ICLG

The International Comparative Legal Guide to:

Private Equity 2018

4th Edition

A practical cross-border insight into private equity

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co
Advokatfirman Törngren Magnell
Ali Budiardjo, Nugroho, Reksodiputro
Allen & Gledhill LLP
Appleby
Ashurst Hong Kong
Atanaskovic Hartnell
Avance Attorneys
Bär & Karrer
British Private Equity & Venture Capital Association
Corpus Legal Practitioners
Dechert LLP
Dentons
Deri & Co.
DS Avocats
Eversheds Sutherland
GANADO Advocates
Garrigues
Hategan Attorneys
Houthoff
Lloreda Camacho & Co.
Maples and Calder
Matheson
McMillan LLP
Memminger LLP
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Pekin & Bayar Law Firm
Pinheiro Neto Advogados
Proskauer Rose LLP
Samvād: Partners
Schindler Attorneys
SEUM Law
Skadden, Arps, Slate, Meagher & Flom LLP
SOLCARGO
Taxpoint Attorneys
Udo Udoma & Belo-Osagie
Webber Wentzel
Zhong Lun Law Firm

BVCA British Private Equity & Venture Capital Association

glg global legal group

global legal group

Contributing Editors
Richard Youle & Lorenzo Corte, Skadden, Arps, Slate, Meagher & Flom LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Sub Editor
Jenna Feasey

Senior Editors
Suzie Levy
Caroline Collingwood

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2018

ISBN 978-1-912509-22-5
ISSN 2058-1823

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

global legal group

Country Question and Answer Chapters:

EDITORIAL

Welcome to the fourth edition of *The International Comparative Legal Guide to: Private Equity*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of private equity.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key private equity issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in private equity laws and regulations in 34 jurisdictions.

All chapters are written by leading private equity lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Richard Youle and Lorenzo Corte of Skadden, Arps, Slate, Meagher & Flom LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

Cayman Islands

Sheryl Dean

Heidi de Vries

Maples and Calder

1 Overview

1.1 What are the most common types of private equity transactions in your jurisdiction? What is the current state of the market for these transactions? Have you seen any changes in the types of private equity transactions being implemented in the last two to three years?

As the pre-eminent offshore jurisdiction for private equity fund formation, private equity structures are established in the Cayman Islands to accommodate a broad range of fund structures and transactions, which commonly reflect the trends developed in the US, Europe and Asia. While private equity fund establishment for acquisition purposes and co-investment opportunities are most common, Cayman Islands structures are becoming increasingly popular for buy-outs and secondary transactions. Driven by strong performance and resulting investor demand in the current market, we are seeing new and bespoke products offered by fund managers, including funds of one, managed accounts and direct and co-investment opportunities.

1.2 What are the most significant factors or developments encouraging or inhibiting private equity transactions in your jurisdiction?

The Cayman Islands continues to be the leading offshore domicile for private equity funds due to the global distribution appeal of Cayman Islands vehicles, their ease of use, speed to market and low cost. The Cayman Islands' tax neutral status ensures the fund vehicle itself does not create an additional layer of tax, creating efficiencies in raising funds from a potentially global investor base. The Cayman Islands is a well-regulated, co-operative and transparent jurisdiction and continues to refine its laws and regulatory standards to respond and adapt to international standards. This has been most recently demonstrated by the update to the Cayman Islands Exempted Limited Partnership Law in 2014, the enactment of the Limited Liability Companies Law in 2016, the recent implementation of a beneficial ownership register regime and an update to the anti-money laundering regime as it relates to private equity.

2 Structuring Matters

2.1 What are the most common acquisition structures adopted for private equity transactions in your jurisdiction? Have new structures increasingly developed (e.g. minority investments)?

While a Cayman Islands private equity fund can also be structured as a company or a trust, the majority of Cayman Islands private equity funds are established as partnerships. A private equity acquisition structure that has become increasingly popular with US and international investment managers in managing their global investments is a structure referred to as the "Cayman Ireland Investment Platform" ("CIIP"). The CIIP structure comprises a Cayman Islands fund, typically an exempted limited partnership ("ELP"), which holds an Irish investment company, which holds underlying investments. The Irish company will generally be established to fall within either the beneficial Irish section 110 tax regime (a "Section 110 Company") or the Irish holding companies tax regime (an "Irish Holding Company"). Depending on the choice of Irish company, the ELP will fund the company by way of subscribing for a loan note or for share capital. The Irish company uses the proceeds to acquire investments and returns the investment proceeds to the ELP as and when required, which are in turn distributed to investors.

2.2 What are the main drivers for these acquisition structures?

The CIIP structure combines the investor familiarity, sophistication and flexibility of Cayman Islands funds, with the significant economic advantages of an Irish investment company that may benefit from in excess of 70 double taxation treaties and certain EU laws than can reduce or eliminate tax on the underlying investments.

2.3 How is the equity commonly structured in private equity transactions in your jurisdiction (including institutional, management and carried interests)?

As the majority of Cayman Islands private equity funds are structured as ELPs, investors subscribe for an equity interest in the ELP in the form of a limited partnership interest. Management will typically participate in the performance of the ELP as a carried interest partner either directly or through a separate vehicle.

2.4 What are the main drivers for these equity structures?

The main drivers are the ability to structure and accommodate complex arrangements amongst the stakeholders within the terms of the ELP's partnership agreement, the ability to address the diverse onshore tax considerations of the investors and the fund manager, management incentivisation and onshore legal and regulatory considerations of the fund manager.

2.5 In relation to management equity, what are the typical vesting and compulsory acquisition provisions?

There can be a broad range of approaches as to how the carried interests or other returns are shared amongst the management team; this is generally left to the management team to determine what works best for them in their particular case.

The vast majority of Cayman Islands private equity funds are managed by a US or other international domiciled and regulated investment manager. Therefore, vesting and compulsory acquisition provisions relating to the management equity are typically driven by the onshore legal and regulatory considerations of the fund manager.

2.6 If a private equity investor is taking a minority position, are there different structuring considerations?

Commercial considerations such as anti-dilution rights and veto rights, as opposed to requirements of Cayman Islands law, will drive the structuring of an investor's minority stake in an investment.

3 Governance Matters

3.1 What are the typical governance arrangements for private equity portfolio companies? Are such arrangements required to be made publicly available in your jurisdiction?

A Cayman Islands private equity portfolio company can be formed as an exempted company, a limited liability company or a limited partnership.

For an exempted company, the board of directors is responsible for the overall management and control of the company. The composition of the board of directors of a portfolio company tends to vary depending on the nature of the private equity transaction. A director of an exempted company is in a fiduciary relationship to the company, owing duties of loyalty, honesty and good faith to the company. Every director owes these duties individually and they are owed to the company as a whole. Specifically, they are not owed to other companies with which the company is associated, to the directors or to individual shareholders. In addition to the fiduciary duties, each director owes a duty of care, diligence and skill to the company. The Register of Directors and Officers of an exempted company is not publicly available in the Cayman Islands.

A limited liability company can be member managed or can appoint a separate board of managers. There is significant flexibility as to governance arrangements with respect to a limited liability company, which can be agreed by the parties in the limited liability company agreement. The default duty of care for a manager or managing member is to act in good faith. This standard of care may be expanded or restricted (but not eliminated) by the express provisions of the limited liability company agreement.

A limited partnership is managed by its general partner. The general partner has a statutory duty to act in good faith, and subject to the express provisions of the limited partnership agreement, in the interests of the partnership.

3.2 Do private equity investors and/or their director nominees typically enjoy significant veto rights over major corporate actions (such as acquisitions and disposals, litigation, indebtedness, changing the nature of the business, business plans and strategy, etc.)? If a private equity investor takes a minority position, what veto rights would they typically enjoy?

This is generally a case by case consideration based on the commercial circumstances of each transaction.

Investors in a Cayman Islands private equity fund do not typically enjoy veto rights over major corporate actions. For funds structures structured as exempted limited partnerships, the general partner must act within any limitations agreed in the limited partnership agreement of the fund (for example, as to business purpose, limitations on investment, limitations on indebtedness and guarantees, etc.). A limited partner advisory committee will often be established to approve any conflict transactions of the general partner or fund manager. A minority investor would not typically enjoy any veto rights.

3.3 Are there any limitations on the effectiveness of veto arrangements: (i) at the shareholder level; and (ii) at the director nominee level? If so, how are these typically addressed?

This is generally a case by case consideration based on the commercial circumstances of each transaction.

There are no limitations on the effectiveness of veto arrangements. However, care needs to be taken in the formulation of any limited partner veto rights to ensure that these veto rights are internal approvals, and do not involve dealings with third parties, to ensure limited liability is preserved.

3.4 Are there any duties owed by a private equity investor to minority shareholders such as management shareholders (or *vice versa*)? If so, how are these typically addressed?

As a matter of Cayman Islands law, a private equity investor does not generally owe fiduciary duties or any other duties to minority shareholders (or *vice versa*), unless duties of this nature have been contractually agreed between the parties.

3.5 Are there any limitations or restrictions on the contents or enforceability of shareholder agreements (including (i) governing law and jurisdiction, and (ii) non-compete and non-solicit provisions)?

A shareholders' agreement governed by the laws of another jurisdiction (other than the Cayman Islands) is generally enforceable in the Cayman Islands (provided that the agreement is not contrary to Cayman Islands law or public policy). With respect to non-compete and non-solicit provisions, such provisions in restraint of trade are presumed to be unenforceable under Cayman Islands law. That presumption can, however, be rebutted by proving that the restraint is 'reasonable', both as between the parties and in relation to the public interest.

3.6 Are there any legal restrictions or other requirements that a private equity investor should be aware of in appointing its nominees to boards of portfolio companies? What are the key potential risks and liabilities for (i) directors nominated by private equity investors to portfolio company boards, and (ii) private equity investors that nominate directors to boards of portfolio companies under corporate law and also more generally under other applicable laws (see section 10 below)?

While there are no Cayman Islands statutory restrictions preventing a private equity investor from appointing a nominee to the board of a Cayman Islands portfolio company, any such director owes fiduciary and other duties to the company as a whole and not to the private equity investor that nominated the director to the board. Consequently, any such nominee director must be mindful to avoid a conflict between their duty to the company and their personal interests (or the interests of the private equity investor) and must at all time act in the best interests of the Company. Should a director act in breach of its fiduciary and other duties owed to the company it risks incurring personal liability. There can be greater flexibility in this regard if a Cayman Islands limited liability company is used as the portfolio company.

The concept of a "shadow director" is only recognised in limited circumstances in the context of certain offences in connection with winding up of a Cayman Islands company under the Companies Law (2018 Revision). In these circumstances, a private equity investor may be considered to be a shadow director if the nominee director is accustomed to acting in accordance with the directions or instructions of the private equity investor responsible for his or her appointment to the board.

3.7 How do directors nominated by private equity investors deal with actual and potential conflicts of interest arising from (i) their relationship with the party nominating them, and (ii) positions as directors of other portfolio companies?

Directors are required to comply with the conflicts of interests provisions set out in the articles of association of the relevant portfolio company. Typically, the articles of association of a Cayman Islands company permit a director to vote on a matter in which he or she has an interest, provided that he or she has disclosed the nature of this interest to the board at the earliest opportunity.

Where private equity funds are structured as limited partnerships, a limited partner advisory committee will often be established to approve any conflict transactions.

4 Transaction Terms: General

4.1 What are the major issues impacting the timetable for transactions in your jurisdiction, including competition and other regulatory approval requirements, disclosure obligations and financing issues?

The timetable for transactions is driven by onshore issues, such as regulatory approvals required in the jurisdictions where the assets are domiciled or where the private equity investors are resident. There are no competition approvals or regulatory approvals required for Cayman Islands private equity structures.

4.2 Have there been any discernible trends in transaction terms over recent years?

The trends that develop in the Cayman Islands in the context of private equity funds and transactions reflect the trends experienced or developed in the US, Europe, Asia and other markets. The flexibility of Cayman Islands law allows the fund manager to replicate or accommodate deal terms driven by onshore requirements.

5 Transaction Terms: Public Acquisitions

5.1 What particular features and/or challenges apply to private equity investors involved in public-to-private transactions (and their financing) and how are these commonly dealt with?

The target companies in public-to-private transactions are generally not based in the Cayman Islands. The considerations that apply will therefore generally be driven by circumstances in the relevant jurisdictions where the target is based.

A Cayman Islands company would typically be listed on a stock exchange outside the Cayman Islands. Therefore, the features and/or challenges particular to that non-Cayman Islands stock exchange would apply.

5.2 Are break-up fees available in your jurisdiction in relation to public acquisitions? If not, what other arrangements are available, e.g. to cover aborted deal costs? If so, are such arrangements frequently agreed and what is the general range of such break-up fees?

The target companies in public-to-private transactions are generally not based in the Cayman Islands. The considerations that apply will therefore generally be driven by circumstances in the relevant jurisdictions where the target is based.

A Cayman Islands company would typically be listed on a stock exchange outside the Cayman Islands. Therefore, the rules of that non-Cayman Islands stock exchange would apply.

6 Transaction Terms: Private Acquisitions

6.1 What consideration structures are typically preferred by private equity investors (i) on the sell-side, and (ii) on the buy-side, in your jurisdiction?

The operating companies and deal terms for specific portfolio investments are generally not governed by Cayman Islands law and are non-Cayman Islands considerations typically driven by onshore tax and regulatory considerations.

6.2 What is the typical package of warranties/indemnities offered by a private equity seller and its management team to a buyer?

The operating companies and deal terms for specific portfolio investments are generally not governed by Cayman Islands law and are non-Cayman Islands considerations typically driven by onshore tax and regulatory considerations.

6.3 What is the typical scope of other covenants, undertakings and indemnities provided by a private equity seller and its management team to a buyer?

The operating companies and deal terms for specific portfolio investments are generally not governed by Cayman Islands law and are non-Cayman Islands considerations typically driven by onshore tax and regulatory considerations.

6.4 Is warranty and indemnity insurance used to "bridge the gap" where only limited warranties are given by the private equity seller and is it common for this to be offered by private equity sellers as part of the sales process? If so, what are the typical (i) excesses / policy limits, and (ii) carve-outs / exclusions from such warranty and indemnity insurance policies?

The operating companies and deal terms for specific portfolio investments are generally not governed by Cayman Islands law and are non-Cayman Islands considerations typically driven by onshore tax and regulatory considerations.

6.5 What limitations will typically apply to the liability of a private equity seller and management team under warranties, covenants, indemnities and undertakings?

The operating companies and deal terms for specific portfolio investments are generally not governed by Cayman Islands law and are non-Cayman Islands considerations typically driven by onshore tax and regulatory considerations.

6.6 Do (i) private equity sellers provide security (e.g. escrow accounts) for any warranties / liabilities, and (ii) private equity buyers insist on any security for warranties / liabilities (including any obtained from the management team)?

The operating companies and deal terms for specific portfolio investments are generally not governed by Cayman Islands law and are non-Cayman Islands considerations typically driven by onshore tax and regulatory considerations.

6.7 How do private equity buyers typically provide comfort as to the availability of (i) debt finance, and (ii) equity finance? What rights of enforcement do sellers typically obtain if commitments to, or obtained by, an SPV are not complied with (e.g. equity underwrite of debt funding, right to specific performance of obligations under an equity commitment letter, damages, etc.)?

The deal terms for specific portfolio investments are generally not governed by Cayman Islands law, nor driven by Cayman Islands considerations. As such, the comfort provided and sellers' enforcement rights with respect to financing commitments reflect usual commercial terms and are typically negotiated and agreed by onshore deal counsel in the usual way.

6.8 Are reverse break fees prevalent in private equity transactions to limit private equity buyers' exposure? If so, what terms are typical?

The operating companies and deal terms for specific portfolio investments are generally not governed by Cayman Islands law and are non-Cayman Islands considerations typically driven by onshore tax and regulatory considerations.

7 Transaction Terms: IPOs

7.1 What particular features and/or challenges should a private equity seller be aware of in considering an IPO exit?

This will depend primarily on which exchange the IPO is listed; usually, the Cayman Islands Stock Exchange will not be the primary listing for such transactions.

Note that any listing vehicle will need to be a Cayman Islands exempted or ordinary company. Limited partner interests in a limited partnership and membership interests in a limited liability company cannot themselves be the subject of an IPO. It is also not possible to convert a Cayman Islands limited partnership into a company. Therefore, care should be should be taken to include sufficient flexibility in the documents on acquisition to ensure we have the correct type of entity for listing on an IPO exit.

7.2 What customary lock-ups would be imposed on private equity sellers on an IPO exit?

This will depend primarily on which exchange the IPO is listed; usually the Cayman Islands Stock Exchange will not be the primary listing for such transactions.

Typically, these commercial terms are agreed by onshore counsel to the IPO.

7.3 Do private equity sellers generally pursue a dual-track exit process? If so, (i) how late in the process are private equity sellers continuing to run the dual-track, and (ii) were more dual-track deals ultimately realised through a sale or IPO?

This will depend primarily on which exchange the IPO is listed; usually the Cayman Islands Stock Exchange will not be the primary listing for such transactions.

Yes, we often see private equity sellers pursuing a dual-track exit process. The dual track can run very late in the process. In recent times we have seen more dual-track deals ultimately realised through sale.

8 Financing

8.1 Please outline the most common sources of debt finance used to fund private equity transactions in your jurisdiction and provide an overview of the current state of the finance market in your jurisdiction for such debt (particularly the market for high yield bonds).

The Cayman Islands are a leading "creditor-friendly" jurisdiction where both Cayman Islands and non-Cayman Islands security packages are respected and recognised. Financing counterparties are very familiar with, and comfortable lending to, Cayman Islands vehicles, which are able to access the full range of debt finance options seen in the market. Common private equity financing structures include subscription line facilities secured on investors' capital commitments, and leveraged finance facilities secured by the relevant target group's assets.

8.2 Are there any relevant legal requirements or restrictions impacting the nature or structure of the debt financing (or any particular type of debt financing) of private equity transactions?

There are no specific Cayman Islands statutory restrictions impacting the type of debt financing activity that can be undertaken and Cayman Islands vehicles generally are able to access the full range of debt finance options seen in the market. Restrictions on debt financing may, however, be contained in the constitutional documents of the Cayman Islands vehicle (such as limited partnership agreement in the case of a partnership), the terms of which would be agreed by the sponsor and investors on launch of the fund in the usual way.

9 Tax Matters

9.1 What are the key tax considerations for private equity investors and transactions in your jurisdiction? Are off-shore structures common?

The Government of the Cayman Islands does not, under existing legislation, impose any income, corporate or capital gains tax, estate duty, inheritance tax, gift tax or withholding tax upon (i) Cayman Islands exempted vehicles established to operate as private equity funds or portfolio vehicles (namely, exempted companies, exempted trusts or exempted limited partnerships) or (ii) the holders of shares, units or limited partnership interests (as the case may be) in such private equity vehicles. Interest, dividends and gains payable to such private equity vehicles and all distributions by the private equity vehicles to the holders of shares, units or limited partnership interests (as the case may be) will be received free of any Cayman Islands income or withholding taxes. The position is similar for and with respect to Cayman Islands liability limited companies.

An exempted company, an exempted trust or an exempted limited partnership may apply for, and expect to receive, an undertaking from the Financial Secretary of the Cayman Islands to the effect that, for a period of 20 years (in the case of an exempted company) or a period of 50 years (in the case of a limited liability company, an exempted trust or an exempted limited partnership) from the date of the undertaking, no law which is enacted in the Cayman Islands imposing any tax to be levied on profits or income or gains or appreciations shall apply to the vehicle or to any member, shareholder, unitholder or limited partner (as the case may be) thereof in respect of the operations or assets of the vehicle or the interest of a member, shareholder, unitholder or limited partner (as the case may be) therein; and may further provide that any such taxes or any tax in the nature of estate duty or inheritance tax shall not be payable in respect of the obligations of the vehicle or the interests of a member, shareholder, unitholder or limited partner (as the case may be) therein.

The Cayman Islands are not party to a double tax treaty with any country that is applicable to any payments made to or by the private equity vehicles.

9.2 What are the key tax considerations for management teams that are selling and/or rolling-over part of their investment into a new acquisition structure?

Please see the answer to question 9.1 above.

9.3 What are the key tax-efficient arrangements that are typically considered by management teams in private equity portfolio companies (such as growth shares, deferred / vesting arrangements, "entrepreneurs' relief" or "employee shareholder status" in the UK)?

Please see the answer to question 9.1 above.

9.4 Have there been any significant changes in tax legislation or the practices of tax authorities (including in relation to tax rulings or clearances) impacting private equity investors, management teams or private equity transactions and are any anticipated?

No, and none are anticipated.

10 Legal and Regulatory Matters

10.1 What are the key laws and regulations affecting private equity investors and transactions in your jurisdiction, including those that impact private equity transactions differently to other types of transaction?

The most common Cayman Islands vehicles used for private equity funds and private equity transactions are the exempted limited partnership ("ELP"), the exempted company and the limited liability company. Accordingly, the key laws and regulations affecting private equity investors and transactions are the respective statutes governing these vehicles, as follows:

- Exempted Limited Partnership Law (2018 Revision) ("ELP Law"): The ELP is by far the most popular vehicle for a Cayman Islands private equity fund. The ELP law was revamped in 2014 and is closely modelled on the Delaware partnership legislation. The key features of an ELP are: (i) an ELP does not have separate legal personality, hence it must conduct its business through its general partner; (ii) the general partner has unlimited liability and is liable for the debts and obligations of the partnership to the extent that the partnership assets are insufficient; (iii) the property of the ELP is vested in and held by the general partner on trust on behalf of the partnership, in accordance with the terms of the partnership agreement; (iv) a limited partner must not take part in the conduct of the business of the partnership, however, similar to Delaware law, there are very broad safe harbours contained in the law which allow a limited partner to take specified actions without running the risk of losing limited liability status; and (v) limited partners do not owe fiduciary duties to the ELP or to any other partners.
- Companies Law (2018 Revision): Companies are almost always incorporated with limited liability; although it is possible to incorporate companies with unlimited liability or with liability limited by guarantee. The liability of a shareholder of a company incorporated with limited liability is limited to the amount paid up and agreed to be paid up on the shares taken by that shareholder. Shares of the same class in a company rank equally with each other. However, by appropriate adaptation of the articles of association of the company, it is possible to create separate share classes (or separate series within the same class), to facilitate, for example, the payment of performance fees payable to the fund manager.
- Limited Liability Companies Law (2018 Revision) (the "LLC Law"): The new limited liability company ("LLC") is a legal entity with separate legal personality (like a company). The key features are that its members have limited liability,

while also providing flexible governance arrangements and capital account mechanics in a manner similar to a limited partnership. The LLC Law is closely modelled against the Delaware LLC Law.

10.2 Have there been any significant legal and/or regulatory developments over recent years impacting private equity investors or transactions and are any anticipated?

The Cayman Islands continues to refine its laws and regulatory framework to ensure that it meets the ever-increasing demands of the private equity industry. This ability to respond and adapt has resulted in the following legal developments over recent years:

- A comprehensive review and update to the ELP Law in 2014. While the new law did not make fundamental alterations to the nature, formation or operation of ELPs, it promotes freedom of contract and includes provisions to deal specifically with issues and concerns raised, and suggestions made, by the industry to bring the ELP Law even further into line with Delaware concepts.
- The enactment of the LLC Law in 2016 provided for the formation of a new Cayman Islands vehicle: the limited liability company. Since its introduction, we have seen LLCs used in private equity structures, particularly as GP governance vehicles, aggregator vehicles (where multiple related funds are investing in the same portfolio investment) and holding companies in portfolio acquisition structures.
- The enactment of the Contracts (Rights of Third Parties) Law, 2014, which confers on third parties, via an opt-in requirement in the relevant agreement, a statutory right of direct enforcement of contractual obligations granted to them in the agreement even though they are not a party. In the context of exempted limited partnerships, this law assists, among other things, with giving effect to the intentions of the parties with respect to indemnification and exculpation provisions of the partnership agreement which commonly seek to benefit a wider class of persons than the parties to the agreement.
- The Cayman Islands was an early introducer of comprehensive and strict anti-money laundering laws and "know your client" rules and regulations and continues to adapt these rules and regulations in line with international standards. In a continuing effort to meet international standards, a comprehensive update was made to the Anti-money Laundering Regulations (2018 Revision) in October 2017.

10.3 How detailed is the legal due diligence (including compliance) conducted by private equity investors prior to any acquisitions (e.g. typical timeframes, materiality, scope etc.)? Do private equity investors engage outside counsel / professionals to conduct all legal / compliance due diligence or is any conducted in-house?

This will depend on the particular manager and may also vary on a transaction-by-transaction basis.

10.4 Has anti-bribery or anti-corruption legislation impacted private equity investment and/or investors' approach to private equity transactions (e.g. diligence, contractual protection, etc.)?

The Cayman Islands' Anti-Corruption Law (2014 Revision) (the "AC Law") came into force on 1 January 2010 with the intent of giving effect to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as well as the United Nations Convention Against Corruption. The AC Law replaced the provisions relating to anti-corruption and bribery which previously existed under the Penal Code, and provides generally for four categories of corruption offences: Bribery (both domestic and foreign); Fraud on the Government; Abuses of Public or Elected Office; and Secret Commissions. There are also ancillary offences for failure to report an offence. The impact of the AC Law on private equity transactions in the Cayman Islands, given the sophistication of the parties involved and the nature and quality of their transactions, has been minimal, although more commonly transaction documents now include a warranty relating to compliance with such laws.

10.5 Are there any circumstances in which: (i) a private equity investor may be held liable for the liabilities of the underlying portfolio companies (including due to breach of applicable laws by the portfolio companies); and (ii) one portfolio company may be held liable for the liabilities of another portfolio company?

As a general rule, in the absence of a contractual arrangement to the contrary, the liability of a shareholder of a Cayman Islands exempted company which has been incorporated with limited liability and with a share capital is limited to the amount from time to time unpaid in respect of the shares he or she holds. A Cayman Islands company has a legal personality separate from that of its shareholders, and is separately liable for its own debts due to third parties. Accordingly, a company's liability does not generally pass through to its shareholders.

The general principles regarding corporate personality under Cayman Islands law are similar to those established under English law, and a Cayman Islands Court will regard English judicial authorities as persuasive (but not technically binding). Accordingly, from the date of incorporation of a Cayman Islands company, it is a body corporate with separate legal personality capable of exercising all the functions of a natural person of full capacity. This includes the ability to own assets, and perform obligations, in its own name as a separate legal person distinct from its shareholders (*Salomon v. Salomon & Co.* [1897] A.C. 22).

As a matter of English common law it is only in exceptional circumstances that the principle of the separate legal personality of a company can be ignored such that the Court will "pierce the corporate veil". These circumstances are true exceptions to the rule in *Salomon v. Salomon*, and there is now a well-established principle under English law that the Court may be justified in piercing the corporate veil if a company's separate legal personality is being abused for the purpose of some relevant wrongdoing.

11 Other Useful Facts

11.1 What other factors commonly give rise to concerns for private equity investors in your jurisdiction or should such investors otherwise be aware of in considering an investment in your jurisdiction?

Cayman Islands private equity vehicles play a well-established and growing role in private equity fund structures. This role is evidenced by the growing number of exempted limited partnership registrations in the Cayman Islands. Statistics issued by the Registrar of Partnerships has confirmed that in the years since the 2008 financial crisis, the Cayman Islands has seen a consistent increase in the number of annual partnership registrations. In 2016,

the number of active exempted limited partnerships stood at 19,937, compared with 17,896 in 2015 and 15,455 in 2014. This continued rise in the popularity of Cayman Islands private equity structures can be attributed in part to the Cayman Islands' commercial and industry specific laws, transparency initiatives and compliance with international standards, coupled with the Cayman Islands' flexibility to implement change and adapt to new opportunities and challenges.

Sheryl Dean
Maples and Calder
PO Box 309, Ugland House
South Church Street
George Town
Grand Cayman, KY1-1104
Cayman Islands

Tel: +1 345 814 5294
Email: sheryl.dean@maplesandcalder.com
URL: www.maplesandcalder.com

Sheryl is a partner in the Investment Funds group at Maples and Calder in the Cayman Islands. She specialises in the structuring, establishment and operation of private equity funds and advising on their downstream transactions, as well as the formation and ongoing operation of hedge funds. She represents large sponsors as well as boutique and start up investment managers. Sheryl also advises on a wide range of corporate transactions, with particular expertise in M&A transactions, restructurings and joint venture arrangements.

Heidi de Vries
Maples and Calder
11th Floor
200 Aldersgate Street
London
EC1A 4HD
United Kingdom

Tel: +44 20 7466 1651
Email: heidi.devries@maplesandcalder.com
URL: www.maplesandcalder.com

Heidi is a partner in the Investment Funds group at Maples and Calder in London. She works closely with hedge fund managers, private equity houses and their onshore counsel in the hedge fund and private equity sectors. Heidi advises on both Cayman Islands and British Virgin Islands law and specialises in the structuring, formation, ongoing maintenance and restructuring of hedge funds and private equity funds, representing large financial institutions as well as boutique and start-up managers. Her experience includes the establishment of Cayman Islands and British Virgin Islands companies and partnerships and advising on a broad range of corporate and commercial matters.

MAPLES

With over 50 years in the industry and over 800 staff, Maples and Calder is a leading international law firm advising global financial, institutional, business and private clients on the laws of the British Virgin Islands, Cayman Islands, Ireland and Jersey.

Maples and Calder is known worldwide for the quality of its lawyers. This extensive experience, the depth of the team and a collegiate approach are main characteristics of the firm, enabling it to provide the highest quality legal advice on a wide range of transactions.

Maples and Calder offices are located in the British Virgin Islands, Cayman Islands, Dubai, Dublin, Hong Kong, Jersey, London and Singapore. The service provided is enhanced by the strong relationships the firm has developed. For fiduciary and fund services requirements, the firm provides a seamless "one stop shop" capability through its affiliate, MaplesFS.

Other titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- Investor-State Arbitration
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com