

# Private Equity

*Contributing editor*  
**Bill Curbow**



**2018**

GETTING THE  
DEAL THROUGH

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# Private Equity 2018

*Contributing editor*

**Bill Curbow**

**Simpson Thacher & Bartlett LLP**

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# Preface

## Private Equity 2018

Fourteenth edition

**Getting the Deal Through** is delighted to publish the fourteenth edition of *Private Equity*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Croatia, Israel and Korea. The report is divided into two sections: the first deals with fund formation in 19 jurisdictions and the second deals with transactions in 21 jurisdictions.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
February 2018

# Cayman Islands

Chris Humphries, Simon Yard and James Smith

Stuarts Walker Hersant Humphries

## Formation

### 1 Forms of vehicle

**What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?**

An exempted limited partnership (ELP) established under the Cayman Islands Exempted Limited Partnership Law 2014 (the ELP Law) is the most commonly used structure in the Cayman Islands for forming private equity funds (PE funds). An ELP does not have a separate legal personality. An ELP must consist of the following:

- one or more persons called general partners who shall, in the event that the assets of the ELP are inadequate, be liable for all debts and obligations of the ELP; and
- one or more persons called limited partners who shall not be liable for the debts and obligations of the ELP except as provided in the partnership agreement and to the extent specified in the ELP Law.

Investors in an ELP are issued partnership interests and join the ELP as limited partners. Generally speaking, a limited partner's liability in an ELP is limited to the extent of the limited partner's partnership interests (but this limited liability status can be lost in instances where the limited partner takes part in the conduct of the business of the ELP). The general partner of the ELP is responsible for the management and conduct of the business of the ELP.

The general partner of a PE fund is usually a company or another ELP established specifically as part of the overall PE fund structure. At least one general partner of the ELP must, if a company, be registered (either as a foreign company or a Cayman Islands incorporated company) under the Companies Law (2016 Revision) of the Cayman Islands (the Companies Law) or, if a partnership, be registered (either as a foreign partnership or an ELP) under the ELP Law.

A PE fund can also be established as a company using a Cayman Islands exempted company incorporated with limited liability, which has a separate legal personality distinct from its shareholders. The exempted company is established with share capital and shares are issued to investors in consideration of investment proceeds. Each investor's or shareholder's liability is limited to the amounts unpaid on its shares, if any, or to such amount as the shareholders may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of it being wound up.

A PE fund can also be established as a limited liability company using a Cayman Islands limited liability company (LLC). The LLC is designed to be substantially similar to the form of a Delaware limited liability company and has a separate legal personality, distinct from its members. The LLC is established without a share capital and otherwise resembles an ELP in having its members' liability limited by reference to the amounts of capital they have agreed to contribute or as otherwise stated in the operating agreement of the LLC (the LLC agreement).

### 2 Forming a private equity fund vehicle

**What is the process for forming a private equity fund vehicle in your jurisdiction?**

Being a partnership, the ELP is established first by both the general partner and an initial limited partner (eg, a principal of the PE fund manager) entering into an initial limited partnership agreement. Second, by a section 9 registration statement (section 9 Statement) being filed with the Cayman Islands Registrar of Exempted Limited Partnerships (the Registrar) signed by the general partner of the ELP and including the following details:

- the name of the ELP;
- the general nature of the business of the ELP;
- the address of the ELP's registered office in the Cayman Islands (legally required to be in the Cayman Islands);
- the term, if any, for which the ELP is entered into or, if for unlimited duration, a statement to that effect and the date of its commencement;
- the name and address of each general partner; and
- a declaration that the ELP will not undertake business with the public in the Cayman Islands other than so far as may be necessary for the carrying on of the business of that ELP exterior to the Cayman Islands.

There are certain supporting documents that must also be filed in respect of the general partner (for example, in the case of a corporate general partner, Certificate of Incorporation and Certificate of Good Standing).

Upon paying the requisite fee and filing the completed registration documents, the Registrar will issue a Certificate of Registration, which is conclusive evidence that compliance has been made with all the requirements of the ELP Law in respect of formation and registration of the ELP.

A Cayman Islands exempted company is established by completing the following:

- filing an affidavit of the subscriber to its memorandum of association;
- filing its memorandum of association and articles of association with the Cayman Islands Registrar of Companies; and
- payment of the requisite filing fees.

An LLC is established by filing a registration statement (Registration Statement) with the Cayman Islands Registrar of Limited Liability Companies (the LLC Registrar) signed by or on behalf of any person forming the limited liability company and including the following details:

- the name of the LLC;
- the address of the LLC's registered office in the Cayman Islands (legally required to be in the Cayman Islands);
- the term, if any, for which the LLC is formed or, if for unlimited duration, a statement to that effect; and
- a declaration that the LLC will not undertake business with the public in the Cayman Islands other than so far as may be necessary for the carrying on of the business of that LLC exterior to the Cayman Islands.

The timescale and costs depend on the nature and complexity of the transaction. However, the registration of an ELP or LLC or the incorporation of an exempted company can be done on an express basis within 24 hours. Cayman Islands legal counsel will be able to provide an estimate of legal fees and disbursement costs once they have conducted an overview of the overall PE fund structure. The registration fee payable to the Registrar for an ELP is currently approximately US\$1,220. An ELP will be required to file with the Registrar a return on or before 31 January in every year and pay the Registrar a fee, currently approximately US\$2,500.

For an exempted company the registration fee will depend on the level of the authorised share capital of the company. An exempted company that falls within the lowest possible band of authorised share capital will have to pay a current incorporation fee of approximately US\$732. Similarly, an exempted company must file an annual return in January of each year and pay a fee to the Registrar of Companies, currently approximately US\$854 for the lowest band of authorised share capital.

For an LLC, the registration fee payable to the Registrar is currently approximately US\$976. An LLC will be required to file with the Registrar a return on or before 31 January in every year and pay the LLC Registrar a fee, currently approximately US\$976. At the formation stage for a PE fund the only service providers that it is necessary to engage are a Cayman Islands legal counsel and a registered office service provider. Most law firms have an affiliated management company that can provide registered office services.

There are no material minimum capital requirements prescribed by Cayman Islands law.

As further discussed in question 10, if the equity interests of the PE fund are redeemable at the option of the investor it may be required to be registered as a 'mutual fund' pursuant to the Cayman Islands Mutual Funds Law (2015 Revision).

### 3 Requirements

#### **Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?**

There is no requirement under Cayman Islands law for a PE fund (whether structured as an ELP, an exempted company or an LLC) to have a Cayman Islands-based custodian or administrator.

The ELP is required to maintain a registered office in the Cayman Islands.

The general partner of the ELP is responsible for maintaining (or causing to be maintained) a register of security interests granted with respect to a partnership interest or part thereof indicating, among other things, the identity of the grantor and grantee, the partnership interest subject to the security interest and the date notice of the interest was served on the ELP.

The general partner is responsible for maintaining (or causing to be maintained) in the country or territory that the general partner may determine (including outside the Cayman Islands) a register of limited partners which shall contain the name and address of each person who is a limited partner of the ELP, the date on which a person became a limited partner and the date on which a person ceased to be a limited partner, and the register shall be updated within 21 days of the date of any change in the particulars therein. The general partner shall also be responsible for maintaining (or causing to be maintained) at the registered office of the ELP a record of the address at which the register of limited partners is kept.

The general partner is also required to maintain (or cause to be maintained) in any country or territory that the general partner may determine, a record of the amount and date of the capital contributions of each limited partner and the amount and date of any payment representing a return of the whole or any part of the capital contribution of any limited partner; such record shall also be updated within 21 days of the date of any change in the particulars therein.

An exempted company is also required to maintain a registered office in the Cayman Islands, a register of mortgages and charges, a register of directors and officers and a register of members. The latter need not be maintained locally in the Cayman Islands.

An LLC is also required to maintain a registered office in the Cayman Islands, a register of mortgages and charges, register of

security interests, a register of managers and a register of members (together with a record of contributions and distributions). The register of members and record of contributions need not be maintained locally in the Cayman Islands.

### 4 Access to information

#### **What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?**

The register of limited partners (and address of where it is maintained) of an ELP is not open to public inspection, but instead is required to be open for inspection during all usual business hours by all partners or by any other person with the consent of the general partner. The record of contributions is only open to inspection by a person with the consent of the general partner. A copy of the section 9 Statement and any amendments made to it is publicly available for inspection upon payment of a fee to the Registrar.

Under the Companies Law, the register of members and the register of directors of an exempted company are not open to public inspection and are private documents. However, shareholders of the exempted company are entitled to see their own details in the register of members. An exempted company is required to keep at its registered office a register of mortgages and charges specifically affecting property of the exempted company. The register of mortgages and charges is required to be open to inspection by any creditor or member of the exempted company at all reasonable times. The only publicly available information in respect of an exempted company is its name, company number, date of incorporation, registered office, the type of company (eg, exempted, special economic zone, segregated portfolio company) and whether the company is active or has been dissolved or is inactive, which can be accessed via the website of the General Registry of the Cayman Islands.

Under the Limited Liability Companies Law 2016 (the LLC Law), the register of members and the register of managers of an LLC are not open to public inspection and are private documents. However, those persons expressly given a right to inspect the LLC agreement or otherwise as permitted by the manager of the LLC, will have the ability to inspect the register of members. Unless otherwise provided in the LLC agreement, each member has the right to inspect from time to time true and full information regarding the state of the business and financial condition of the LLC. An LLC is required to keep at its registered office a register of mortgages and charges specifically affecting property of the LLC. The register of mortgages and charges is required to be open to inspection by any creditor or member of the LLC at all reasonable times. The only publicly available information in respect of an LLC is its name, registration number, date of registration, registered office and whether the LLC is active or has been struck-off. This information can be accessed via the website of the General Registry of the Cayman Islands.

### 5 Limited liability for third-party investors

#### **In what circumstances would the limited liability of third-party investors in a private equity fund formed in your jurisdiction not be respected as a matter of local law?**

As mentioned in question 1, the limited liability of the limited partners of an ELP (who would be the third-party investors in a PE fund) may be lost if the relevant limited partner takes part in the management or operation of the ELP. The following is a non-exhaustive list of activities that a limited partner can undertake without risking loss of its limited liability status:

- holding an office or interest in, or having a contractual relationship with, a general partner of the ELP, or being a contractor for or an agent or employee of the ELP or of a general partner of the ELP or acting as a director, officer or shareholder of a corporate general partner;
- consulting with and advising a general partner or consenting or withholding consent to any action proposed, in the manner contemplated by the partnership agreement, with respect to the business of the ELP;

- investigating, reviewing, approving or being advised as to the accounts or business affairs of the ELP or exercising any right conferred by the ELP Law;
- acting as surety or guarantor for the ELP either generally or in respect of specific obligations;
- approving or disapproving an amendment to the partnership agreement;
- calling, requesting, attending or participating in any meeting of the partners of the ELP;
- taking any action that results in the winding up or the dissolution of the ELP;
- taking any action required or permitted in the partnership agreement or by law to bring, pursue, settle or terminate any action or proceedings brought in circumstances where the general partner(s) has authority to do so but refuse, without good cause, to institute such proceedings;
- appointing a person to serve on a board or committee of the ELP, a general partner or a limited partner or removing such person;
- serving on any board or committee of the exempted limited partnership, a general partner, the limited partners or the partners, or by appointing, electing or otherwise participating in the choice of a representative or any other person to serve on any board or committee, or by acting as a member of any board or committee either directly or by or through any representative or other person, including giving advice or consenting, or refusing to consent, to any action proposed by the general partner on behalf of the ELP and exercising any powers or authorities or performing any obligations as a member of that board or committee in the manner contemplated by the partnership agreement;
- serving on the board of directors or a committee of, consulting with or advising or being an officer, director, shareholder, partner, member, manager, trustee, agent or employee of, or by being a fiduciary or contractor for, any person in which the ELP has an interest or any person providing management, consultation, custody or other services or other products for, to or on behalf of, or otherwise having a business or other relationship with, the ELP or a general partner of the ELP; and
- voting as a limited partner on certain matters in relation to the ELP, for example its dissolution and winding up; the purchase, sale or transfer of assets; the incurrence or renewal of indebtedness; change in the nature of business; the admission, removal or withdrawal of a general or limited partner; or transactions in which one or more general partners have an actual or potential conflict of interest with one or more limited partners.

If a limited partner loses its limited liability status, it will be liable in the event of the insolvency of the ELP for all debts and obligations of the ELP incurred during the period that the limited partner participated in the conduct of the business of the ELP as though the limited partner was, for such period, a general partner of the ELP, provided that the limited partner shall be rendered liable only to a person who transacts business with the ELP during such period with actual knowledge of such participation and who then reasonably believed the relevant limited partner to be a general partner of the ELP.

In addition, if a limited partner receives a payment representing a return of any part of his or her contribution or is released from any outstanding obligation in respect of his or her commitment and at the time that the payment was made or the release effected the ELP is insolvent including where the payment or release causes the insolvency or the limited partner has actual knowledge of the insolvency of the exempted limited partnership, then for a period of six months commencing on the date of that payment or release but not thereafter, the limited partner shall be liable to the ELP for the amount of the payment or the due performance of the released obligation in respect of his or her commitment in each case to the extent that the repayment or performance of the released obligation is necessary to discharge a debt or obligation of the ELP incurred during the period that the contribution or commitment represented an asset of the ELP.

Unlike the ELP, an exempted company is regarded as having separate legal personality, and being an entity distinct from its shareholders. The limited liability status of shareholders of an exempted company will generally be respected. Similarly to a number of other jurisdictions, including under English law, there may be certain circumstances

where a Cayman Islands court might disregard the fundamental principle that a company is a separate legal person from its shareholders and that their respective assets and liabilities are distinct. Such unusual circumstances may include where the company is considered by the courts to be used as a tool for fraud or other criminality or when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he or she deliberately evades or whose enforcement he or she deliberately frustrates by interposing a company under his or her control.

An LLC is also regarded as having separate legal personality, and being an entity distinct from its members. The limited liability status of members of an LLC will generally be respected. Similarly to a number of other jurisdictions, including under English law, there may be certain circumstances where a Cayman Islands court might disregard the fundamental principle that an LLC is a separate legal person from its members and that their respective assets and liabilities are distinct, although this has never been tested in relation to an LLC. Such unusual circumstances may include where the LLC is considered by the courts to be used as a tool for fraud or other criminality or when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he or she deliberately evades or whose enforcement he or she deliberately frustrates by interposing an LLC under his or her control.

## 6 Fund manager's fiduciary duties

**What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund's manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?**

The general partner of the ELP is responsible under the ELP Law for the management of an ELP. In the context of a PE fund, a substantial part of this responsibility is delegated pursuant to the terms of an investment management agreement to the PE fund's investment manager. It is usually the general partner (unless otherwise delegated) that enters into contracts, deeds, instruments or other documents on behalf of the ELP. In conducting the business of the ELP, the general partner has a fiduciary duty under section 19(1) of the ELP Law to act at all times in good faith and, subject to the express terms of the partnership agreement to the contrary, in the interests of the ELP. The duty to act in the interests of the ELP can therefore be modified by the terms of the partnership agreement provided always that the general partner acts in good faith. Even where the general partner has delegated certain of its responsibilities to the PE fund's investment manager, it remains subject to this duty and therefore must retain supervisory oversight of the responsibilities delegated to the PE fund's investment manager.

The duties owed by the PE fund's investment manager will be set out in the investment management agreement between the investment manager and the ELP and may be modified in the manner set forth in the investment management agreement.

In the context of a PE fund that is structured as an exempted company, the management of the entity is vested in the directors. The duties and liabilities of directors of such company will be governed by the Companies Law as supplemented by Cayman Islands case law and English common law insofar as English common law has not been amended by statutory provisions in the Cayman Islands. English case law is considered as persuasive in the courts of the Cayman Islands to the extent that there is no Cayman Islands case law to the contrary. A substantial proportion of the duties and responsibilities of directors of the PE fund (structured as an exempted company) are normally delegated to the investment manager of the PE fund under the terms of the investment management agreement.

Directors of an exempted company owe a number of fiduciary duties to the company. The fiduciary duties include the following:

- the duty to act in accordance with the constitution of the company (that is, the memorandum of association and articles of association);
- the duty to act in good faith in the best interests of the company; and
- the duty to act for a proper purpose.

The directors of an exempted company are also subject to the common law duty to undertake their functions as directors with due care, diligence and skill.

The constitutional documents of a Cayman Islands PE fund will usually contain indemnification provisions in favour of the general partner in the context of an ELP, or directors in the context of an exempted company and their respective affiliates for all liabilities, loss, damage, cost or expense, in the absence or fraud, wilful neglect or negligence (or other behaviour, such as dishonesty or gross negligence).

In the context of an exempted company, under the Companies Law, directors could also face criminal sanctions for criminal offences, including the following:

- fraud committed in the 12-month period prior to a winding up of the PE fund;
- misconduct in the course of a winding up of the PE fund; and
- making material omissions in statements relating to the company's affairs in the course of a winding up.

Subject to any express provision of the LLC agreement to the contrary, a manager of an LLC owes no duty (fiduciary or otherwise) other than a duty to act in good faith in respect of the rights, authorities or obligations of the manager. The good faith duty can be expanded or restricted, but not eliminated, by the express provisions of the LLC agreement. A member does not owe any duty (fiduciary or otherwise) to the LLC or to a member in exercising any rights or authorities, or performing any obligations, in respect of the LLC. In particular, the LLC Law provides that where a member is exercising any vote, consent or approval right, it may do so in its own best interests even though it may not be in the best interests of the LLC or any other member. The LLC Law also expressly provides that any person serving on any board or committee of the LLC may, if expressly permitted to do so by the LLC agreement, act in a manner which the person believes to be in the best interests of a particular member (even though it may not be in the best interests of all the members or the LLC).

The Cayman Islands Monetary Authority (CIMA) has issued a Statement of Guidance for Regulated Mutual Funds (the Statement), in which it sets out CIMA's expectations regarding the corporate governance regime of regulated mutual funds. In essence, CIMA expects the oversight, direction and management of a regulated mutual fund to be conducted in a fit and proper manner. Accordingly, the purpose of the Statement is to provide the governing body of a regulated mutual fund (Governing Body) and its operators (Operators) with guidance on the minimum expectations for the sound and prudent governance of the regulated mutual fund.

The Statement provides guidance for the Governing Body on matters such as: monitoring of a funds compliance with applicable laws, regulations and rules; oversight and supervision of the service providers to the funds; frequency of Governing Body meetings and service provider representation at such meetings; reporting by the investment manager and service providers; and identification and recording of conflicts of interest. The Statement also provides a non-exhaustive list of duties that CIMA considers applicable to an Operator, for example: ensuring it has capacity to apply its mind to oversee and supervise each regulated fund of which it is an operator; and ensuring the roles and responsibilities of all service providers are clearly defined, understood and are being adequately performed.

## 7 Gross negligence

### **Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of a private equity fund?**

Gross negligence (as opposed to 'negligence') is not a fully recognised legal term under Cayman Islands law. However, gross negligence is often referred to in the constitutional document or agreements of a PE fund, but is usually defined either by reference to the laws of a jurisdiction that recognises gross negligence (eg, the state of Delaware in the United States) or is specifically defined in the relevant document.

## 8 Other special issues or requirements

### **Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?**

Most of the special issues or requirements particular to PE funds structured as limited partnerships are governed by the terms of the partnership agreement. Typically, the partnership agreement will contain provisions stating the following:

- a limited partner may only transfer its partnership interests subject to the express terms of such agreement;
- the general partner may appoint or remove the investment manager of the PE fund; and
- advisory committees may be created (which are internal bodies that consent to, or approve of, certain actions by the general partner), the members of which can include limited partners. Limited partners who are members of these committees should read the terms of these advisory committees carefully to ensure that actions taken via an advisory committee are not deemed to be managing the affairs of the ELP and thereby risk losing their limited liability status.

Any limited partnership established under the laws of a jurisdiction other than the Cayman Islands may (provided that the laws of the foreign jurisdiction where it is organised permit or do not prohibit such a transfer), at any time upon effecting such amendments to the partnership agreement as shall be necessary to comply with the ELP Law and upon filing the required documents, be registered under the ELP Law, transfer by continuation to the Cayman Islands and, with effect from the date of the Certificate of Registration issued by the Registrar, would then be governed as an ELP in accordance with the ELP Law.

Where a limited partnership migrates to the Cayman Islands, the ELP and the partnership interests of its partners and their rights and liabilities, as against any person who is not a partner, shall cease to be governed by the laws of the jurisdiction from which it has migrated, with effect from the date indicated on the Certificate of Registration issued by the Registrar. However, any act or omission occurring before such date shall continue to be governed by such law or the laws of such other jurisdiction, provided always that such registration of the migrated limited partnership in the Cayman Islands as an ELP shall not operate to do any of the following:

- create a new legal entity;
- affect the property previously acquired by or on behalf of the ELP;
- affect any act or thing done prior to such registration or the rights, powers, authorities, functions or obligations of the ELP, any partner or any other person prior thereto; or
- render defective any legal proceedings by or against the ELP or any partner or any other person, and any legal proceedings that could have been continued or commenced by or against the ELP or any partner or any other person before its registration hereunder may, notwithstanding such registration, be continued or commenced after such registration and in respect of which such law or the laws of such other jurisdiction shall be of application.

The partnership agreement is typically modified to reflect requirements of the ELP Law.

A qualified transferring foreign company incorporated under the laws of a jurisdiction outside the Cayman Islands may continue by way of transfer into the Cayman Islands, provided that the laws of the foreign jurisdiction where it is incorporated permit or do not prohibit such a transfer. Such transfer by way of continuation does not create a new company or other new legal entity. The transferring foreign company is effectively taken from the foreign jurisdiction and redomiciled in the Cayman Islands as the same legal entity, but now governed by Cayman Islands law rather than the law of the foreign jurisdiction.

A qualified transferring foreign entity formed, registered, incorporated or existing under the laws of a jurisdiction outside the Cayman Islands may continue as an LLC by way of transfer into the Cayman Islands, provided that the laws of the foreign jurisdiction where it is

incorporated permit or do not prohibit such a transfer. Such transfer by way of continuation does not create a new company or other new legal entity. The transferring foreign company is effectively taken from the foreign jurisdiction and redomiciled in the Cayman Islands as the same legal entity, but now governed by Cayman Islands law as an LLC rather than the law of the foreign jurisdiction.

### 9 Fund sponsor bankruptcy or change of control

**With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor?**

Under Cayman Islands law, there are no statutory or regulatory consequences in this regard except that, to the extent that such bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund's sponsor necessitates, in the case of an ELP, a change of general partner of the ELP, a successor general partner should be appointed and the Registrar should be notified of the change in general partner. In the unlikely event that the PE fund is registered with CIMA, CIMA should be notified of the change in sponsor or a change of the PE fund's investment manager. The terms of the limited partnership agreement of the PE fund, the LLC agreement of the PE fund (where it is structured as an LLC) and the memorandum and articles of association of the PE fund (where it is structured as an exempted company) will typically assist in determining the consequences of the sponsor of the PE fund being faced with bankruptcy, insolvency, change of control, or restructuring.

### Regulation, licensing and registration

#### 10 Principal regulatory bodies

**What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators' audit and inspection rights and managers' regulatory reporting requirements to investors or regulators?**

The principal regulatory body in the Cayman Islands for investment funds and investment managers is CIMA. PE funds are typically structured to be exempt from the application of the Mutual Funds Law and therefore are not required to register with CIMA because the investor's partnership interests or shares are not redeemable or repurchasable at the investor's option and therefore do not fall within the Mutual Funds Law definition of 'equity interests'.

A CIMA-registered PE fund (ie, one where the partnership interests, shares or limited liability company interests) are redeemable at the option of the investor and has more than 15 investors) is required to prepare and submit annual audited financial statements to CIMA. CIMA may require such information or such explanation in respect of the PE fund as it may wish to carry out its duties under the Mutual Funds Law. A CIMA-registered PE fund must give CIMA access to or provide at any reasonable time all records relating to the PE fund. The Mutual Funds Law provides for substantial fines for failure to comply with any such requests by CIMA and CIMA may apply to the court to have the PE fund wound up.

Unless exemptions apply, an investment manager of a PE fund may be required to obtain a licence under the Securities Investment Business Law (2015 Revision) (SIBL) if it is incorporated or registered, or has an established place of business, in the Cayman Islands (see question 12).

#### 11 Governmental requirements

**What are the governmental approval, licensing or registration requirements applicable to a private equity fund in your jurisdiction? Does it make a difference whether there are significant investment activities in your jurisdiction?**

A PE fund may be required to register with CIMA under the circumstances outlined in question 10. A PE fund is prohibited from doing business with the public of the Cayman Islands (other than so far as may

be necessary for the carrying on of its business outside of the Cayman Islands).

The Cayman Islands' Director Registration and Licensing Law, 2014 (as amended) requires all directors, whether resident in the Cayman Islands or non-resident, of regulated mutual funds and companies which maintain a registration as an excluded person pursuant to the SIBL to register with CIMA. Persons who hold more than 20 of such directorships will need to be licensed by CIMA and will be subject to enhanced regulatory requirements. Corporate directors, irrespective of directorship numbers held, will also need to be licensed by CIMA. Therefore all directors of CIMA-registered PE funds and their Cayman Islands management companies (holding the SIBL exemption – see question 12) will have to be registered with CIMA. A fee is payable upon application for registration or licensing. In addition, each such director will be required to make an annual filing each year with CIMA together with the payment of a fee, and if there are any changes to the information supplied to CIMA on registration or in any subsequent annual filing, the director concerned will be required to inform CIMA within 21 days of the change.

#### 12 Registration of investment adviser

**Is a private equity fund's manager, or any of its officers, directors or control persons, required to register as an investment adviser in your jurisdiction?**

Investment managers that are vehicles incorporated or registered in the Cayman Islands, or any person or entity incorporated anywhere else in the world but with an established place of business in the Cayman Islands through which securities investment business is carried on, will be governed by the provisions of the SIBL and its licensing requirements. The following is a non-exhaustive list of persons that may be registered as an 'excluded person':

- one of a group of companies carrying on securities investment business exclusively for one or more members of its group;
- a person carrying on a securities investment business exclusively for:
  - a sophisticated person (as defined in the SIBL);
  - a high-net-worth person (as defined in the SIBL); or
  - a person who is regulated in respect of such securities investment business by a recognised overseas regulatory authority.

In order to register, such excluded person must:

- complete and submit to CIMA the Annual Declaration Form for Excluded Persons; and
- submit the annual fee of approximately US\$6,000.

Normally, PE fund managers are able to qualify for registration as an excluded person under SIBL.

As mentioned in question 11, directors of an 'excluded person' which is a company must also register with CIMA.

#### 13 Fund manager requirements

**Are there any specific qualifications or other requirements imposed on a private equity fund's manager, or any of its officers, directors or control persons, in your jurisdiction?**

If the PE fund's investment manager is registered as an excluded person under the SIBL, as mentioned in questions 11 and 12, the directors of an investment manager which is a company must be registered with CIMA or where the director holds 20 or more directorships of mutual funds or excluded persons, licensed by CIMA. Where the SIBL does not apply to an investment manager, there will be no qualifications or licensing requirements required under Cayman Islands law for the PE fund manager and its principals or directors.

#### 14 Political contributions

**Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund's manager or investment adviser or their employees.**

There are currently no such Cayman Islands rules or policies applicable to PE funds.

**15 Use of intermediaries and lobbyist registration**

**Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund’s manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund’s investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.**

There are currently no such Cayman Islands rules or policies applicable to PE funds.

**16 Bank participation**

**Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.**

There are currently no such legal or regulatory developments in the Cayman Islands applicable to PE funds.

**Taxation****17 Tax obligations**

**Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.**

Under current Cayman Islands law there are no Cayman Islands taxes on income or gains of the PE fund or on gains on dispositions of shares or partnership interests, and distributions made by a PE fund will not be subject to withholding tax in the Cayman Islands.

As an ELP, a PE fund has the ability to apply for, and could expect to obtain, an undertaking from the governor-in-council of the Cayman Islands (the governor) pursuant to the provisions of the Tax Concessions Law that for a period of 50 years from the date of exemption no law enacted in the Cayman Islands imposing any tax to be levied on profits or income or gains shall apply to it or its operations, and that any such tax or any tax in the nature of estate, duty or inheritance tax shall not be payable on the partnership interests, debentures or other obligations of the PE fund or by way of the withholding in whole or in part of any payment of divided or other distribution of income or capital by the PE fund to its partners or payments of principal or interest or other sums due under a debenture or other obligation of the PE fund. If the PE fund is structured as an exempted company, it can also apply to the governor for an exemption for a period of 20 years and, if the PE fund is an LLC, it can also apply for an exemption for a period of 50 years.

**18 Local taxation of non-resident investors**

**Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?**

No, see question 17.

**19 Local tax authority ruling**

**Is it necessary or desirable to obtain a ruling from local tax authorities with respect to the tax treatment of a private equity fund vehicle formed in your jurisdiction? Are there any special tax rules relating to investors that are residents of your jurisdiction?**

No, see question 17.

**20 Organisational taxes**

**Must any significant organisational taxes be paid with respect to private equity funds organised in your jurisdiction?**

There are currently no significant organisational taxes in the Cayman Islands. However, there are registration and annual maintenance fees payable to the government of the Cayman Islands in connection with the registration or incorporation of a PE fund in the Cayman Islands, as described previously.

**21 Special tax considerations**

**Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund’s sponsor.**

Currently, none. See question 17.

**22 Tax treaties**

**Please list any relevant tax treaties to which your jurisdiction is a party and how such treaties apply to the fund vehicle.**

As of 1 July 2005, the EU Savings Directive (2003/48/EC) (EUSD) became effective. The EUSD requires withholding of tax or exchange of tax information on interest paid to EU-resident individuals and certain EU intermediary entities in certain limited circumstances. The Cayman Islands government entered into bilateral agreements with each of the member states of the European Union in relation to reporting of savings income information and passed laws implementing those agreements. Distributions made by a PE fund or income derived from the sale or redemption of the shares should generally not be subject to the EUSD withholding tax or exchange of information. However, if an investor in a PE fund were to hold its shares through a professional nominee that is based in an EU member state, it is possible that the EUSD may apply to distributions made by the PE fund to the investor or to the income derived by the investor from the sale or redemption of the shares in the PE fund. Whether the EUSD would apply in any given case would depend upon the circumstances surrounding the relevant investor and the manner in which the EUSD has been implemented in the relevant EU member state. With the implementation of the Common Reporting Standard (CRS), which is broader in scope than the EU Savings Directive, such Directive has been repealed and it is anticipated that any reporting under the Directive will be replaced with reporting under the CRS from 2017.

The Cayman Islands has signed over 36 tax information exchange agreements (TIEAs) with other countries, of which 31 were in force as at November 2017, including most EU member states (the Czech Republic, Denmark, Finland, France, Germany, Ireland, Italy, Malta, the Netherlands, Norway, Poland, Portugal, Sweden, the United Kingdom), Argentina, Aruba, Australia, Canada, China, the Faroe Islands, Greenland, Guernsey, Iceland, India, Isle of Man, Japan, Mexico, New Zealand, South Africa and the United States, and as a result is on the Organisation for Economic Co-operation and Development (OECD) ‘white list’ of jurisdictions that have substantially implemented international tax standards. Essentially, TIEAs are bilateral agreements under which jurisdictions agree to cooperate in tax matters through the exchange of information. The Cayman Islands has also joined the Convention on Mutual Administrative Assistance in Tax Matters, which was developed by the OECD and the Council of Europe to combat tax evasion and aggressive tax avoidance. It provides for all possible forms of administrative cooperation between states in the assessment and the collection of taxes.

The Foreign Account Tax Compliance Act (FATCA) was introduced by the United States in 2010 as part of the Hiring Incentives to Restore Employment Act with the purpose of reducing tax evasion by its citizens. The Cayman Islands has entered into a Model 1B Intergovernmental Agreement (IGA) with the US relating to FATCA and also an agreement to improve international tax compliance with the United Kingdom (based on the US Model 1 IGA). The Cayman Islands has also introduced legislation that implements FATCA, and also what is known as UK FATCA (or CDOT), under which Cayman Islands financial institutions (which would include most funds) are required to, inter alia, conduct due diligence on their account holders (ie, investors) to determine whether they are US or UK persons; and report on an annual basis certain information to the Cayman Islands Tax Information

### Update and trends

The Anti-Money Laundering Regulations 2017 (the Regulations) were brought into force on 2 October 2017 and replace the Money Laundering Regulations (2015 Revision) (the Former Regulations).

The principal aim of the Regulations is, as the name suggests, to combat money laundering and the financing of terrorism. Rather than bringing about wholesale changes, the Regulations are really a further iteration of the regime set out in the Former Regulations and the accompanying Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands (the Guidance Notes). The Regulations codify some of the recommendations previously set out in the Guidance Notes and also seek to more accurately reflect the 2012 recommendations of the Financial Action Task Force.

One of the principal changes is the extended scope of the Regulations. The Former Regulations applied to those who conducted 'relevant financial business', as such term was defined therein. However, the Regulations now refer to the definition of 'relevant financial business' set out in the Proceeds of Crime law (2017 Revision).

This definition, importantly, has extended the list of activities that constitute 'relevant financial business' to specifically include 'investing, administering or managing funds or money on behalf of other persons'. Accordingly, regulated and unregulated investment entities and finance vehicles (including private equity and closed-ended funds) are within the scope of the Regulations and will be required to comply with them.

This requires the establishment and maintenance of various procedures for due diligence of the relevant entity's investors, the training of its employees, the appointment of certain officers and the reporting of any issues.

The Regulations are in force as of 2 October 2017 but, in order to provide sufficient time for those entities that are now finding themselves subject to this regime to be compliant, there will be no enforcement against them until 31 May 2018.

The revised Guidance Notes, when issued, are expected to contain a specific section detailing how a closed-ended/unregulated fund should ensure compliance.

Authority (TIA). The legislation permits the Cayman Islands government to exchange tax information automatically with the UK and the US without violating Cayman Islands law.

On 16 October 2015, the Cayman Islands issued regulations relating to the CRS, the OECD initiative for the global automatic exchange of information for tax purposes. As with FATCA, the CRS regulations require Cayman Islands reporting financial institutions to, inter alia, establish policies and maintain procedures designed to identify reportable accounts from 1 January 2016 (which include the identification of each jurisdiction in which an account holder or controlling person is resident for tax purposes, application of certain due diligence and retention of information obtained or a record of the steps taken to comply with the CRS Regulations for six years) and file an annual report with the TIA setting out certain information on reportable accounts.

We expect many of the sponsors of PE funds will outsource to administrators the reporting requirements imposed on them by the increased regulation and will rely on the administrators to ensure full due diligence is conducted with respect to the investors in their funds. In any event, managers should remain vigilant in their compliance with the FATCA and CRS legislation.

### 23 Other significant tax issues

**Are there any other significant tax issues relating to private equity funds organised in your jurisdiction?**

Currently, none. See question 17.

### Selling restrictions and investors generally

#### 24 Legal and regulatory restrictions

**Describe the principal legal and regulatory restrictions on offers and sales of interests in private equity funds formed in your jurisdiction, including the type of investors to whom such funds (or private equity funds formed in other jurisdictions) may be offered without registration under applicable securities laws in your jurisdiction.**

A Cayman Islands PE fund is not allowed to carry on business with the public of the Cayman Islands other than so far as may be necessary for the carrying on of the business of the PE fund outside of the Cayman Islands. As such, Cayman Islands PE funds are prohibited from offering shares to the public in the Cayman Islands (in the case of an exempted company) unless such shares are listed on the Cayman Islands Stock Exchange.

'Public', for these purposes, does not include a sophisticated person, a high net worth person, a company, partnership or trust of which the shareholders, unit holders or limited partners are each a sophisticated person, a high-net-worth person any exempted or ordinary non-resident company registered under the Companies Law or a foreign company registered pursuant to Part IX of the Companies Law or any such company acting as general partner of a partnership registered pursuant to the provisions of the ELP Law or any director or officer of the

same acting in such capacity or the Trustee of any trust registered or capable of registering pursuant to the provisions of the Trusts Law (as revised).

#### 25 Types of investor

**Describe any restrictions on the types of investors that may participate in private equity funds formed in your jurisdiction (other than those imposed by applicable securities laws described above).**

There are currently no other Cayman Islands restrictions to describe.

#### 26 Identity of investors

**Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?**

Save where the PE fund constitutes a financial institution for the purposes of FATCA or the CRS and is thereby obliged to make annual notification filings to the TIA in respect of relevant investors (see question 22), there are no filings or notifications required as regards investors in an exempted company, LLC or an ELP. However, as noted above, the general partner must maintain a register of limited partners that is open to inspection by all partners of an ELP or by any other person with the consent of the general partner of the relevant ELP. In addition, the general partner must file a statement with the registrar of exempted limited partnerships where there has been a change in any of the information provided under the section 9 registration filing described in question 2.

In the unlikely event that the PE fund is to be CIMA-registered, in order to effect the required registration, the PE fund is required to provide CIMA with a summary of the terms of the offering for each class of equity interests and to provide details of the various service providers of the PE fund along with a copy of its offering document. The PE fund must notify CIMA of any changes in the details of the summary of the terms of the offering and any change in the PE fund's service providers as filed on initial registration with CIMA and supply copies of any supplements to, or revision of, the offering document.

The directors of a CIMA-registered PE fund or manager holding a SIBL exemption will be required to make an annual filing together with the payment of a fee, and if there is any change to the information previously provided, the director must inform CIMA of the change within 21 days of the change.

The PE fund usually will require evidence identifying the branch or office of the bank from which subscription monies are being remitted or have been transferred, to verify that the account is in the name of the subscriber and retain a written record of such details. Normally the PE fund and its general partner (or directors if it is an exempted company) reserve the right to request such information as is necessary to verify the identity of a subscriber. Any failure or delay by a subscriber to produce

any information required for verification purposes could result in the PE fund refusing to accept the subscription application and the subscription monies relating thereto.

If any person who is resident in the Cayman Islands (including the general partner or a director) has a suspicion that a payment to the PE fund (by way of subscription or otherwise) contains the proceeds of criminal conduct, that person is required to report such suspicion pursuant to the Proceeds of Crime Law (2014 Revision).

Pursuant to an agreement made between the governments of the Cayman Islands and the UK in April 2016, the Cayman Islands implemented legislation on 1 July 2017 that requires certain Cayman Islands companies and limited liability companies to maintain beneficial ownership registers at their registered offices and for the information contained in such registers to be stored in encrypted form on a secure standalone search platform operated by the Cayman Islands government (the Search Platform). The principal purpose of the legislation is to make beneficial ownership information normally held by corporate service providers readily accessible in response to proper and lawful requests from specified law enforcement agencies (currently only those located in the Cayman Islands or the UK). The Search Platform will not be publicly accessible and may only be searched by the Cayman Islands authorities following a request by one of the specified law enforcement agencies.

There are various exclusions to the requirement to maintain beneficial ownership registers. The most obvious of these is that the beneficial ownership regime does not apply to exempted limited partnerships. In addition, companies or limited liability companies that are registered under the Mutual Funds Law (2015 Revision) or managed or operated by an approved person (ie, someone regulated in the Cayman Islands or another approved jurisdiction, such as the US) as an investment fund or private equity fund (or is a general partner of such an entity). This should exclude most, if not all, private equity funds from needing to maintain beneficial ownership registers. In any event, as the threshold for registration of a beneficial owner is more than 25 per cent of the shares/interests or voting rights, it is unlikely that a private equity fund would need to include anyone in its beneficial owner even if it were not excluded.

## 27 Licences and registrations

**Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?**

Usually, the person offering interests in a PE fund will be the investment manager or sponsor of the Fund and, unless such person is domiciled in the Cayman Islands or carries on business in the Cayman Islands, there will be no requirement for that person to obtain licences or registration in the Cayman Islands provided that such PE fund is not offering interests redeemable at the option of investors and no registration with CIMA is required.

## 28 Money laundering

**Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.**

The PE fund will be subject to the provisions of the Cayman Islands Anti-Money Laundering Regulations and Proceeds of Crime Law of the Cayman Islands. To comply with these regulations and laws aimed at the prevention of money laundering and terrorist financing, the PE fund typically requires prospective investors to provide evidence to verify their identity. The general partner of the PE fund where it is structured as an ELP or the board of directors where it is structured as an exempted company usually reserve the right to request such information as it considers necessary to verify the identity of a prospective investor.

As Cayman Islands-based PE funds will typically be considered financial institutions, they will be required to undertake due diligence on their investors to identify whether they are US or UK specified persons (for FATCA purposes) and where they are tax resident (for CRS purposes) and disclose certain information to the TIA (see question 22).

## Exchange listing

### 29 Listing

**Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?**

It is possible for a PE fund established as either an ELP or an exempted company to apply for a listing on the Cayman Islands Stock Exchange (CSX), but it would be unusual for a PE fund to do so. The principal advantage of obtaining a listing is that the PE fund's securities would be listed on a recognised exchange, which some institutional investors may require. However, the main disadvantage would be that it would add another layer of expense and formation procedures, which may not be necessary in order to facilitate a private equity transaction. The CSX listing rules are available online at [www.csx.com.ky](http://www.csx.com.ky), and the principal initial and ongoing requirements for listing are set out in Chapter 9 of the CSX listing rules.

### 30 Restriction on transfers of interests

**To what extent can a listed fund restrict transfers of its interests?**

Chapter 9 of the CSX listing rules provides that securities must be freely transferable, but certain transfer restrictions are allowed if they are adequately disclosed and approved by the CSX, such as where transfer restrictions are required in order to avoid breaching the securities laws of any relevant jurisdictions.

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**Participation in private equity transactions**

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**31 Legal and regulatory restrictions**

Are funds formed in your jurisdiction subject to any legal or regulatory restrictions that affect their participation in private equity transactions or otherwise affect the structuring of private equity transactions completed inside or outside your jurisdiction?

There are currently no such restrictions under Cayman Islands law.

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**32 Compensation and profit-sharing**

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Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

Other than the fiduciary duty of the general partner of an ELP to act in good faith and, subject to the express terms of the partnership agreement to the contrary, in the interests of the ELP, the duty of a manager of an LLC to act in good faith (subject to the provisions of the LLC agreement) and the fiduciary duties of the directors of an exempted company, there are currently no specific legal or regulatory issues under Cayman Islands law that affect compensation and profit-sharing arrangements of a PE fund. The structuring of such arrangements in a Cayman Islands PE fund is usually driven by the legal or regulatory requirements of certain onshore jurisdictions.

## *Getting the Deal Through*

Acquisition Finance  
Advertising & Marketing  
Agribusiness  
Air Transport  
Anti-Corruption Regulation  
Anti-Money Laundering  
Appeals  
Arbitration  
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Aviation Finance & Leasing  
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Competition Compliance  
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Energy Disputes  
Enforcement of Foreign Judgments  
Environment & Climate Regulation  
Equity Derivatives  
Executive Compensation & Employee Benefits  
Financial Services Litigation  
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Foreign Investment Review  
Franchise  
Fund Management  
Gas Regulation  
Government Investigations  
Healthcare Enforcement & Litigation  
High-Yield Debt  
Initial Public Offerings  
Insurance & Reinsurance  
Insurance Litigation  
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Investment Treaty Arbitration  
Islamic Finance & Markets  
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Licensing  
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Mediation  
Merger Control  
Mergers & Acquisitions  
Mining  
Oil Regulation  
Outsourcing  
Patents  
Pensions & Retirement Plans  
Pharmaceutical Antitrust  
Ports & Terminals  
Private Antitrust Litigation  
Private Banking & Wealth Management  
Private Client  
Private Equity  
Private M&A  
Product Liability  
Product Recall  
Project Finance  
Public-Private Partnerships  
Public Procurement  
Real Estate  
Real Estate M&A  
Renewable Energy  
Restructuring & Insolvency  
Right of Publicity  
Risk & Compliance Management  
Securities Finance  
Securities Litigation  
Shareholder Activism & Engagement  
Ship Finance  
Shipbuilding  
Shipping  
State Aid  
Structured Finance & Securitisation  
Tax Controversy  
Tax on Inbound Investment  
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