Message from the Chair

Dear PEVC Committee Members and Friends:

I hope you have enjoyed your summer. As we begin to look toward the fall, I know many of you are planning to attend the ABA Business Law Section's Annual Meeting later this month in Chicago. As always, our Committee will be involved in a number of interesting CLE programs and other substantive meetings and events. I wanted to highlight a few of these, so that you can plan accordingly and make the best use of your time. Please see the full schedule of events below.

We are pleased to have Houlihan Lokey once again as sponsor for this year's dinner, and thank them for their continued support! The dinner is scheduled for Thursday, September 17th, at 7:30 p.m. in a dedicated room at Chicago hot-spot restaurant, RPM Italian - [http://rpmitalian.com/](http://rpmitalian.com/). Attendance is limited to 40 registrants and we expect the dinner to fill up quickly; please book your reservations early, if you have not already done so.

We will hold a full meeting of the Private Equity and Venture Capital Committee on Thursday, September 17th, from 1-2:30 p.m. We are honored to inform you that Vice Chancellor J. Travis Laster of the Delaware Court of Chancery will join our meeting and will discuss recent developments of note in the Delaware courts. In addition, Youmna Salameh from Houlihan Lokey and Lisa Stark from K&L Gates LLP will share insights on trends in the PEVC markets and related legal developments. This is always informative, and a report you won't want to miss. This main meeting is also a great opportunity to get caught up on committee-wide business and will include a report from our Subcommittee chairs. We also have a lineup of great Subcommittee meetings, all of which include substantive presentations. They are listed below, and I encourage you to make a special note of all of these meetings in your calendar.

Our Committee is involved in several CLE programs in Chicago and we are the lead sponsor of two of these. On Saturday, September 19th, at 8 a.m., we will host "The Spectrum of Private Equity: From Venture Capital to Mezzanine and Everything in Between." Also on Saturday at 10:30 a.m., we will host "Cross-Border Private Equity and Venture Capital Transactions". Thanks to all of our panelists, and to Eric Klinger-Wilensky, chair of the Programs Subcommittee, for their efforts in putting these programs together. Please note in the schedule that we are also co-sponsoring other CLE programs we believe should be of particular interest to our members.

Please take some time to read through the attached issue of Preferred Returns, the online publication of the Private Equity and Venture Capital Committee. The publication has a number of useful articles, as well as information about the upcoming meeting. Thanks once again to Lisa Stark, chair of the Venture Capital Jurisprudence Subcommittee, for all her efforts in putting this issue of Preferred Returns together.

Our Committee has been expanding its member offerings and programs, and our membership base has also grown: we are now the fifth-largest committee within the Business Law Section, with over 2,100 members, and the Committee grew more than 10% from 2014! This is the result of the high engagement and participation of our many active members. Thanks to all of you who have contributed in so many different ways. To be sure, there is plenty of opportunity for
anyone interested in getting more involved, and we have a number of exciting initiatives underway. The more involvement and participation we have, the more useful and relevant our content and programming will be for all of our members. Feel free to contact me, or any other member of the PEVC committee leadership team, any time with your ideas and suggestions.

I will look forward to seeing many of you soon in Chicago! Please note that, while we hope you are planning to attend in person, if you are unable to be in Chicago, you will still be able to join certain meetings by teleconference.

Jon Gworek, Chair
Private Equity and Venture Capital Committee
Business Law Section
American Bar Association

Featured Articles

**UK’s Summer Budget 2015: What’s relevant for private equity and venture capital?**
*By Steve Wilson*

Following the Conservative party's majority win earlier in the year, the new Government was quick to deliver a budget - some of which had been blocked or diluted during the prior coalition government. The budget speech delivered some surprises but there was more to be discovered in the detailed papers released after it had been delivered in parliament. Below we pick out the key changes for private equity and venture capital announced in the Summer Budget 2015.

Read more...

**Practical Application of Ballenger, Aveta and Cigna for Associates**
*By Scott Rissmiller*

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Read more...

**Why Should Western Nations Invest in Egypt?**
*By Waleed Ahmed*

Foreign investments are very important because they connect nations and create a global community. However, to address the question in regards to Egypt, we must take into consideration its character, legal system, and its recent reforms, statistics, and demands.

Egypt has the largest population in the Middle East, and it is the cultural hub for the Arab countries. As the host of the Arab League and historically referred to leader of the Arab nation, Egypt has a huge burden to satisfy the expectations of millions of Arabs in the area.

Read more...

**Switzerland: New Registration Obligations for Shareholders**
*By Oliver Blum*

Since July 1, 2015, shareholders of Swiss companies are subject to new registration obligations combating money laundering. The effect of these new regulations has to be carefully considered by private equity funds investing in Swiss companies.
Swiss stock corporations can issue either registered shares or bearer shares. Companies maintain a share register for the formal holders of registered shares, where the holders of bearer shares had, until recently, the possibility of remaining anonymous, even with the company, if they wished (thus the French term société anonyme, “anonymous company,” for the stock corporation). The formal holders of participation rights in a Swiss limited liability company are always registered, both in a register maintained by the company, and in a publicly accessible commercial register.

Read more...

Committee, Subcommittee and Program Descriptions

Private Equity and Venture Capital Full Committee Meeting

Chair: Jonathan D. Gworek, Morse, Barnes-Brown & Pendleton, P.C.

At the full committee meeting, we will discuss ongoing initiatives and projects of the PEVC committee. Younna Salameh from Houlihan Lokey and Lisa Stark from K&L Gates LLP will present on recent trends in VC and PE deals and related legal issues. In addition, the Honorable J. Travis Laster, a Vice Chancellor on the Delaware Court of Chancery, will join our full committee meeting to discuss recent developments in the Delaware courts.

- Thursday 9/17/2015 1:00PM - 2:30PM - Michigan, Lakeshore Meeting Suites, Bronze Level, East

Private Equity and Venture Capital Angel Venture Capital Subcommittee

Program Title: Early Stage Financings: Exploring Standard and Alternative Securities

Chairs: Emily J. Yukich, Fox Rothschild LLP and Matthew R. Kittay, Fox Rothschild LLP (Co-Chairs)

The Subcommittee will discuss ongoing committee business and initiatives. There will also be a discussion regarding the range of securities that are being issued in early stage seed finance—such as KISS, SAFEs, notes and Series Seed documents.

- Thursday 9/17/2015 2:30PM - 3:30PM - Michigan, Lakeshore Meeting Suites, Bronze Level, East

Program Title: Leadership

Chair: Jonathan D. Gworek, Morse, Barnes-Brown & Pendleton, P.C.

- Thursday 9/17/2015 3:30PM - 4:30PM - Michigan, Lakeshore Meeting Suites, Bronze Level, East

Program Title: Ethics and Privilege Issues With Confront Inside and Outside Corporate Counsel

Chairs: Anton R. Valukas, Jenner & Block LLP; and Dan K. Webb, Winston & Strawn LLP

Panelists; Robert E. Bostrom, Senior Vice President, General Counsel and Corporate Secretary, Abercrombie & Fitch; Carrie J. Hightman, Executive Vice President and Chief Legal Officer, NiSource Inc.; Paul M. Liebenson, General Counsel, ArcelorMittal USA LLC; Carla R. Michelotti, Executive Vice President and Chief Legal Officer, Leo Burnett Worldwide; Mark Jay Ohringer, Executive Vice President and Global General Counsel, Jones Lang LaSalle Incorporated; Daniel E. Reidy, Business and Tort Litigation Practice Leader, Jones Day; David P. Scharf, Corporate Vice President and General Counsel, Baxter International Inc.; Patrick M. Sheller, Senior Vice President, General Counsel and Secretary, Mead
Johnson Nutrition Company.

- Friday 9/17/15 10:30 AM - 12:30 PM - Columbus KL, Gold Level, East Tower

Private Equity and Venture Capital Jurisprudence Subcommittee

Program Title: Recent Developments in Private Equity and Venture Capital Law

Chair: Lisa R. Stark, K&L Gates LLP

Panelists will discuss recent judicial developments relating to private equity and venture capital during this jurisprudence subcommittee meeting. Topics will include dilutive down round financings, redemption, dividend and blocking rights in preferred stock instruments, as well as fiduciary duty issues. The panel will provide practical drafting and planning tips for practitioners.


- Friday 9/18/2015 11:00AM - 12:00PM - Addams, Silver Level, West Tower

Program Title: Venture Capital Transactional Documents and Issues Subcommittee

Chair: Jonathan D. Gworek, Morse, Barnes-Brown & Pendleton, P.C.

The subcommittee will discuss ongoing subcommittee business. The committee will also discuss recent developments in venture capital documentation including changes resulting from legal developments. When available, the subcommittee will discuss recent and pending changes to the NVCA forms.

- Friday 9/18/2015 1:30PM - 2:30PM - Riverside Center West, Purple Level, East Tower

International Private Equity and Venture Capital Subcommittee

Chairs: Steve Wilson, Osborne Clark and Samantha Horn, Stikeman Elliott LLP

The Subcommittee will meet to discuss issues relevant to cross-border private equity and venture capital deals. Our usual format will continue, having a variety of speakers from different regions of the world as well as an open-mike session.

- Friday 9/18/2015 4:00PM - 5:00PM - Atlanta, Gold Level, West Tower

Program Title: The Spectrum of Private Equity: From Venture Capital to Mezzanine and Everything in Between

Chair: Michael Kendall, Goodwin Procter LLP

The panel will discuss how different business considerations impact on the equity terms and conditions across a wide range of venture capital and private equity transactions.

Panelists: Jeffrey Steele, Morse, Barnes-Brown & Pendleton, P.C., Matthew Kittay, Fox Rothschild LLP, Michael Kendall, Goodwin Procter LLP

- Saturday 9/19/2015 8:00AM - 10:00AM - Columbus IJ, Gold Level, East Tower

Program Title: Cross-Border Private Equity and Venture Capital Transactions

Chair: Samantha Horn, Stikeman Elliott LLP

This panel will discuss typical structures used in private equity cross border transactions where U.S. acquirors are buying or investing in target companies in foreign jurisdictions. The panel will focus on tax and corporate law issues, including what the typical structure that is used in a particular jurisdiction is and
what a practitioner needs to know to understand and recommend that structure.

Panelists; Samantha Horn, Stikeman Elliott LLP, David Louis, Charles Russell Speechlys, Robert Oberlies, Fredrikson & Byron, P.A., Steve Wilson, Osborne Clarke

- Saturday 9/19/2015 10:30AM - 12:30PM - Columbus IJ, Gold Level, East Tower

**Fund Formation Subcommittee**

**Program Title:** Alternative Investment Fund Managers Directive

**Chair:** Ben Kwon, Stradling Yocca Carlson & Rauth, P.C.

Several countries in Europe have adopted the Alternative Investment Fund Managers Directive. This new regulation has changed the landscape for U.S. venture capital funds seeking to raise funds from European investors. Fund raising activities will be significantly affected, as well as the structuring for venture capital funds.

Panelists; David Louis, Partner, Charles Russell Speechlys.

- Saturday 9/19/2015 2:00PM - 3:00PM - Crystal Ballroom C, Green Level, West Tower

**Articles and Authors Needed**

The Committee is collecting articles for future newsletters which are circulated to our members worldwide. Please send your submissions to Lisa Stark at lisa.stark@klgates.com.

Articles should be 1500 words or less, and on any topic of interest to practitioners in the private equity and venture capital sectors. From short scholarly articles, to practice tips, reviews/summaries of a Section program, life in the trenches, interesting pro bono projects, humorous looks at life and the law, or even how you balance work and personal life. We appreciate your help in making this newsletter a success.
UK's Summer Budget 2015: What’s relevant for private equity and venture capital?  
By Steve Wilson

Following the Conservative party's majority win earlier in the year, the new Government was quick to deliver a budget – some of which had been blocked or diluted during the prior coalition government. The budget speech delivered some surprises but there was more to be discovered in the detailed papers released after it had been delivered in parliament. Below we pick out the key changes for private equity and venture capital announced in the Summer Budget 2015.

Carried interest tax increases

UK investment managers are likely to see an increase in the tax they will pay on any carried interest payments as the Government will be introducing legislation to restrict the availability of "base cost shift relief" which allows managers to reduce their tax liabilities.

Carried interest will continue to be subject to capital rather than income treatment but the legislation will ensure that "sums which arise to investment fund managers by way of carried interest will be charged to the full rate of capital gains tax, with only limited deductions being permitted", according to Budget papers published by HM Treasury.

Managers should prepare to pay the full 28% capital gains tax rate on their carry as opposed to typical rates of 18% or less which some managers have been used to paying.

The changes take effect from Budget day, 8 July 2015, though the detail of the legislation will be published as part of the Summer Finance Bill.

EIS and VCT locked out of deals

New rules will be introduced to prevent EIS and VCT funds from being used to make acquisitions of existing businesses. This is a significant and surprising move not hinted at during previous consultations on the tax-advantaged schemes. The Government's policy position is that "investments are intended to support the growth and development of the company itself and not expansion by the acquisition of existing companies or trades". VCTs will not be able to use monies previously protected under grandfathering provisions (i.e. funds raised pre-2012) to fund buyouts, or to fund the acquisition of a trade, whether or not the VCT’s investment would be a non-qualifying holding. Other changes to SEIS, EIS and VCT announced in the Summer Budget include:

- New time limits within which a company must receive its first SEIS, EIS or VCT investment of 10 years from its first commercial sale for knowledge-intensive companies and 7 years for other qualifying companies.
- A new cap on the total SEIS, EIS and VCT investment that a company may receive of £20 million for knowledge-intensive companies and £12 million for other qualifying companies.

1 Steve Wilson is head of Osborne Clarke's office in Silicon Valley, California.
These changes will come into effect when the Summer Finance Bill is passed and State aid approval is received. Our best estimate is that the Summer Finance Bill will pass in mid-October giving a short window of opportunity for EIS and VCT funds to complete their buyout deals.

**Limited Partnership reform**

The Government will be publishing a consultation on "technical changes to limited partnership legislation to enable private equity and venture capital investment funds to more effectively use the limited partnership structure".

English limited partnership reform has been talked about for a number of years and has become long overdue as this fund vehicle faces stiff competition from innovative vehicles introduced in other jurisdictions.

We await publication of the consultation but previously mooted changes include a "white list" of actions which limited partners could take without losing their limited liability and the option for the partnership to opt for separate legal personality.
Practical Application of Ballenger, Aveta and Cigna for Associates
Scott Rissmiller, Esq.1

Associates are often tasked to ensure stockholders’ representatives are correctly appointed and to review letters of transmittal in connection with private company acquisitions. It may not be readily apparent to associates why such tasks are important or what those tasks entail. In addition, junior associates may not foresee the importance of indemnification obligations. This article provides the practical application of key Delaware cases, one of which is recent; and one Massachusetts case, in addition to summarizing the cases. Aspects of cases irrelevant to this article are not discussed.

I. Understanding Ballenger, Aveta and Cigna in the Context of a Private Company Acquisition

The decision in Cigna Health and Life Insurance v. Audax Health Solutions, Inc., 107 A.3d 1093 (Del. Ch. 2014), recalled the earlier Ballenger and Aveta cases. Taken together, Ballenger, Aveta and Cigna address central components of most private company acquisitions: stockholder representatives, letters of transmittal and indemnification obligations. The cases confirm that:

• A validly appointed stockholders’ representative is authorized to act on behalf of all stockholders, including non-signatory stockholders, but such authority can be limited.
• Post-closing obligations contained in a letter of transmittal should be incorporated into the related merger agreement, absent additional consideration.
• Indemnification obligations need to be limited in terms of amount and duration, whether by express provisions in the merger agreement or by “facts ascertainable” outside of the agreement. If the latter, then the merger agreement must explain how such facts would alter the consideration.

II. Applying the Cases to Your Merger and Acquisitions Practice

Associates working on an acquisition or sale should:

• Ensure that the merger agreement provisions related to the stockholders’ representative’s appointment and powers are “clear and unambiguous.” Determine what powers are not expressly granted or are not exclusive.
• Ensure the stockholders’ representative was duly and validly appointed.
• Remember that post-closing disagreements over items such as post-closing adjustments may lead to stockholders contesting the stockholders’ representative’s actions. Explain the role and responsibilities to a stockholders’ representative that has not previously been in such a role.
• Confirm that all obligations in the letter of transmittal are included in the merger agreement. Associates should not limit the scope of their review to only grammar and the like.
• Assess the indemnification provisions to determine whether the cap or duration could ever be unlimited. If so, revise the merger agreement or ensure that such items could be based on “facts ascertainable.”

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1 Scott Rissmiller is an associate in the Washington, D.C., office of Hogan Lovells US LLP, advising public and private clients on a range of corporate and securities matters. His practice focuses on assisting clients with mergers and acquisitions, public securities offerings, U.S. federal securities law compliance and corporate governance matters. His practice also includes private equity and venture capital transactions.
III. Ballenger: Identifying the Scope of the Representative’s Power

In Ballenger v. Applied Digital Solutions, Inc., No. C.A. No. 19399, 2002 WL 749162 (Del. Ch. Apr. 24, 2002), the Court considered, among other issues, whether the case must be dismissed because the plaintiffs (the stockholders’ representatives), did not join the stockholders who sold their shares in the merger.

The Court held that a stockholders’ representative should pursue post-closing adjustments set forth in a merger agreement on behalf of all stockholders, provided that the stockholders’ representative was granted such authority in the merger agreement. The Court also noted that inconsistent judgments among stockholders would be impossible because a judgment against the stockholders’ representatives binds all former stockholders. At the same time, stockholders can take action against the stockholders’ representatives.

The action originated with a June 2000 merger pursuant to which Applied Digital Solutions, Inc. ("Applied"), acquired Computer Equity Corporation ("Compec") in a cash and stock transaction. The merger closed in August 2000. Under the terms of the agreement, Applied would make up to two earn-out payments provided that certain financial results were achieved.

At the time of the merger, Compec’s founder and his family members owned 72% of Compec, and the founder and two other individuals were designated as the stockholders’ representatives. Compec never received the first earn-out payment, yet Applied stated in its SEC filings that the first payment was made. However, Applied had not, in fact, made any payment because, according to Applied, Compec’s financial statements did not accurately portray the financial condition of Compec. Unsurprisingly, the stockholders’ representatives sued seeking payments. Applied contended, among other things, that such payments were not earned and arbitration was not waived.

One ground on which Applied sought dismissal was that not all prior stockholders were joined as parties to the action. However, the stockholders’ representatives were given authority to act on behalf of all stockholders, including the pursuit of claims. As the Court explained, the stockholders’ representatives were not without some limitations — stockholders have a course of action against the stockholders’ representatives should the need arise.

Practice Pointer: Play close attention to the powers granted to stockholders’ representatives. Consider whether, based on the lawyer’s knowledge of the parties, the proposed authority either is too expansive or narrow. Do not gloss over that section.

IV. Aveta: Stockholders’ Representative Acts for All Stockholders

In Aveta Inc. v. Cavallieri, 23 A.3d 157 (Del. Ch. 2010), the Court considered whether controlling and non-controlling stockholder defendants were bound by the actions of the stockholders’ representative when determining the transaction consideration under the agreement, including post-closing adjustments. According to the Court, all stockholders (controlling and non-controlling) are bound by the determinations of the stockholders’ representative in the post-closing adjustment process, provided Section 251 of the General Corporation Law of the State of Delaware ("DGCL") is satisfied. Furthermore, an appointment that includes an “interest” is irrevocable.

In 2006, Aveta Inc. ("Aveta"), a Delaware corporation, completed the acquisition of Preferred Medicare Choice Inc. ("PMC"), a Puerto Rican corporation. PMC had Class A shares and Class B non-controlling shares. BER, a holding company, held the Class A shares, and BER was owned entirely by
controlling stockholders of PMC Class A shares. The control group consisted of the stockholders’ representative and others, each of whom signed the purchase agreement. Over 100 individuals (mostly doctors and health professionals in the PMC network) owned Class B shares.

Class A shares were purchased from PMC’s controlling stockholders for over 60% of the aggregate consideration. The Class B shares were converted into the right to receive the balance of the consideration, subject to post-closing adjustments and potential earn-out payments. According to the agreement, Aveta would calculate post-closing adjustments and earn-out payments, and Aveta and the stockholders’ representative would try to resolve disputes over the calculations. If an agreement could not be reached, then an accounting firm would help resolve the dispute.

In 2007, over 100 former stockholders attempted to revoke the stockholders’ representative’s appointment over a dispute relating to the post-closing adjustments. Concurrently, the stockholders’ representative and Aveta were at odds over the post-closing calculations.

As the Court noted, the attempts to overthrow the stockholders’ representative were baseless, because the appointment language in the agreement was “clear and unambiguous” and the controlling stockholders irrevocably appointed the stockholders’ representative. The stockholders’ representative was a former controlling stockholder and had an interest in PMC, the purchase agreement and the merger consideration.

In deciding the case, the Court looked at the governing Puerto Rican law and DGCL § 251, because § 251 paralleled the applicable Puerto Rican law. In doing so, the Court explained that Class B holders were bound by the stockholders’ representative’s actions because post-closing adjustments were dependent on “facts ascertainable outside of the merger agreement” and the stockholders’ representative followed the procedures set forth in the agreement.

Practice Pointer: Explain the role and responsibilities to a stockholders’ representative who has not previously been in such a role, because stockholders may contest the stockholders’ representative’s actions.

V. Cigna: The Letter of Transmittal Must Align with the Merger Agreement and Open-ended Indemnification Obligations are Unenforceable

In Cigna, the Court considered whether a release in a letter of transmittal was enforceable and whether an indeterminable indemnification obligation violated DGCL § 251. The Court ruled that, absent consideration in addition to the merger consideration, a release in a letter of transmittal that is not included in the merger agreement is not enforceable. In addition, as required by DGCL § 251(b), indemnification obligations cannot be uncertain with respect to monetary cap or duration, except that such obligations may be “dependent upon facts ascertainable outside of such agreement … provided that the manner in which such facts shall operate upon the terms of the agreement is clearly and expressly set forth in the agreement.” In other words, the merger consideration can be adjusted based on known facts if the merger agreement explains how the consideration will be effected.

The case originated with the February 2014 merger agreement pursuant to which Optum Services, Inc. (“Optum”), would acquire Audax Health Solutions, Inc. (“Audax”), through a holding company. Cigna Health and Life Insurance Co. (“Cigna”) owned over 23 million shares of Audax’s Series B Preferred Stock. Almost 67% of Audax stockholders consented in writing to the merger agreement. Cigna did not consent.
The indemnification obligations sought to address a situation where money set aside in escrow for post-closing indemnification falls short of the funds necessary. In that situation, and in the case, the acquirer looks to stockholders to pay for the overage. Some stockholders in Cigna agreed to such a provision pre-closing. Other stockholders were asked post-closing to execute a letter of transmittal to consent to indemnification obligations, the appointment of the stockholder representative and a release of claims against Optum. Cigna refused to execute the letter of transmittal, and then sued after not receiving the merger consideration. Cigna, a preferred holder, had a mandatory right to at least partial consideration in addition to the additional obligations being ineffective.

Practice Pointer: Cross-check the letter of transmittal against the merger agreement to ensure there are not any new obligations in the letter of transmittal. Work through scenarios to determine whether the indemnification cap or duration could be unlimited.

VI. Bailey: Use the Merger Agreement to Limit the Representative’s Authority

In Bailey v. Astra Tech, Inc., 999 N.E.2d 138 (Mass. App. Ct. 2013), the Court addressed whether shareholders who settled a claim with the acquirer with respect to escrow funds set aside for indemnification had such power or whether the stockholders’ representative was the only individual with the authority necessary to settle the claim.

In October 2007, Astra Tech, Inc. (“Astra”), acquired Atlantis Components, Inc. (“Atlantis”), and as part of the merger agreement, certain funds were set aside in escrow for indemnification claims. In August and September 2007, Atlantis received letters from a competitor alleging Atlantis infringed on certain patents. Atlantis did not disclose the second letter to Astra, which later found out about the letter in October 2007.

Eventually, Astra demanded payment of the entire escrow because at the time of the request the total cost of defending the infringement claims was unknown. The stockholders’ representative (or as named in the case, shareholders’ agent) challenged the request, and the two sides became embroiled in a dispute.

Certain stockholders grew weary of the rising legal costs and entered into a settlement with Astra, which the stockholders’ representative challenged, asserting that the shareholders did not have the authority to settle the claim.

In addition to finding that the escrow agreement did not forbid the settlement and the appointment as stockholders’ representative was not irrevocable, the Court noted that the merger agreement did not forbid the settlement. Specifically, while the merger agreement granted the stockholders’ representative “broad powers to negotiate and to make decisions,” the merger agreement did not grant exclusive power. Simply put, the merger agreement section applicable to the stockholders’ representative powers did not use the word exclusive or similar words expressly providing total authority.

Practice Pointer: Know and understand the powers granted to the stockholders’ representative. Identify powers that are not granted.
Why Should Western Nations Invest in Egypt?

By: Waleed Ahmed

Foreign investments are very important because they connect nations and create a global community. However, to address the question in regards to Egypt, we must take into consideration its character, legal system, and its recent reforms, statistics, and demands.

Egypt has the largest population in the Middle East, and it is the cultural hub for the Arab countries. As the host of the Arab League and historically referred to leader of the Arab nation, Egypt has a huge burden to satisfy the expectations of millions of Arabs in the area. Egypt further offers a relatively large market due to its large population and its proximity to Europe that could potentially serve as an export base for Foreign Direct Investment in industries with substantial economies of scale. Moreover, Egypt could take advantage of the open market abroad due to its diversified economy, which is well endowed with relatively cheap and skilled labor, its modern natural resources, such as oil, gas, and the waters of the Nile River, and its historical sites and other tourism attractions. Egypt, as part of the Middle East, maintains two separate bodies of law. Islamic law, derived from Shariaa, governs family law and inheritance, while the secular laws, such as the civil and commercial codes, are framed after the rules and provisions of the French law. The Middle Eastern countries were motivated by the development of trade and commerce to have a modern body of commercial law regarding foreign

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1 Egyptian Attorney & Student at the University of Minnesota Law School.
4 Galal & Lawrence, supra at 302.
investment, labor, commercial transactions, corporate taxation, business organizations and intellectual property.⁶ “Often, when new issues arise in these civil or secular courts, they are resolved by legal principles adopted from international treaties, organizations, or neighboring Middle Eastern nations.”⁷ As a contracting party to World Trade Organization (WTO) since 1995, Egypt has proven to be an active participant in the multilateral trading system.⁸ Egypt also has extended Most Favored Nation (MFN) treatment to all WTO members, and in the services sector, Egypt supports more trade liberalization.⁹

The Middle East and North Africa region (MENA) experienced positively sweeping changes since the Arab Spring uprisings, and countries have recognized the democracy-seeking rebel fractions as the new legitimate leaders of countries such as Tunisia and Egypt.¹⁰ Reputed as a stable MENA nation and as a valuable-strategic partner of the United States, Egypt, followed in Tunisia’s footsteps, ousted its dictator of thirty years, President Hosni Mubarak.¹¹ Moreover, after the Egyptian Military had removed Mohamed Morsi, the Muslim-Brotherhood president, and his government from power in July 3, 2013; Egypt started to create stability, enhancement their entrepreneurship, and safety and security of the state—which should boost

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⁶ Id.
⁷ Id.
⁹ Id.
the Egyptian economy. For example, the local private equity advocates established the Egyptian Private Equity Association (EPEA) in 2011, and in addition, Egyptians overwhelmingly approved the draft Constitution on January 14 and 15, 2014. This Constitution encourages further reforms to create a more favorable environment for private equity and venture capital, better regulation and liberalization of Egypt’s economy, and sets Egypt on a path of prosperity and economic growth through sustainable development and social justice.

Egypt is likely one of the promising countries to lead the private equity rebound in the Middle East. The private equity sector in the Middle East and North Africa experienced instability since the global financial crisis struck the region six years ago, which caused a lack of large buyout transactions, and resulted in an increase of venture capital and small-to-medium sized companies in recent years. However, “Egypt, in particular, could lead the sector’s rebound as it continued to be one of the top attractive PE destinations [in 2013] despite the political transition that took place there”. This is based on the MENA private equity & venture capital’s report which shows that Egypt attracted 20% of the region’s investment. There are several notable-private-equity deals occurred in Egypt, such as:


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13 Id.
14 Id.
16 Id.
17 Id.
18 Id.
million in Bio Pharma Egypt, a manufacturer of nutritional supplements, 4) August 2012: Capital Trust Group acquired a minority stake in Sakson Oil & Gas Group, 5) April 2012: Capital Trust Group, structured through its fund Euromena II, acquired 51% of Al Oyoun al Dawli Hospital, and 6) March 2012: Venture capital firm Ideavelopers invested US $1.3 million in DrBridge, a health-care IT firm.”

Shehata, supra. In 2007, Goldman Sachs named Egypt part of the “N-11,” one of eleven countries that have a high potential of joining the ranks of the world’s largest economies in the 21st century. In 2009, the Economist Intelligence Unit ranked Egypt as a member of the CIVETS, which are the six most favored emerging markets. In addition, the US Secretary of State, John Kerry, has praised recent economic reforms in Egypt, and urged businesses to invest in the country.

There are, however, some disadvantages in the Egyptian legal system. Company Law n. 159 of 1981 does require in public offering that at least 49% of the shares of joint-stock companies to be to Egyptian underwriters for a period of one month, unless an Egyptian founding shareholder has already acquired such percentage of shares prior to the public offering intending to offer shares to the public must. Also, the Investment Incentives and Guarantees Law n. 8 of 1997, referred to as providing exceptions to Company Law n. 8 of 1981, which was “....intended to encourage foreign direct investments in Egypt in specific sectors: manufacturing and mining, logistics, tourism, medical facilities, oil services, infrastructure, and, interestingly, venture capital.” At a minimum, the scope of its application should now be expanded to cover foreign direct investment in all sectors.” This law allows non-Egyptians to own 100% of

19 Id.
20 Id.
22 Id.
23 Id.
24 Id.
Egyptian companies, nominate boards of administrators that do not include Egyptian citizens, and issue licenses and permits for foreign investors promptly.\textsuperscript{25} Companies falling within Law n. 8 of 1997 can purchase properties, land and construct buildings and plants anywhere (with the exception of the Sinai region) to implement the company’s business in Egypt.\textsuperscript{26} The law further protects those companies from confiscation or nationalization and “their assets cannot be subject to sequester, seizure or expropriation by any administrative order.”\textsuperscript{27} Although, the Investment Incentives and Guarantees Law presents a Company Law reform in Egypt, it fails to explain why the protections and benefits currently granted to foreign investors are unavailable to both foreign and domestic.\textsuperscript{28} So that, the Egyptian Private Equity Association (EPEA) takes initiatives to amend the Egyptian company and capital market laws in order to create a better environment for private equity deals.\textsuperscript{29}

In several sectors, Egypt has demands that the U.S.’s exports and investments can supply, such as “architecture/construction/engineering services (ACE), electricity power systems (ELP), franchising; medical equipment and supply, renewable energy (REQ), safety and security industry, telecommunications equipment and services, and water/wastewater resources.” In presenting the (ACE), the U.S. Department of Commerce stated that the market has been growing rapidly at a rate of 15 percent since the 1980s, which has resulted in a substantial boom in residential and commercial real estate. Although the political unrest of January 2011 negatively affected the sector and led to slower growth rates, it has shown signs of recovery; and there is strong demand for infrastructure projects due to rapid population growth and housing

\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
shortages, particularly in the low- and middle-income segments. However, the lack of access to private capital for infrastructure development represents an industry deterrent, reinforcing the country’s dependence on external loans and financial assistance from neighboring countries. U.S. Department of Commerce, supra at Chapter 4. The U.S. Department of Commerce further stated that the sub-sector should invest in “road management systems, bridges, green building, power projects, new cities, utilities and infrastructure, and low income housing.”

Moreover, in addressing the (ELP) in Egypt, the U.S. Department of Commerce asserted that Egypt is the largest energy producing country in the Middle East, with high population growth and a growing economy. Electricity consumption tripled over the last 20 years and demand is expected to grow by 10 percent over the next five years following 7.5 percent growth since 2009.30 The U.S. Department of Commerce stated that the subsector’s best prospects are “gas turbine units, steam turbine units, products and services related to power industries and electricity grid, smart grid technology, and compressed Natural Gas (CNG) and Liquefied Natural Gas (LNG) technologies and peripherals.”31

In addressing the (REQ), the U.S. Department of Commerce asserted that Egypt enjoys excellent wind along the Suez Gulf, with an average wind speed of 10.5 m/sec, and also has a “sun belt” country with 2,000 to 3,000 kWh/m2/year of direct solar radiation. The sun shines 9-11 hours a day from North to South in Egypt with only a few cloudy days, making Egypt prime territory for renewable energy sources. The renewable equipment market is potentially worth several billion dollars.32 The U.S. Department of Commerce stated that the sub-sector’s best

30 Id.
31 Id.
32 Id.
prospects are “wind turbines, wind towers, concentrated solar power equipment and technologies, and photovoltaic panels and related technologies.”

In presenting the water/wastewater resources, the U.S. Department of Commerce stated that despite the presence of the Nile River, which spans the entire length of Egypt from South to North, Egypt has suffered from water scarcity problems in recent years, due to water-intensive agricultural methods that threaten Egypt’s natural water resources. Egypt is interested in updating its technology in the water sector, in areas such as water desalination, reverse osmosis, and the design and construction of new water plants in rural areas, which are most in danger.

The U.S. Department of Commerce stated that the sub-sector’s best prospects in water/wastewater resources are “sanitary wastewater projects, composting programs, water and sludge treatment projects, filters and services, reverse osmosis, water desalination equipment, design of water plants, solid waste management equipment and operation, water meters, water and sludge treatment projects, and filters and services.”

In conclusion, Egypt is considered a valuable partner to the United States and the Western nations in the Middle East. Egypt experienced economic and political upheaval within the last five years, which lead to several legal, political and economic reforms. Even though the Egyptian economy was damaged through the turmoil, statistics showed that many foreign investments and private equity deals were established because Egypt has promising economic potentials that should be explored. Western nations should take initiatives now before the dust settles. The U.S. searches for a trade partner in the Middle East that others will emulate, and Egypt has a great influence that extends throughout the Middle East. Galal & Lawrence, supra

33 Id.
34 Id.
35 Id.
at 301-02. Supporting the reform movement in Egypt could lead to a positive effect in the region. Moreover, developed nations now move towards clean energy projects in the developing MENA region. MENA is the region to watch for remarkable solutions on a grand scale. High revenues from these projects can further finance major infrastructure and rebuilding needs in Egypt.

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36 Id.  
38 Id.  
Switzerland: New Registration Obligations for Shareholders
By Oliver Blum

Since July 1, 2015, shareholders of Swiss companies are subject to new registration obligations combating money laundering. The effect of these new regulations has to be carefully considered by private equity funds investing in Swiss companies.

Swiss stock corporations can issue either registered shares or bearer shares. Companies maintain a share register for the formal holders of registered shares, where the holders of bearer shares had, until recently, the possibility of remaining anonymous, even with the company, if they wished (thus the French term société anonyme, “anonymous company,” for the stock corporation). The formal holders of participation rights in a Swiss limited liability company are always registered, both in a register maintained by the company, and in a publicly accessible commercial register.

Based on the recommendations of the G7 Financial Action Task Force regarding transparency and beneficial ownership by legal persons in 2012, Switzerland enacted new regulations, effective July 1, 2015, which impose new registration obligations on both formal shareholders and beneficial owners of Swiss companies. On the one hand, an acquirer of any number of bearer shares has to disclose its identity to and be registered with the company, while on the other hand, any beneficial owner, or group of beneficial owners, of shares of a stock corporation or of participation rights in a limited liability company have to be registered with the company, if they obtain control of 25% or more of the capital or voting rights in the company.

All of these notifications have to be made within one month of acquiring the respective shares.

In addition, shareholders who acquired their bearer shares before July 1, 2015 have to disclose their identity and — if they control at least 25% of the capital or voting rights — the beneficial owners of the shares to the company until the end of 2015. No retroactive notification obligation exists for the holders of registered shares and of participation rights in LLCs.

A shareholder may not exercise its membership rights (particularly, voting rights) or its monetary rights (particularly, rights to dividends) until the required notification has been made. Further, if the aforementioned deadlines are not complied with, all monetary rights are forfeited, but can be restored (for the future only) by making the notification later on.

The investors in a private equity fund must be considered the “beneficial owners” of the portfolio companies of the fund; this raises the question of whether, under the new regulations, these investors have to be disclosed to Swiss portfolio companies. Based on a strict reading of the law’s language, this would indeed be the case; emerging practice seems to take the position that only the acquisition vehicle of the private equity fund must be disclosed to the company, because on the one hand, investors do not have any means of exercising control over the portfolio company, and on the other, the fund manager is itself already subject to

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extensive due diligence and registration obligations with regard to investors and their funds. However, it remains to be seen whether the Swiss courts and anti-money laundering authorities will share this pragmatic view.