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Guest Editorial

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The partnership vehicle worldwide remains in good shape after many centuries of service.¹ In the UK there are almost half a million general partnerships,² which are still governed by the venerable – and admirably succinct - Partnership Act 1890 and which are used by a wide range of businesses, particularly small and family businesses.³ Limited partnerships, governed by the Partnership Act as modified by the only slightly less venerable Limited Partnerships Act 1907, have been increasing rapidly in number in recent decades and there are now almost 50,000.⁴ This expansion is primarily due to their use by the financial services industry, at whose behest a new form of limited partnership, the private fund limited partnership (PFLP)⁵ has recently been introduced, but they are also commonly used by family businesses,⁶ oil and gas exploration and production, and the film industry.⁷ There are a similar number of Limited Liability Partnerships (LLPs),⁸ governed by the Limited Liability Partnerships Act 2000 and an unfortunate plethora of statutory instruments, principally the Limited Liability Partnerships Regulations 2001 which apply much of general partnership law including default rules on decision-making, management, profit sharing and members' duties, and the Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009⁹ which apply many provisions of company law including separate legal personality (thus enabling limited liability) and the mandatory disclosure of accounts. Though relatively new, the LLP is well established as the vehicle of choice for professional service firms,

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¹ See, for example, Christopher Anglim, 'Joined in Common Enterprise: A Bibliography on the Origins of Early Anglo-American Partnership Law' (William S Hein & Co Inc 2005).

² BEIS, 'Business Population Estimates for the UK and regions: 2017 statistical release, p14.

³ The Law Commission and the Scottish Law Commission, *Partnership Law* (Law Com No 283 and Scot Law Com No 192, 2003) paras 1.2-1.3.

⁴ Companies House, 'Companies Register Statistical Release 2017-2015', Table 1.

⁵ The Legislative Reform (Private Fund Limited Partnership) Legislative Reform Order SI 2017/514; see further Elspeth Berry, 'Limited Partnership Law and Private Equity: an Instance of Legislative Capture?' (2018) JCLS (forthcoming).

⁶ Terence Pay, 'UK: The Family Limited Partnership' (Mondaq, 9 May 2012) <<http://www.mondaq.com/uk/x/176648/Personal+Tax+Inheritance+Estate+Planning/The+Family+Limited+Partnership>>.

⁷ BEIS, 'Limited Partnerships: Reform of Limited Partnership Law' (30 April 2018) para 38.

⁸ Companies House, 'Companies Register Statistical Release 2017-2015', Table 1.

⁹ SI 2009/1804.

and it is also used in investment and other financial services.¹⁰ Similar comments could be made in many other jurisdictions about the importance of partnerships or partnership-type structures, including the limited liability company (LLC) in the US (not to be confused with the ordinary limited company), which is similar in many respects to the UK LLP.

Nonetheless, the fitness for purpose of partnership law has come under extensive review in the UK and elsewhere in recent years. In the UK, in addition to the debate about limited liability which led to the introduction of LLPs, and the debate about limited partnership law which led to the introduction of PFLPs, the Law Commissions conducted a wide ranging review of partnership law¹¹ culminating in a comprehensive report in 2003.¹² This report recommended the introduction of separate legal personality, reforms to promote business continuity, clarification of the liability of incoming partners, and reforms to the winding up of a solvent partnership. Unfortunately, none of the Law Commissions' substantial proposed reforms to general partnerships were adopted by the government, and only a very few of its reforms to limited partnership law – and minor ones at that – were eventually enacted. This pattern was repeated when a much more fundamental package of reforms to limited partnership law, proposed by the UK's Department for Business, Enterprise and Regulatory Reform (BERR) at the same time as the minor reforms actually made, was not then adopted for limited partnerships as a whole but only, some years later, for PFLPs. Other current issues in partnership law include the perennial (and perennially litigated¹³) problem of determining whether an alleged partnership exists and the associated question of who its partners are, given that a general partnership is not required to register or have a formal agreement and may be formed accidentally; whether a partner or LLP member can simultaneously also be an employee or worker;¹⁴ the influence of the private equity industry in framing (or preventing) partnership law reform;¹⁵ and, most recently, the use of partnerships – and Scottish limited partnerships (SLPs) in particular – as vehicles to facilitate

¹⁰ Denise Fletcher, Jane Frecknall, and Stephen Williams, 'Understanding Limited Liability Partnerships in the Small and Medium-Sized Business Sector' (ICAEW 2013), para 5.3 and Table 8.

¹¹ The Law Commission and the Scottish Law Commission, *Partnership Law: A Joint Consultation Paper* (CP No 159 and DP No 111, 2000) and *Limited Partnerships Act 1907: A Joint Consultation Paper* (CP No 161 and DP No 118, 2001).

¹² The Law Commission and the Scottish Law Commission, *Partnership Law* (Law Com No283 and Scot Law Com No 192, HMSO 2003).

¹³ *Khan and Miah* [1998] 1 WLR 477; see also *Christie Owen & Davies plc v RAOBGLE Trust Corporation* [2011] EWCA 1151 (Ch), [2011] NPC 104 and *Ilott v Williams and others* [2013] EWCA Civ 645, [2013] All ER (D) 55 (Jun).

¹⁴ *Clyde & Co LLP v Bates van Winkelhof* [2014] UKSC 32, [2014] 1 WLR 2047; see also *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ 35, [2012] ICR 647 and *Reinhard v Ondra LLP and others* ¹⁴[2015] EWHC 26 (Ch), [2015] All ER (D) 69 (Jan) (main judgment).

¹⁵ HM Treasury HM Treasury, 'Proposal on using Legislative Reform Order to change partnership legislation for private equity investments: Consultation on draft legislation' (July 2015) and 'Legislative Reform Order on the Limited Partnership [sic] Act: explanatory document' (January 2017) and Elspeth Berry, 'Limited Partnership Law and Private Equity: an Instance of Legislative Capture?' (2018) JCLS (forthcoming).

money laundering and other criminal activities.¹⁶ The investigation into the latter by the UK's Department of Business, Energy and Industrial Strategy (BEIS), the successor to BERR, is ongoing, and the government has already responded to BEIS's initial call for evidence by requiring some Scottish partnerships to register information about persons who may exert significant influence over the firm (PSCs) and file an annual confirmation statement;¹⁷ a further consultation is considering extending the requirement of an annual statement (though, strangely, not that of a PSC register) to all limited partnerships, increasing the disclosure of partnership accounts (which are currently only disclosed where all partners are entities with limited liability¹⁸), giving the Registrar of Companies the power to strike limited partnerships off the register, and requiring a limited partnership at all times to have a connection with the particular part of the UK in which it is registered, through either a principal place of business or a service address.

Yet, despite the legal and economic importance of partnerships, and the political and legislative attention devoted to them, they are often overlooked in legal studies and research in favour of their great competitor, the company, and in particular the private limited company. For example, in the UK, although there is a thriving high profile organisation for professional advisors to partnerships and LLPs – the Association of Partnership Practitioners (APP),¹⁹ which encompasses over 300 solicitors, barristers, accountants, tax advisors and bankers - the leading societies for UK academic lawyers do not have specialist sections for partnership law, and most university law schools either do not teach partnership law at all, or do so only as a tiny part of a much larger subject (usually dominated by company law).

It is against this background that I established the Partnership, LLP and LLC Law Forum²⁰ in autumn 2017, in order to promote debate on partnership law and the law relating to similar business vehicles which provide alternatives to the limited company, including LLPs and US LLCs, with the support of a grant from the Society of Legal Scholars (SLS) Small Projects and Events Fund and encouragement from many in the academic and practitioner communities both in the UK and overseas. The Forum's website (<http://www.partnershiplawforum.org/>) and its conferences provide a forum for debate and foster collaboration among academics in the UK and overseas, and between academics and practitioners, including colleagues whose interests lie in related areas that impact on partnerships such as company law, employment law, tax, commercial law and criminal law, in order to create a network for the exchange of ideas, knowledge and expertise, and thereby further research into partnership, LLP and LLC law. The Forum accordingly welcomes contributions to its conferences and its website (via the 'Contribute' link or email to elspeth.berry@ntu.ac.uk), including updates on recent or forthcoming caselaw and

¹⁶ BEIS, 'Review of Limited Partnership Law: call for evidence' (16 January 2017) and BEIS 2018 (n 7).

¹⁷ Scottish Partnerships (Register of People with Significant Control) Regulations 2017, SI 2017/694.

¹⁸ Partnerships (Accounts) Regulations 2008, SI 2008/569.

¹⁹ See further www.app.org.uk/.

²⁰ Initially 'The Partnership, LLP and LLC Law Academic Forum'; the name was changed at an early stage in order to make it clear that practitioner involvement is welcomed.

legislative developments in the UK or other jurisdictions, reports of relevant conferences or meetings, book reviews, questions on areas of debate in the law and its practical application, and pedagogical issues. It also welcomes subscriptions to its (free) email alert option (via the 'Subscribe' link).

The Inaugural Conference of the Partnership Forum was held on 5 April 2018 at Nottingham Law School (NLS) and was supported by both the SLS and NLS. It attracted a wide range of delegates including academics specialising in law and business from UK, Australian, US, Dutch and Italian universities, solicitors, barristers, tax advisers and students. Papers covered a range of current issues in partnership law in the UK and other jurisdictions. The success of the Conference, both in terms of the quality of papers and the opportunity to meet and network with colleagues working partnership law, who are otherwise widely dispersed geographically, prompted calls from speakers and delegates to make the Conference an annual event, as well as to maintain and enhance the value of the Forum website as a knowledge exchange mechanism.

The proceedings of the Inaugural Conference form the basis for this special edition of the Nottingham Insolvency and Business Law e-Journal (NibleJ), which includes articles based on six of the papers given at the Conference, and an additional article on a subject we hope to address more fully at the second annual conference on 10 January 2019, partnership insolvency.

In conclusion, the scholarship and networking already promoted by the Forum provide a solid foundation for the work of the Forum to enable the substantial attention given to partnership law by practitioners and the courts, the Law Commissions and various government department, to be mirrored by the research in and teaching of partnership, LLP and LLC law.

An Introduction to the Contributions to this Volume

The first part of this edition comprises four articles that concern a range of current issues in UK partnership law.

David Milman, Professor of Law at the University of Lancaster, examines the ever topical problem of identifying when and whether a partnership exists. He considers the particular triggers for litigation on this issue, including the desire of purported partners to claim a share of the partnership assets or profits and of third parties to make alleged partners personally liable as such. After discussing the limited guidance provided by the Partnership Act 1890, and the more substantial guidance given by the courts, including in a wide range of recent cases, he considers the alternative possibilities for claims based on laws other than partnership law. He concludes, perhaps unsurprisingly given the government's (lack of) response to the Law Commissions' report, that reform is unlikely, but he offers the welcome reassurance that the courts' extensive experience in dealing with characterisation issues across a range of other areas of law equips them to deal with such issues in the partnership context.

Jonathan Hardman, Honorary Lecturer at the University of Glasgow, presents the results of his empirical study of the potential moral hazard of limited liability, a study which is particularly timely given the current BEIS investigation into limited partnerships, and the risk of LLPs being similarly misused. He examines Scottish partnerships that have converted to LLP status, using evidence from publicly available records at Companies House. His research focusses on the potential risk indicators, including the granting of floating charges, delays in registering accounts, changes in drawings, and increases in liabilities. The results suggest that LLP status might lead to some increase in risk taking but that in many cases it improves the firm's position by making membership more attractive.

Geoffrey Morse, Professor of Law at the University of Birmingham, examines recent developments on the issue of whether a partner can simultaneously be both a partner, and an employee or a worker, with particular reference to the Supreme Court judgment in *Clyde & Co*, and the legal underpinnings for these developments. He considers the reasons for the incompatibility of partner status and employee status according to both partnership and employment law cases, in particular the very different nature of those relationships co-existing with the nature of the partnership relationship. He also evaluates the likelihood of the courts aligning partnership law with LLP law in relation to worker status, and concludes that it is probable that partners, like LLP members, can simultaneously be workers and enjoy the associated legal protections.

In my own article, I analyse the laws governing insolvent partnerships and LLPs in the UK, focussing on the many serious problems with these laws. I argue that there

is little justification for basing insolvent partnership law on laws governing companies or individuals, since partnerships are significantly different and offer personal liability to creditors without the complexities and cost of the intervention of insolvency law. I therefore propose removing partnerships from the ambit of certain Insolvency Act procedures, as well as radical reform of the remaining procedures.

The second part of this edition comprises three articles dealing with current issues in partnership law in other jurisdictions.

Iris Wuisman, Professor of Company Law at Leiden University, and Hylda Boschma, Professor of Company Law at the University of Groningen, discuss current proposals in the Netherlands to reform partnership law and draws parallels with the position in the UK. They suggest that the traditional distinction between professional and non-professional partnerships is likely to remain, and that there will be changes to (though not necessarily simplification of) the complicated distinctions drawn between equal liability for certain types of claim, and joint and several liability for others. They conclude that the reforms would, at very least, consolidate the relevant laws.

Professor Marco Speranzin, Full Professor of Business law at the University of Padua, provides a detailed analysis of the different types of partnership available under Italian law and their key features, noting differences when compared to the position in certain other European jurisdictions including the UK, in particular regarding the restrictions on the type of partnership available to different kinds of businesses, the availability of separate legal personality, partners' liability and enforcement of that liability by third parties or the partnership, and amendments to the partnership agreement.

Brad Borden, Professor of Law at Brooklyn Law School, and Douglas Longhofer, Assistant Professor at the University of Central Missouri, consider the importance of partner/member capital contributions to a partnership/LLC and in particular the range of provisions which might be included in the firm's agreement to deter defaults in relation to capital calls made on partners after their initial contributions, and make good the financial deficiency which results from such defaults. Deterrent provisions include the dilution of existing partner/member interests and consequent dilution of distribution and voting rights, while financial provisions focus on loans by other members to meet the shortfall, and the consequent effect on distributions, and the advantages and disadvantages of each requires careful consideration by the partners before inclusion in the partnership agreement. The article also considers the possible tax consequences of the inclusion in the agreement of such default remedies.

Two papers presented at the Inaugural Conference are not included in this volume but will be published elsewhere. Brett Freudenberg, Associate Professor of Law at Griffith University, Australia, presented a paper discussing the international trend

towards new business forms offering limited liability, separate personality and tax transparency, such as the UK LLP and the US LLC. He highlighted the importance of such structures enabling flexibility in both partner contributions and drawings, but noted the risk of this flexibility distorting the taxation outcomes. Jason Ellis, Senior Lecturer in Law at Nottingham Law School, Nottingham Trent University, presented a paper on whether directors should be accorded employment rights, with particular reference to claims made by directors of insolvent companies against the UK's National Insurance Fund. He examined the difficulty of reconciling separate legal personality with any attempt to consider the reality of the director's status, particularly where the director is the sole director and sole shareholder of the company.

Contributor Biographies

Elsbeth Berry, Reader in Law, Nottingham Law School, Nottingham Trent University, UK

Elsbeth has taught and researched partnership law for 25 years and is the founder of the Partnership, LLP and LLC Law Forum. Her most recent publications include 'Limited Partnership Law and Private Equity: an Instance of Legislative Capture?' (2018) JCLS, forthcoming; Partnership and LLP Law (2nd edn, Wildy, Simmonds and Hill 2018); 'When Is a Partner/LLP Member Not a Partner/LLP Member? The Interface with Employment and Worker Status' (2017) 46(3) Ind LJ 309; The Law of Insolvent Partnerships and LLPs (Wildy, Simmonds and Hill 2015) (with Rebecca Parry); 'Partnership Options in the UK: Good Things Come in Threes' in Research Handbook on Partnerships, LLCs and Alternative Forms of Business Organizations (Robert W. Hillman and Mark J. Loewenstein eds, Edward Elgar 2015); 'The Criminal Liability of Partnerships and Partners: Increasing the Divergence between English and Scottish Partnership Law?' (2014) 7 JBL 585-607; and 'Limited Partnership Law in the US and the UK: Teaching an Old Dog New Tricks?' (2013) 2 JBL 160-185. Elspeth's current teaching includes Business Organisations, an LLM module which compares general partnerships, limited partnerships, LLPs and private limited companies. Elspeth is a qualified (non-practising) solicitor and contributes the legal updates to the journal of the Association of Partnership Practitioners, 'A Propos Partnership' (at <http://www.app.org.uk/>).

Bradley T Borden, Professor of Law, Brooklyn Law School, USA

Brad is a Professor of Law at Brooklyn Law School where he teaches Federal Income Taxation, Partnership Taxation, Taxation of Real Estate Transactions, and Unincorporated Business Organizations. He also frequently works as an expert witness or advisor on matters related to these topics. Brad is the author of several

books and numerous articles in leading tax and legal journals. His books include *Federal Income Taxation* (7th edn, Foundation Press 2017, with Martin J. McMahon, Jr., Daniel L. Simmons & Dennis J. Ventry, Jr.); *Federal Taxation of Corporations and Corporate Transactions* (Aspen Publishers 2018, with Steven A. Dean); *Limited Liability Entities: a State by State Guide to LLCs, LPs and LLPs* (Wolters Kluwer Law & Business 2012, seven annual updates, with Robert J. Rhee); *Taxation and Business Planning for Partnerships and LLCs* (Aspen Publishers 2017); *Taxation and Business Planning for Real Estate Transactions* (2nd edn, Carolina Academic Press 2017); and *Tax-Free Like-Kind Exchanges* (2nd edn, Civic Research Institute 2015). Brad is also columnist for *Journal of Passthrough Entities*, a fellow of the American Bar Foundation and the American College of Tax Counsel, and an active member of the Section of Taxation of the American Bar Association.

Hylda Boschma, Professor of Company Law, University of Groningen, Netherlands

Hylda has been Professor of Company Law at the University of Groningen since 2011 and was formerly a candidate civil-law notary. She has a special interest in legal enterprise forms in the European Union and in the way in which the interests of the stakeholders concerned are protected. She is also interested in the broad area of (European) company law, corporate governance, and comparative law. She is an expert in the field of restructuring of partnerships and regularly publishes on partnership law. She is co-programme leader of the research programme 'Protecting European Citizens and Market Participants' of the Faculty of Law of the University of Groningen. Furthermore, Hylda is one of the leaders and member of the 'Instituut voor Ondernemingsrecht' which on the Dutch national level is a leading Institute in the field of company law and securities law.

Jonathan Hardman, Honorary Lecturer, University of Glasgow, UK

Jonathan is a solicitor in full time private practice in Edinburgh and London and an honorary lecturer at the University of Glasgow. His research interests include partnership law, company law, corporate transactions, and law and economics. He has published regularly in the *Edinburgh Law Review* and the *Juridical Review*. His first monograph, *A Practical Guide to Granting Corporate Security in Scotland*, was published by W Greens in 2018.

Douglas Longhofer, Assistant Professor, University of Central Missouri, USA

Doug is an Assistant Professor at the University of Central Missouri where he teaches courses in Partnership Taxation, Corporate Taxation, Tax Research, and Individual Income Tax. He has authored articles on these subjects in leading tax and law journals. Prior to entering academia, Doug worked in the National Tax Office of Ernst & Young, LLP, and also served as a Law Clerk to the Honorable L. Paige

Marvel at the U.S. Tax Court. Doug is a member of the American Taxation Association and the American Bar Association.

David Milman, Professor of Law, University of Lancaster, UK

David has pursued his research in Partnership Law for over 35 years. He was the co-author of *Modern Partnership Law* (Croom Helm 1983). He has published substantial articles on the subject in *The Company Lawyer* and has provided regular knowledge exchange pieces in *Sweet and Maxwell's Company Law Newsletter*. He has contributed Chapters 6,7 and 8 over three editions of *Palmer's Limited Liability Partnership Law*, with the third edition being published by Sweet and Maxwell in 2017. David Milman is a Professor of Law at Lancaster University and a Professorial associate at Exchange Chambers.

Geoffrey Morse, Professor of Law, University of Birmingham, UK

Geoffrey is currently the Professor of Corporate and Tax Law at the University of Birmingham having previously been the Professor of Company Law at the University of Nottingham (from 1988 to 2004) where he was also for a time head of the law school. He has been teaching company law, tax law, and partnership law at university level for nearly 50 years. His principal publications include *Palmer's Company Law* and *Palmer's LLP Law*, of both of which he is the principal editor. He has also been the joint editor of seven editions of *Davies, Principles of Tax Law* and has written eight editions of his book *Partnership and LLP Law*. He is also the author of numerous articles on company law, tax law and partnership law.

Marco Speranzin, Professor of Law, University of Padua, Italy

Marco is Full Professor of Business law at Padua University, and his current courses include International Business and Contract Law, Advanced Company Law and Business Law. He has previously been (from 2010 to 2014) Professor of advanced company law at Università Cattolica del Sacro Cuore, Milan, and (from 2006 to 2014) Associate Professor of company law at Udine University. Marco has also been Lecturer in "Introduction to Italian civil and commercial law" at Bielefeld University, Germany, and Lecturer in "Italian banking law" at Warsaw University, Poland. He has been studying at the Institut für Ausländisches und Internationales Privat- und Wirtschaftsrecht Heidelberg University, Germany, and at the Universidad Autónoma de Madrid. His publications include *Share Purchase Agreement and Warranties* (Giuffrè 2006); *Transfer of Private Company Shares and the Public Register of Companies* (UTET 2007); *Private Company Shares without Voting Rights* (Giappichelli 2011); *Pre-emption Rights in Private Companies and Shareholders' Protection* (Giappichelli 2012); *Partnerships' Conversion* (Zanichelli 2014); "Former Partners and Liabilities" [2015] 4 Riv Dir Comm 629; and "Partners' Liabilities in Insolvency" (2017) 92(2) Riv Dir Fall 312.

Iris Wuisman, Professor of Law, University of Leiden, Netherlands

Iris has been Professor of Company Law at Leiden University since 2011 and was formerly an entrepreneur and lawyer. She has a special interest in future business structures and how entrepreneurship can be best be facilitated with innovative legal forms, but is also interested in the broad areas of company law, comparative law, and European company law. Currently, her research focuses on the (potential) influence of blockchain, artificial intelligence, and new business models on collaboration and the future of business structures. She is an expert in the field of liability aspects of partnerships and has written several articles on partnership law. She is co-founder of the Business & Liability Research Network, which is a multidisciplinary research and expertise network that focuses on a variety of aspects of doing business within the context of company and insolvency law. Iris is also a member of COALA, an international taskforce on blockchain, and a board member of the Association for Corporate Litigation, the Foundation for the professional education of legal counsels, and the Law Firm School.