an undertaking to which the latter would not have agreed if he had not been in that
situation of weakness and derives therefrom an excessive advantage.” This latter criterion of
excessive advantage has been introduced in order to counter criticism that this provision risks to
induce parties to allege duress in order to avoid contractual performance.

Content of the contract

With regard to the content of a contract, the Ordonnance also codifies the case law of the Cour
de Cassation represented by the famous Chronopost decision (Cour de Cassation, Chambre commerciale,
term which deprives a debtor’s essential obligation of its substance is deemed not written” (new Article
1170 Civil Code). The case law on this question sometimes suggests irreconcilable answers. Now, the
destiny of such clauses is clearly regulated in the Ordonnance: a clause limiting the liability which relates
to an essential obligation is not in itself prohibited; it is only deemed not written (i.e., thus, this provision
is stricken from the agreement) where it contradicts the scope of the obligations assumed by emptying
the essential obligation of its substance. Furthermore, one of the most important innovations of the
ordonnance is the introduction in Article 1171 new Civil Code of a control mechanism for abusive
(standard) terms (“Clauses abusives”) defined as any provision that creates a significant imbalance
between the rights and obligations of the parties. This control mechanism is limited to standard-form
contracts (“contrats d’adhésion”) which are defined in the new Article 1110 Civil Code “as one whose
terms have been determined by one of the parties without free discussion”. The central question will be
whether international standard form contracts will fall under this definition. One may argue that this
should not be the case as they are internationally recommended contract forms that should not be
considered as having been determined by one of the parties. Under the new Article 1171 paragraph 2 Civil
Code the “assessment of significant imbalance must not concern either the definition of the subject-matter
of the contract nor the adequacy of the price to the act of performance”.

Imprévision

Finally, one of the most important innovations of the Ordonnance is the introduction of the
possibility of revising the contract in the case of unforeseen circumstances (“Imprévision”) in the new
Article 1195 Civil Code. Until now, French case law did not allow for such a revision of a contract (see
Canal de Craponne-case, Cour de Cassation, Chambre civile, 6 March 1876
https://fr.wikisource.org/wiki/Cour_de_cassation_-_Canal_de_Craponne). The introduction of the new Article 1195 Civil Code raised fears that the judicial powers that go hand in hand with it, might threaten contractual certainty. However, these fears are not founded since this new Article is not mandatory; i.e., parties may provide otherwise for the allocation of risks in case of unforeseen circumstances (hardship clause). Furthermore, the court’s power to modify the contract is confined to cases where negotiations fail and where both parties agree to give the judge that power. An important question is what constitutes “unforeseen circumstances” that entitle a party to seek revision of the contract: Pursuant to the wording of the new Article 1195 Civil Code, the circumstances must not be foreseeable at the time of conclusion of the contract; they must make the performance of the contract excessively onerous for one party; and that party did not agree to accept this risk resulting therefrom.

Conclusion

Where the Ordonnance introduces true innovations (see in particular the chapter regarding Imprévision above), the effects of the reform may be easily contained by hardship clauses. For the rest of that the reform, the Ordonnance’s impact is limited to the codification and clarification of the existing case law. Thereby the Ordonnance makes French Private law more accessible for foreign investors. One may therefore draw the conclusion that, in particular as far as the judge’s possibilities to interfere with the parties’ contract is concerned, the fears that this reform will have a negative impact on commercial contracts seem to be exaggerated and were more related to earlier, un-adopted versions which subsequently had been attenuated.
Recent Amendments to Delaware’s Entity Laws

By: John J. Paschetto, Partner, Young Conaway Stargatt & Taylor, LLP, Wilmington, DE

The Delaware legislature recently adopted amendments to the State’s entity laws that should, among other things, help to deter “nuisance” actions for appraisal of corporate stock and simplify governance of limited liability companies (“LLCs”) and limited partnerships (“LPs”). The amendments include (i) a mandate that appraisal actions involving publicly traded corporate stock be dismissed when a tiny proportion of the shares is at stake; (ii) changes that will make it easier to acquire corporations by means of two-step, tender-offer-plus-merger transactions; and (iii) a new default rule under which the assignee of all the interests of an LLC in a voluntary transaction will automatically be admitted as the LLC’s sole member. Unless otherwise stated below, all of the amendments took effect on August 1, 2016.

Deterrence of Economically Inefficient Appraisal Actions

Under § 262 of the General Corporation Law of the State of Delaware (the “DGCL”), stockholders of a Delaware corporation are entitled to have the Court of Chancery appraise the “fair value” of their shares if the corporation engages in a merger having certain characteristics and the stockholders follow the statutory procedures. 8 Del. C. § 262. The main policy goal underlying the appraisal remedy is to provide a source of relief for stockholders who oppose a merger and believe that the merger price does not reflect the corporation’s value were it to continue as a stand-alone enterprise. Experience in recent decades has shown, however, that the appraisal remedy can be abused by parties that buy stock after a merger is announced and use the nuisance aspects of an appraisal proceeding to obtain a settlement from the defendant corporation.

The legislature has amended § 262 in an effort to reduce the frequency of nuisance appraisal actions. As amended, § 262(g) provides that an appraisal action must be dismissed if the class or series of stock containing the shares for which appraisal is sought was listed on a national securities exchange immediately before the merger, unless any of three exceptions applies. The exceptions are that (i) the total number of shares for which appraisal has been sought is greater than 1% of all the shares of the same class or series, (ii) the stockholders that have sought appraisal would have received more than $1 million in the merger if they had not dissented, or (iii) the merger was a “short-form” merger under either § 253 or § 267 of the DGCL.

Section 262 has also been amended to include a mechanism by which corporations defending appraisal actions can limit their risk of interest-rate increases. Under amended § 262(h), the defendant corporation can make a payment, while an appraisal action is pending, to the stockholders seeking appraisal. If the corporation does so, then for the period after the payment, the appraisal judgment can include interest on only the amount, if any, by which the payment is exceeded by the court’s appraised value of the shares. All of the amendments to § 262 will apply only to mergers under agreements entered into on August 1, 2016, or later.

Further Refinement of Second-Step Corporate Merger Provisions

In 2013, the Delaware legislature amended the DGCL’s basic merger statute, 8 Del. C. § 251, to simplify the consummation of a merger when it forms the second step of a standard two-step acquisition of a public corporation (in which a merger follows a successful tender offer for the target corporation’s shares). Under then-new § 251(h), when various requirements were met, the acquiring corporation would be spared the necessity of obtaining approval of the merger from the target corporation’s
stockholders if, following the tender offer, the acquiring corporation owned enough shares to determine the outcome of any stockholder vote on the merger (typically, anything over 50% of the shares entitled to vote). This was a significant innovation because, under prior law, approval by the target’s stockholders could be avoided only if the acquirer held at least 90% of the target’s voting shares after the tender offer and any subsequent “top-up” purchases.

This year, § 251(h) has been amended in various respects that should make it easier for acquiring corporations to dispense with a stockholder vote after a tender offer. First, for § 251(h) to be available as an option, there is no longer a requirement that all of the target’s stock be publicly traded or widely held. Instead, this must be the case for only one class or series of target stock. Second, § 251(h) now expressly permits a qualifying tender offer to condition its closing on the tender of a specified minimum number or proportion of target shares. Third, while § 251(h) continues to require that the offer be made for all outstanding shares of the target’s voting stock, the section now expressly permits a qualifying offer to be made up of separate offers for separate classes or series of target stock. Fourth, the section now provides greater specificity regarding when tendered shares of the target are deemed to have been “received” pursuant to an offer. Fifth, the amendments to § 251(h) have enlarged the category of shares that can be counted in determining whether the acquiring corporation owns enough target shares that a stockholder vote would be unnecessary. Previously, the only shares that could be counted were those already owned by the acquiring corporation and those the acquiring corporation had irrevocably accepted for purchase in the tender offer. Now the acquirer can also count (i) any target shares owned by a direct or indirect parent of the acquirer, (ii) any target shares owned by a direct or indirect wholly owned subsidiary of the acquirer or its parent, and (iii) any target shares that the acquirer (or its parent or wholly owned subsidiaries) has a contractual right to acquire, provided that such shares (termed “rollover stock”) are in fact acquired before the merger is consummated.

To effectuate these amendments, several new defined terms—including “affiliate” and “rollover stock”—have been added to § 251(h). Practitioners should also be aware that the legislative synopsis in connection with the amendments contains a definition of the term “agent’s message,” which is used in the amended provisions regarding when shares are deemed “received.” The amendments to § 251(h) will apply only to merger agreements entered into on August 1, 2016, or later.

Change to the Signature Requirement for Stock Certificates

The DGCL long required that stock certificates (if any are issued) be signed by one officer from each of two lists contained in § 158. Those lists were (i) the chairperson, vice-chairperson, president, or vice-president, and (ii) the treasurer, assistant treasurer, secretary, or assistant secretary. The 2016 amendments have removed these lists of officers and replaced them with the requirement that stock certificates be signed by “any two authorized officers[.]” The legislative synopsis explains that this change “is not intended to change the existing law that the signatures on a stock certificate may be the signatures of the same person, so long as each signature is made in a separate officer capacity of such person.” It is not clear, however, whether the officers formerly listed in § 158 continue to be authorized by default to sign stock certificates. Accordingly, it may be prudent to include in corporate bylaws provisions that expressly authorize at least two officers to sign stock certificates.
Reorganized Provisions on Revocation of Corporate Dissolution and Revival of Void Corporation

Sections 311 through 314 of the DGCL address the revocation of a vote by stockholders to dissolve a corporation and the revival of a corporation that has become “void” (typically, because it has failed to pay its annual franchise tax or file its annual franchise tax report). These sections have been thoroughly revised so that, among other things, they now also deal expressly with corporations whose existence has expired by the terms of their charters, and they no longer provide remedies duplicative of those found elsewhere in the DGCL.

A Delaware corporation may include in its certificate of incorporation a provision limiting its existence “to a specified date[.]” 8 Del. C. § 102(b)(5). When that date is reached, such a corporation dissolves. 8 Del. C. § 278. However, before this year’s amendments, the DGCL did not clearly provide a mechanism by which the stockholders of a corporation that had dissolved by the passage of time could undo the dissolution. As amended, § 311 now enables a corporation with an “expired” certificate of incorporation to “restore” it.

The procedure for restoring an expired certificate of incorporation parallels the long-standing procedure for revoking voluntary dissolution. Action to restore must be taken within three years after the date of expiration (unless the Court of Chancery has extended this three-year period). The board of directors must adopt a resolution recommending restoration and submit the resolution to a vote by those who were stockholders on the date of expiration and entitled to vote on an amendment to the certificate of incorporation. If a majority in interest votes in favor of restoration, a certificate of restoration must then be filed with the Delaware Secretary of State to restore the expired charter. Among other things, the certificate of restoration must contain the new date when it will expire or state that the corporation’s existence will be perpetual.

The amendments to § 311 have also removed an obsolete provision requiring the Secretary of State to issue a certificate that the dissolution has been revoked “upon being satisfied that the requirements of [§ 311] have been complied with[.]” Section 311 now simply provides that a revocation of dissolution or restoration of an expired charter will be effective upon the effective time of the filing of the corporation’s certificate of revocation or restoration. Finally, the amendments have added language to § 311 to confirm that in connection with revocation of dissolution or restoration, the corporation must pay any franchise taxes and file any annual franchise tax reports that it would have filed if it had not been dissolved or its charter had not expired.

The DGCL’s provisions on reviving void corporations, found in § 312, have been amended to remove language pertaining to the extension of the time of a corporation’s existence if its existence is not perpetual. There is no need to address the latter in § 312, since it is now covered by § 311 if the corporation has already expired, and it is covered by the DGCL provisions on charter amendments (§§ 241-242) if the corporation has not yet expired. Likewise, references in § 312 to “renewal, revival, extension and restoration” have been shortened to simply “revival,” and the clauses specifying the contents of a certificate of revival have been shortened and clarified.

The “revival” provisions have also been amended to make clear that a void corporation’s revival may be authorized by the directors (even if only one) who, “but for the certificate of incorporation having become forfeited or void pursuant to this title, would be the duly elected or appointed directors[.]” 8 Del. C. § 312(h). The amended section also now states plainly that revival will cause all property and rights
acquired by the corporation while it was void to be vested in the corporation as if it had never been void, a proposition that had previously been only implied. Finally, the amendments confirm that revival is not available for a void corporation whose charter was revoked or forfeited by court order under § 284 of the DGCL. Conforming changes have been made to § 313 (which deals with revival of charters of exempt corporations) and § 314 (which confirms the rights of corporations that properly “renew, extend and continue” their existence).

**Additional Amendments to the DGCL**

The statutory subject-matter jurisdiction of the Delaware Court of Chancery has been enlarged by an amendment to § 111 of the DGCL. Previously, the statute gave the court jurisdiction to interpret and enforce agreements by which corporations create or sell stock or stock options (among other things). The amendment has added to the court’s jurisdiction the power to interpret and enforce agreements (i) to which a corporation and any of its stockholders are parties, and under which the stockholders sell stock in the corporation, or (ii) whose provisions include a sale or lease of assets by a corporation and approval of the sale or lease by any of the the corporation’s stockholders.

The DGCL’s provisions regarding committees of boards of directors and subcommittees of board committees have been amended to provide default quorum and voting proportions that match those already provided for full boards. 8 Del. C. § 141. The amendments also make clear that, elsewhere throughout the DGCL, a reference to a board committee or member of a board committee will be deemed to apply to a board subcommittee or member of a board subcommittee, as the case may be. Lastly, the amendments have deleted the clause of § 141 stating that when a board consists of one director, a quorum will be one. As the legislative synopsis states that this clause was removed because it was surplusage, its removal does not reflect a change in the law.

**Automatic Membership of Assignee of All LLC Interests**

Under the Delaware Limited Liability Company Act (the “DLLCA”), an acquirer of LLC interests is not necessarily admitted as a member of the LLC. To become a member, the acquirer must be admitted as such to the LLC, either pursuant to provisions in the LLC agreement or with the approval of all the members (assuming the LLC agreement does not provide otherwise). 6 Del. C. § 18-704(a).

This separation of the acquisition of interests from admission as a member can create a problem when the seller of the interests is the sole member of the LLC and is selling all of the seller’s interests. By default, the transfer of all of the seller’s interests will cause the seller automatically to cease to be a member. 6 Del. C. § 702(b)(3). Thus, if the seller does not admit the acquirer as a member of the LLC, the sale will (by default) cause the LLC to have no members at all, which will in turn cause the LLC to dissolve under § 18-801(a)(4) of the DLLCA. Years may pass, and the LLC interests may have several different owners, before the LLC’s unintended dissolution is discovered. Although the dissolution can then be revoked under § 18-806, doing so will require that the then-holder of the LLC interests be admitted as a member “effective as of the occurrence of the event that terminated the continued membership of the last remaining member.” When a substantial period of time and several owners have come between that “event” and the revocation of dissolution, the current holder of the LLC interests may be understandably reluctant to have its membership relate back to when the LLC last had a true member.

Amendments to DLLCA § 18-704 have largely obviated this chain of events. As amended, the section now states that unless the LLC agreement or the parties provide otherwise, an acquirer becomes a member of the LLC “upon the voluntary assignment by the sole member” to the acquirer of all of the
LLC interests held by the sole member. The amendments further explain that an assignment will be deemed “voluntary” if “it is consented to by the member at the time of the assignment and is not effected by foreclosure or other similar legal process.” In addition, automatic admission under the amendments to § 18-704 can occur only if the assignment is to a “single” acquirer.

Greater Flexibility for Actions without a Meeting by LLC Members and Managers, and LP Partners

Before this year’s amendments, the DLLCA and the Delaware Revised Uniform Limited Partnership Act (the “DRULPA”) contained multiple references to “written” consents or consents “in writing.” These references were recently interpreted by the Delaware Court of Chancery as contemplating “formal member action.” In re Carlisle Etcetera LLC, 114 A.3d 592, 600 (Del. Ch. 2015). To maintain the policy in favor of private ordering that underlies the DLLCA and the DRULPA, both Acts have been amended to remove “written” and revise similar language where it suggested a level of formality more appropriate to the corporate form.

Thus, § 18-302(d) of the DLLCA and § 17-302(e) of the DRULPA have been amended to provide that members and limited partners can act without a vote and without a meeting if the action is “consented to or approved, in writing, by electronic transmission or by any other means permitted by law,” by members or limited partners having a sufficient number of votes. Similar changes have been made respecting actions by managers of LLCs (§ 18-404(d)) and general partners of LPs (§ 17-405(d)).

Likewise, all occurrences of the term “written consent,” when used in connection with members, managers, or partners, have been replaced with simply “consent” throughout the DLLCA and the DRULPA. See, e.g., §§ 18-215(k)(3), 18-304, 17-218(k)(3), 17-402. The phrase “in writing” has been removed from provisions that previously required members or partners to agree in writing. See, e.g., §§ 18-806, 17-801. Relatedly, “affirmative” has been removed from occurrences of the expression “affirmative vote” on the grounds that the word is unnecessary. See, e.g., §§ 18-801, 17-806.

Additional Amendments to the DLLCA and the DRULPA

The DLLCA and the DRULPA enable LLCs and LPs to form what are often called “shielded” series of assets, i.e., series of assets that will not be subject to claims against other series of the LLC or LP, or against the LLC or LP generally (as distinguished from its series). To form a shielded series of assets, one must comply with certain requirements set forth in § 18-215(b) of the DLLCA and § 17-218(b) of the DRULPA. Provisions relating to shielded LLC and LP series have been amended this year in two respects.

First, language has been added to make explicit that (i) a shielded series may agree to allow liabilities of other series or of the entity generally to be charged against the assets of the shielded series, and (ii) the entity may agree to allow liabilities of a shielded series to be charged against the assets of the entity generally. 6 Del. C. §§ 18-215(b), 17-218(b). In the case of LPs, these permissive provisions extend also to the assets of general partners associated with series and the liabilities of general partners. 6 Del. C. § 17-218(b). The amendments confirm as well that the expressions “assets associated with a series” and “assets of a series” are synonymous as used in the Acts.

Second, the DLLCA and the DRULPA now specify means for serving process on shielded series. Service on the series may be accomplished in the same manner as service on the entity. However, if service is accomplished by serving the entity’s registered agent in Delaware, or by serving the Delaware
Secretary of State when other means are unavailable, the process must include the name of the entity and the name of the series being served. §§ 18-105, 17-105.

Finally, the DLLCA has been amended to eliminate a possible implication regarding what may cause an LLC member that is an entity to cease to be a member. As previously worded, § 18-801(b) stated that, by default, dissolution of an LLC will not be triggered by, among other things, a member’s bankruptcy or dissolution, “or the occurrence of any other event that terminates the continued membership of any member[.]” The phrase “any other event” implied that the bankruptcy or dissolution of a member that is an entity would by default cause the entity to cease to be a member. That implication has now been removed by the change of “any other event” to simply “an event.”
The following is a list of the MMSB Committee leadership. Please contact the Chairs or Vice Chairs of our MMSB Committee or any Subcommittee, or of our Task Forces or any of our Liaisons, to get involved in the particular MMSB Committee activities that interest you and which can benefit you, your practice and your clients. All levels are welcome, and we hope to see you soon in Boston!

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