Deal protection mechanisms in the US and the UK

Scott Davis and Kate Ball-Dodd*, Mayer Brown LLP and Mayer Brown International LLP

www.practicallaw.com/8-380-9085

There are key differences in deal protection mechanisms available to bidders for publicly listed companies in negotiated transactions in the US and the UK. For example, higher termination fees and a greater variety of non-solicitation provisions tend to be used in US deals than in UK deals. However, there is one significant exception to the generalisation that the US permits more deal protection than the UK. A court decision in Delaware (the most important jurisdiction governing public companies in the US) has prohibited the use of shareholder support agreements in conjunction with other mechanisms to lock up a public deal with a bidder. In contrast, in the context of a recommended takeover in the UK, a bidder is permitted to obtain an irrevocable undertaking to accept its offer from the holders of a target's shares which, if over a significant proportion of the total shares, effectively guarantees the consummation of the transaction.

Against this background, this chapter examines:

- Differences between negotiated acquisitions in the US and the UK.
- The reasons for deal protection mechanisms.
- Deal protection mechanisms in the US and the UK.

STRUCTURE AND REGULATION OF NEGOTIATED ACQUISITIONS IN THE US AND THE UK

In the US, acquisitions of public companies are typically achieved through either a one-step merger or a tender offer followed by a merger. In either case, the shareholders of the target must give their consent to the transaction, either by voting for it (in the case of a merger) or tendering their shares (in the case of a tender offer). The terms of the acquisition are negotiated between the parties and recorded in an acquisition agreement. Acquisition agreements in the US generally contain a right for the target to terminate the transaction if consummating the transaction would be inconsistent with the fiduciary duties of its directors (Fiduciary Out).

The conduct of takeovers, including recommended takeovers (which in this chapter is equivalent to a negotiated transaction in the US) of UK public companies is regulated principally by the City Code on Takeovers and Mergers (Code). The Code comprises a series of General Principles (essentially standards of commercial behaviour) and Rules, designed to ensure fairness to shareholders. The Panel on Takeovers and Mergers (Panel) enforces the Code.

The Code was revised in May 2006 on the implementation of Directive 2004/25/EC on takeover bids (Takeover Directive) in the UK. One of the key changes was that the Panel was put within a statutory framework, resulting in increased powers. However, these revisions to the Code did not materially alter the availability or use of deal protection mechanisms.

In the UK, the majority of public company takeovers are effected by an offer made to the shareholders of the target. A recommended takeover can also be implemented by a statutory scheme of arrangement under which the share capital of the target is restructured to give control to the bidder. The use of schemes of arrangement is becoming increasingly popular with around one-third of takeovers in the UK now being effected in this manner (although concerns have been raised as to the level of control over the proceedings which can be levied by activist shareholders during a takeover offer which is being implemented by means of a scheme of arrangement). A scheme of arrangement must first be approved by a majority of the target's shareholders representing 75% in value of the target's shares and then sanctioned by the court.

Unlike in the US, bidders and targets in UK recommended takeovers do not customarily enter into merger or acquisition agreements unless the offer is being implemented by a scheme of arrangement of the target. In this context, the bidder is keen to ensure that the target does what is necessary to implement the scheme. It has, however, become typical for a UK target to agree to pay a break fee to the bidder (irrespective of whether the takeover is being implemented by means of a scheme of arrangement or not), payable if the bidder is not ultimately successful, which includes losing out to a competing offer.

REASONS FOR DEAL PROTECTION MECHANISMS

Deal protection mechanisms are essentially contractual agreements between the preferred bidder and the target that are designed to discourage competing bids and to protect the preferred bidder if a competing bid emerges. From a bidder's standpoint, the desire for deal protection arises because the target's board of directors (board) cannot fully bind the target to a change of control transaction. Bidders have reason to be concerned about losing out to a competing bid. Transactions are expensive, both in terms of actual out-of-pocket costs and opportunity costs. They are also time-consuming and divert management's attention from day-to-day operations. The undertaking of a public acquisition in which the bidder is then outbid, especially if it is outbid by a competitor, may be seen as a defeat of the bidder and its management. For all of these reasons, bidders are reluctant to enter into agreements for the acquisition of public companies without protecting the deal against competition to the fullest extent possible.

Target companies often resist deal protection mechanisms because they perceive that it is in the interest of their shareholders if a higher bid emerges. However, there may be reasons why target boards accede to the demands of the bidder. In a share-for-share transaction, the target company's board and management may have confidence in the long-term opportunity offered by the combination, and indeed may be part of the board and management of the combined company going forward. The board and management of the target may also believe the proposed transaction benefits its employees, customers, suppliers or community. In addition, providing the bidder with deal protection may be necessary to get the deal done.

Of course, the target's management may be accused of having less noble reasons for agreeing to protective mechanisms. Their prospects of continued employment, promotion and increased compensation may be better with the recommended bidder than potential competing bidders. This may be the case, for example, when the recommended bidder is moving into a new market and needs the incumbent management, while the rival bidder is a consolidator looking for cost savings.

Legal constraints against the use of certain deal protection mechanisms, either alone or in combination with other mechanisms, have been imposed because of the concern that too much deal protection will improperly preclude the emergence of a superior offer and disadvantage the target's shareholders. Those constraints are largely imposed in the form of common law decisions by courts in the US. In the UK, such constraints are imposed by Rule 21 of the Code, which effectively precludes actions by the target that would frustrate a competing bid once it is credibly threatened, as well as through common law and statute.

DEAL PROTECTION MECHANISMS IN THE US

Directors' duties

Directors of US targets, in agreeing to deal protection mechanisms, are constrained by their fiduciary duties under the law of the state of the target's incorporation. Delaware is the most important jurisdiction for publicly traded companies in the US and has the most developed body of corporate case law. Delaware precedents, while not binding on the courts of other jurisdictions, are often, though not always, cited and relied on by other courts.

Under Delaware law, the inclusion of deal protection mechanisms in a transaction agreement triggers scrutiny of the target's board. Subject to an important exception described below, if the transaction in question involves the sale of control of the corporation, *Revlon* duties apply and the board is charged with the duty to secure the transaction offering the best value reasonably available for the shareholders (*see Revlon Inc. v. MacAndrews & Forbes Holdings Inc., 506 A.2d 173 (Del. 1986)*). However, *Revlon* duties do not apply in strategic, share-for-share mergers in which the shares of the surviving public company are widely dispersed, with no person holding a control block (*see Paramount Communications, Inc. v. Time Inc., 673 A.2d 1140, 1152 (Del. 1989)*).

Even in a share-for-share merger in which *Revlon* duties are not applicable, the target board's decision to employ deal protection mechanisms will be reviewed under the *Unocal* standard. Under this standard, the directors of the target must have reasonable grounds to believe that a third party bid would represent a threat to corporate policy, and that the protection mechanisms employed to protect the preferred bid represent a reasonable response to the perceived threat (*see Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (1995)*). The general rule under both of these standards is that a target board cannot adopt deal protection mechanisms that, alone or in combination, would preclude a higher bid from emerging (*see In re Toys "R" Us Shareholder Litigation, 877 A.2d 975 (Del. Ch. 2005)*).

Commonly used deal protection mechanisms

Commonly used mechanisms to protect US transactions include the following:

Termination or break-up fees. Termination fees are negotiated fees payable to a bidder under certain circumstances if the transaction with the bidder is not completed. Termination fees reduce the value of the target and increase the cost to a competing bidder. Trigger events for payment of termination fees are heavily negotiated. Target companies often ask that termination fees become payable only if the transaction is terminated and an alternative transaction is consummated within a specified time frame, but they are not always successful in limiting the payment of the fee to those circumstances. Delaware courts have upheld break-up fees even when the target's shareholders reject the transaction without an alternative transaction (*see H.F. Ahmanson & Co. v. Great Western Financial Corp., C.A. No. 15650, 1997 Del. Ch. LEXIS 84 (1997)*, where the Delaware courts upheld a provision whereby half of the 3% fee was payable under such circumstances). Termination fees are sometimes characterised in the transaction agreement as liquidated damages (*see Brazen v. Bell Atlantic Corporation, 695 A.2d 43 (Del. 1997)*).

Delaware courts have upheld termination fees so long as they are not preclusive of higher bids. The courts examine the legitimacy of termination fees in a very fact-specific way, looking at the protective mechanisms in the transaction agreement as a whole, and the degree to which the directors of the target acted reasonably in agreeing to the termination fee (*see In re Toys "R" Us Shareholder Litigation, 877 A.2d 975*, upholding a termination fee of 3.75% of the equity value of the transaction and additional expenses of up to 0.45% of the equity value of the transaction). Termination fees of 2.5% to 4% of total transaction value are fairly typical in US public acquisition agreements. However, termination fees can lie outside of that range under certain circumstances.

Non-solicitation provisions. Non-solicitation provisions are negotiated by bidders to limit the target's use of its Fiduciary Out, by placing constraints on the target's ability to seek out or respond to alternative offers. A no-shop clause typically provides that a target cannot encourage, seek or solicit third party offers for the duration of the transaction, while providing rules on the circumstances under which targets may provide information to and negotiate with a third party that has indicated its interest in a transaction (*see box, No-shop provisions and fiduciary termination rights in the US*).

Delaware courts have invalidated certain no-shop provisions, such as the no-talk provision, which restrict completely the ability of the target to provide information to or negotiate with a third party, and these provisions are no longer typical (*see Ace Limited v. Capital Re (C.A. No. 17488 (Del. Ch. Oct. 25, 1999)* and *Omnicare Inc. v. NCS Healthcare Inc., 818 A.2d 914 (Del. 2003)*).

NO-SHOP PROVISIONS AND FIDUCIARY TERMINATION RIGHTS IN THE US

Commonly negotiated terms

The non-solicitation provision and the Fiduciary Out are two of the most heavily negotiated provisions of US transaction agreements. There are a great number of variables to consider when customising the provisions to fit particular circumstances and parties' needs. The following is a brief, annotated list of some available options.

Conditions to providing information or negotiating with third parties

- Target must obtain advice from outside counsel (written or oral) that failure to provide information to or negotiate with a third party would be reasonably likely to result in breach of fiduciary duties (alternative formulations include "may be inconsistent with fiduciary duties").
- Target must make certain determinations with respect to the proposal (that it is, or is reasonably likely to lead to, a superior proposal, sometimes required to be based on advice from a financial adviser).
- Target must notify the bidder regarding the provision of information to, or commencement of negotiations with, the third party (the timing of the notice is negotiable).
- Target must notify bidder of offers received from the third party (detail and timing of notice is negotiable).
- Target must enter into a confidentiality agreement with third party (often required to be no less restrictive than in the agreement between bidder and target).

Conditions to exercise of fiduciary termination rights or fiduciary right to alter recommendation

- Target must obtain advice from outside counsel (written or oral) that failure to terminate or alter its recommendation would breach fiduciary duties (typically a higher standard must be met here than when merely determining whether fiduciary duties may require target to provide information or negotiate with a third party).
- Target must determine that the superior proposal standard is met.
- Target must notify bidder regarding termination (sometimes requires advance written notice which may include terms of offer).

Additional negotiated points

- Whether bidder will have a matching or topping right in connection with a Fiduciary Out, including its timing and parameters.
- Triggers for payment of termination fee and timing of such payment.
- Circumstances in which the board of directors can withdraw its recommendation to its shareholders and whether it is able to do so in the absence of a Superior Proposal.

Matching or topping rights. Delaware law permits targets to provide bidders with matching or topping rights in connection with a competing bid (*see In re Toys "R" Us Shareholder Litigation, 877 A.2d 975 (Del. Ch. June 24, 2005)*, where a matching right in favour of a bidder was upheld in a case with particularly strong facts in favour of the target's board acting reasonably). These provisions require the target to notify the bidder of the details of any third party proposal, and the bidder is entitled to match or better such a proposal.

Force the vote requirements. In 1998, the Delaware General Corporation Law (DGCL) was amended to allow directors to present a transaction to the shareholders, even if the board has withdrawn its recommendation (the amendment was originally to §251 of the DGCL, but is now codified in §146). Accordingly, transaction agreements can require that the transaction be submitted to the shareholders of the target, even where there is a competing bid and the target's board has withdrawn its recommendation.

These so-called force the vote provisions may help the bidder, because they can substantially delay the potential consummation of an alternative transaction. The target is sometimes unable to sign an agreement with the competing bidder (and begin the proxy solicitation and regulatory approval process) until its shareholders reject the first deal. Consequently, these provisions may require the target's shareholders to choose between the deal in hand, which often can be closed shortly after the vote, and the mere prospect of a deal (albeit at a higher price) in the future. This may provide significant deal protection, especially if the competing, higher bid presents anti-trust issues or other completion risks.

The effectiveness of a force the vote provision in certain circumstances is illustrated by the battle between Chevron and Cnooc, the Chinese government-backed oil company, for control of Unocal. Chevron and Unocal had entered into a merger agreement which contained a force the vote provision, requiring that Unocal present the Chevron transaction to its shareholders. Despite a substantially higher offer from Cnooc (which had actually been withdrawn at the time of the vote), the shareholders of Unocal supported the Chevron transaction, fearing that the Cnooc transaction faced steep regulatory hurdles, in part because certain US government officials were signalling the possibility of introducing legislation to block the Cnooc bid.

Shareholder support agreements (voting agreements, options, and so on). A bidder commonly seeks to improve its chances of success by entering into agreements with significant shareholders of the target, in conjunction with entering into the transaction agreement.

Depending on the structure of the underlying transaction, these support agreements may take the form of voting agreements (including the granting of proxies) or agreements to tender shares in connection with the bidder's offer. They may also contain pro-

visions granting the bidder a specifically-enforceable option to acquire the shareholder's shares in the target, should the shareholder fail to live up to its obligations.

While practitioners once considered shareholder support agreements to be an unassailable means of protecting the underlying transaction, several cases have called into question how far a bidder can go in using support agreements in conjunction with other mechanisms. In *Ace*, Vice Chancellor Leo Strine found a strict no-shop provision unenforceable when used in conjunction with support agreements from the holders of 33.5% of the target's shares, and where the bidder held an additional 12.5% of the target's shares. The court held that, in the absence of an effective Fiduciary Out, the support agreements impermissibly precluded the target's shareholders from receiving the benefit of alternative offers.

In *Omnicare*, the Delaware Supreme Court invalidated a set of deal protection mechanisms contained in the agreement, which included:

- Support agreements from the holders of a majority of the shares of the target.
- The absence of a Fiduciary Out.
- A force the vote provision.

NCS Healthcare, a Delaware corporation, had been the target of competing bids, one by Genesis Health Ventures and the other by Omnicare. NCS eventually agreed to be acquired by Genesis, and the transaction agreement contained the three deal protection mechanisms described above, which together made consummation of the transaction a certainty.

The *Omnicare* court found the combination to be unreasonably preclusive, even though NCS had been thoroughly shopped before agreeing to be acquired by Genesis and the NCS board had scrupulously observed corporate formalities. The *Omnicare* decision can be interpreted to represent the adoption of a rule invalidating board approval of locked up transactions (although the full scope of the decision is still open to debate). Since the decision, practitioners have been concerned about including lock-up arrangements that completely preclude higher bids in transaction agreements governed by Delaware law. However, shareholder support agreements that do not preclude higher bids are still permitted under Delaware law.

DEAL PROTECTION MECHANISMS IN THE UK

Directors' duties

Directors' duties in the context of a public company takeover in the UK are derived, as in the US, from common law and statute, but also, unlike the US, from the Code. In the US, directors' decisions to accept deal protection mechanisms are tested in court proceedings initiated by a competing bidder or in subsequent shareholders' litigation. In the UK, deal protection mechanisms tend to be scrutinised primarily by the Panel, and it is rare (but not unheard of) for such mechanisms to be tested by the UK courts.

A statutory statement of director's duties was implemented in the UK as part of the Companies Act 2006 (2006 Act), and came into force on 1 October 2007. The 2006 Act sets out seven general duties that directors must comply with, but the list is not exhaustive; some duties of directors are not set out in the 2006 Act and therefore certain common law and equitable principles regarding directors' duties continue to apply.

The list includes the core duty of a director to act in the way he considers in good faith, would be most likely to promote the success of the company for the benefit of the shareholders as a whole. In addition, directors must exercise reasonable care, skill and diligence (being that which a reasonably diligent person would exercise with general knowledge, skill and experiences that may reasonably be expected of a person carrying out the functions carried out by that director).

A general duty to avoid conflicts of interest has been created, although it is now possible for independent directors to authorise contracts if this is permitted by the company's constitutional documents. These codified duties are owed to the company and only the company is able to enforce them. However, in certain circumstances, the shareholders may be able to bring a derivative action against a director on the company's behalf. The 2006 Act has codified what was previously the common law right of shareholders to bring derivative claims on behalf of the company. However, the new statutory derivative claim procedure is not a replica of the common law regime. For example, the statutory right to bring a derivative claim applies in a broader range of circumstances. It remains to be seen whether this will result in increased litigation in relation to takeovers.

The Code imposes further duties on the directors of the bidder and the target and recognises that the General Principles and Rules inevitably impinge on the freedom of boards and persons involved in offers. For example:

- Under General Principle 1 and Rule 16 of the Code, a bidder cannot, without the consent of the Panel, make special arrangements with shareholders of the target which are not generally available to all shareholders of the target.
- Under Rule 20.2, the target must supply the same information to a hostile bidder as the target has given to its preferred bidder.
- Rule 21.1 prohibits the target, during or (if it has reason to believe that an offer might be imminent) before an offer period, from issuing new shares, granting options, disposing of or acquiring assets or entering into contracts outside the ordinary course of business without shareholder approval (although the Panel may dispense with this requirement if the bidder agrees to the proposed course of action).
- Rule 21.2 limits break fees to 1% of the offer price and requires the target and its financial adviser to confirm to the Panel that they believe the fee is in the best interest of the target's shareholders.

The standards developed by the US courts relating to directors' conduct in takeovers (such as those formulated in *Unocal* and *Revlon*) have not been considered by the UK courts to the same extent. This is primarily due to the effective regulation of public company takeovers in the UK by the Panel. In spite of this, fiduciary duties of directors of targets in the UK and the US are not significantly different.

Available protection mechanisms

Deal protection mechanisms used in the US in the 1970s and early 1980s, such as Crown Jewel options, are barred by the Code. There are, however a number of deal protection mechanisms available to the parties in a public company takeover in the UK as described below.

Break fees. It is now common for the target to agree to pay the bidder a fee on the occurrence of certain specified trigger events that prevent the bidder's offer from becoming unconditional. These events differ from transaction to transaction but usually relate to the target board's recommendation of a higher competing offer or a change of control of the target taking place. The following restrictions are relevant in the context of the agreement by a UK target to pay a break fee (which is the equivalent of a termination fee in the US):

- **Financial assistance.** It is unlawful for a UK company to give financial assistance in connection with the acquisition of its own shares. While there is no legal authority as to whether a break fee constitutes unlawful financial assistance, the financial assistance prohibitions of the Companies Act 1985 should not be breached as long as the break fee is not a gift or an indemnity, and does not give rise to a material reduction in the net assets of the target. The 2006 Act will repeal the restrictions on private companies from giving financial assistance with effect from 1 October 2008. Given that most companies the subject of a takeover offer are public companies, this legislative change will not affect the requirement to consider the impact of an agreement to pay a break fee in light of the financial assistance legislation.

- **The Code.** Under Rule 21.2 of the Code, the break fee can be no more than 1% of the offer value (the amount must not be sufficient to frustrate any competing offer). The target and its financial advisers must each confirm to the Panel that they believe the fee to be in the best interests of shareholders.

- **The Listing Rules of the UK Listing Authority.** If the target is listed on the Official List in London, the aggregate of any break fees payable in the context of a transaction can be no more than 1% of the value of the target, calculated by reference to the offer price. If the break fee (or fees) exceeds this amount, the arrangement constitutes a Class 1 transaction for the purposes of the UK Listing Rules and will require shareholder approval.

Shareholders in the target can agree to pay break fees. Such arrangements do not constitute financial assistance under the Companies Act, and are not limited by the Code, but do need to be disclosed. In addition, the shareholder might be considered to be acting in concert with the bidder. This could have undesirable effects, such as requiring the bidder to make a mandatory cash bid under Rule 9 of the Code.

Non-solicitation undertakings of the target. A bidder can seek an undertaking from the target not to solicit any competing offers. These undertakings may be contained in a:

- Break fee letter agreement.

- Stand-alone exclusivity agreement.

- Transaction agreement between the bidder and the target.

The scope of these provisions is subject to negotiation, but bidders will often seek to prevent the target from soliciting any competing offers, entering into any discussions or negotiations with a third party, or from disclosing any information to a third party unless Rule 20.2 of the Code (which obliges the target to provide any bona fide competing offeror with the same information the target provided to the initial bidder) applies.

The target board will attempt to narrow the scope of the non-solicitation obligations to preserve the board's flexibility and protect against breaches of their fiduciary duties. In practice, no shop and non-solicitation provisions in UK transaction agreements tend to be fairly short, and are not negotiated (at least as yet) to the same extent as non-solicitation agreements in US merger agreements.

Non-solicitation undertakings on the directors of the target. A bidder can seek similar non-solicitation undertakings from the directors of the target, and also possibly restrictions in relation to the conduct of the target's business, until completion of the offer. Such provisions will usually be included in each director's irrevocable undertaking to accept the offer (*see below*). Directors often resist these personal undertakings and, when given, they tend to be subject to the directors' fiduciary duties.

Matching or topping rights. There is nothing preventing a bidder in the UK from seeking matching or topping rights in connection with a competing bid in the same way as in the US. However, these rights have not generally been relevant in the UK, as there is usually nothing to prevent a bidder from increasing its offer when faced with a competing bid (unless it has indicated otherwise). But there is evidence that market practice in the UK is beginning to evolve in this area, and it is becoming more common for a bidder to negotiate the right to match any subsequent higher offer with an inducement fee being triggered if the target then fails to recommend any matching offer.

Irrevocable undertakings to accept. A bidder often seeks irrevocable undertakings from significant shareholders in the target to accept the bidder's offer. In the case of directors of the target, these undertakings customarily include an undertaking from the director to recommend the bidder's offer (which is usually given subject to the directors' fiduciary duties). Irrevocable undertakings can either be binding on the shareholder in all circumstances (a hard irrevocable), or can cease to apply if any higher offer is made for the target (a soft irrevocable) or any offer is made which is a specified percentage higher than the original offer (an irrevocable subject to a collar).

Institutional shareholders are generally unwilling to give legally binding undertakings to accept an offer but may be prepared to give non-binding letters of intent to accept an offer or to sell in the market after an offer has been made (comfort letters). Where a majority or near majority of a target's shares are closely held, it may be possible, in the context of a recommended takeover, for a bidder to lock-up the deal before it commences by obtaining irrevocables from key shareholders.

Stakebuilding. A bidder may increase the likelihood of the success of its offer by acquiring shares in the target. Stakebuilding is a tactic which is being used with increasing success in takeovers in the UK. However, there are a number of reasons why stakebuilding may not be feasible, including the fact that sufficient shares may

not be available and the fact that purchases exceeding specified thresholds must be disclosed. Rule 6 of the Code provides that, where a bidder has purchased shares in the target within a specified period before the announcement of a firm intention to make a bid, any offer made by the bidder to the shareholders of the same class must not be made on less favourable terms. If, after it has made an announcement of a firm intention to make a bid for the target, the bidder purchases shares in the target at above the offer price, it is obliged to increase its offer to not less than the highest price paid for the shares it has acquired.

Before acquiring any shares in the target, a bidder needs to consider whether it has inside information regarding the target (other than the fact of the intention to bid), in order to avoid committing a criminal offence under the Criminal Justice Act 1993, a civil offence of market abuse under the Financial Services and Markets Act 2000, or to avoid breaching Rule 4 of the Code.

Additionally, Rule 5 of the Code prevents the acquisition of a stake of 30% or more of the target's share capital, unless the acquisition immediately precedes the announcement of a recommended offer. Rule 9 of the Code requires a bidder to make a mandatory cash offer for the target's share capital if it acquires 30% or more of the voting rights in the target.

Furthermore, stakebuilding through open market purchases without the knowledge of the target is a hostile way to begin negotiations for a recommended deal.

COMPARISON OF DEAL PROTECTION MECHANISMS IN THE US AND THE UK

The key differences between deal protection mechanisms in the US and the UK are as follows:

- In the UK, deal protection mechanisms are primarily regulated by the Panel through the provisions of the Code.
- Higher break fees are permitted in the US than in the UK (up to about 4% of the offer value has been upheld under appropriate circumstances by a Delaware court, compared to a cap of 1% in the UK).
- Although the potential scope of any non-solicitation obligations is arguably wider in the UK, in practice non-solicitation provisions tend to contain fewer restrictions on the conduct of UK targets and directors in relation to competing bids. This may be because the co-operation of the target's board is less important to a competing bidder in the UK.
- It is possible to lock-up a deal in the UK through the use of irrevocable undertakings, while it is harder to do so in the US (at least where Delaware law applies) after *Omnicare*.
- Force the vote provisions are not relevant to takeovers in the UK since, in a takeover effected by way of an offer, there is no merger to vote on.
- Stakebuilding is sometimes used in the UK, but is not a common technique in negotiated transactions in the US.

**The authors would like to thank their colleague Jeffrey Gordon for his assistance in the preparation of this article.*