THE PRIVATE EQUITY REVIEW

Twelfth Edition

Editor
Stephen L Ritchie

THE LAWREVIEWS

THE PRIVATE EQUITY REVIEW

TWELFTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2023
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Stephen L Ritchie

THE LAWREVIEWS

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at March 2023, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to info@thelawreviews.co.uk.
Enquiries concerning editorial content should be directed to the Content Director,
Clare Bolton – clare.bolton@lbresearch.com.

ISBN 978-1-80449-156-0

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALTER LEGAL SL

BAHR

CUATRECASAS

DE BRAUW BLACKSTONE WESTBROEK NV

HAN KUN LAW OFFICES

KIRKLAND & ELLIS

LEGANCE – AVVOCATI ASSOCIATI

MAPLES GROUP

NIEDERER KRAFT FREY LTD

OH-EBASHI LPC & PARTNERS

SCHINDLER ATTORNEYS

SCHULTE ROTH & ZABEL LLP

SHARDUL AMARCHAND MANGALDAS & CO

SHEARMAN & STERLING

CONTENTS

PREFACE

The 12th edition of *The Private Equity Review* comes in the wake of a successful – but bumpy – year for dealmakers, which came on the heels of 2021's record-breaking level of activity. While private equity dealmakers remained active in 2022, with merger and acquisition (M&A) activity at the second-highest level on record (and well above 2020 and pre-pandemic levels), that activity was largely a continuation of 2021's unprecedented momentum carrying into the first half of 2022 before dropping sharply in the latter part of the year. That drop was due to a confluence of factors, including rising borrowing costs, challenged debt markets, high inflation, fears of a potential recession and declining boardroom confidence. The net result was an overall reduction in deal activity of roughly 40 per cent by value and 15 per cent by deal count from 2021. Large deals were up slightly as a percentage of overall M&A value but down in absolute numbers from 2021 levels, driven by the steep drop in mega-deals in the second half of 2022. Private equity exit activity decreased substantially in 2022, with value down 63 per cent and count down 28 per cent. Consistent with these trends, initial public offering and M&A by special purpose acquisition corporations (SPACs) – one of the biggest drivers of 2021's record-breaking deal volume – came to a screeching halt in 2022. The number of liquidated SPACs, with SPAC funds being returned to investors without a deal being done, shot up in the fourth quarter of 2022, with more expected as additional SPACs face upcoming expirations. Although 2022 did see a steady increase in announced de-SPAC M&A activity, likely due in part to SPAC sponsors seeking a deal ahead of the significant number of SPACs approaching their expiry dates, these deals were done at much smaller average sizes than peak 2021 levels and amid an overall background of increasing numbers of terminated de-SPAC transactions.

That said, more than US$1 trillion of global activity in 2022 was attributed to private equity sponsors – at roughly 33 per cent of global deal value, exceeding the prior all-time-high metric set in 2021. Private equity sponsors continued to seek out larger public targets in record number, with overall take-private activity and value surpassing recent levels – the average take-private deal size was US$3.5 billion in 2022, up significantly from US$2.6 billion in 2021. With continued confidence in the performance of private equity as an asset class, fundraising activity remained strong as well, with private equity funds raising aggregate capital of over US$1.2 trillion and continued record amounts of available capital, or dry powder, at, by one estimate, over US$1.4 trillion.

The year 2022 again demonstrated private equity's enormous impact and the continuing creativity of private equity dealmakers. Given private equity funds' success, creativity and available capital, private equity will continue to play a major role in the global economy, not

only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa, notwithstanding ongoing and potential additional political, regulatory and economic challenges.

Private equity professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. We intend for *The Private Equity Review* to help address this need. It contains contributions from leading private equity practitioners in 14 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

As private equity has grown, it has faced increasing regulatory scrutiny throughout the world. Adding to this complexity is the fact that regulation of private equity is not uniform from country to country. As a result, the following chapters also summarise these various regulatory regimes.

I want to thank everyone who contributed their time and labour to making this 12th edition of *The Private Equity Review* possible. Each of these contributors is a leader in their respective markets, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2023

Part I

Fundraising

Chapter 2

CAYMAN ISLANDS

Patrick Rosenfeld, Sheryl Dean and Iain McMurdo[1]

I GENERAL OVERVIEW

The Cayman Islands (Cayman) is a well-established and ever-growing domicile for private equity funds. This can be seen in the statistics issued by the Cayman Islands Registrar of Partnerships. Although a Cayman private equity fund can be established as a company, or indeed a trust, the overwhelming majority of Cayman private equity funds are set up as partnerships to mirror the preferred domestic vehicle of choice – in particular, by US managers and sponsors. Specifically, for reasons that are set out later, private equity funds are typically established as exempted limited partnerships (ELPs) in Cayman.[2] At the end of 2022, a total of 37,640 ELPs were registered in Cayman. This is a 10 per cent increase on 2021 and nearly six times the 2006 number of 6,468. The years since the 2008 financial crisis have seen impressive numbers of annual partnership registrations. In 2022, the amount of new partnerships stood at 4,684, compared with 5,778 in 2021, which was the highest number of partnerships registered in a single year. The dip in formations in 2022 was not unexpected, given the slower fundraising market for private equity funds globally in 2022 than in the prior year, but still reflects a strong year for the jurisdiction by historical levels.

The reason Cayman has such a well-developed market for private equity funds is a result of its ability to complement onshore fund structures, specifically Delaware partnerships. Although founded on Cayman common law principles, which, in turn, are derived from English law, the Cayman Islands Exempted Limited Partnership Act (first enacted in 1991) was drafted to provide symmetry with the corresponding Delaware statute. It has subsequently been amended, but always with a view to dovetailing with the US market. This policy was, and is, simple in design: it was intended, within the confines of Cayman law, to enable a manager's offshore fund to operate and be governed consistently with its domestic offering. Add to this the fact that although English law is technically not binding on a Cayman court, it is persuasive to it; the Cayman legal environment is at once both familiar and robust. Following a detailed consultation, the Act received a comprehensive review and overhaul in 2014, resulting in a new statute, now the Exempted Limited Partnership Act (As Revised) (the ELP Act). The ELP Act did not make fundamental alterations to the nature, formation or operation of ELPs but was intended to promote freedom of contract and simplify transactions undertaken by ELPs.

1 Patrick Rosenfeld, Sheryl Dean and Iain McMurdo are partners at Maples and Calder, the Maples Group's law firm.

2 As the overwhelming majority of Cayman private equity funds are ELPs, in this chapter we describe the law and practice applicable to ELPs, except where it is also helpful to refer to other structures.

The statute is not, of course, the only reason for Cayman's success. The country provides a tax-neutral environment for fundraising as, under current Cayman law, provided that its business is undertaken outside Cayman, no taxes or duties, either directly or by way of withholding, will be levied in Cayman on the trading activities or results of a Cayman-domiciled private equity fund. The combination of practical laws and low fiscal costs has secured the country's status as a popular and flexible domicile.

This has led to an interesting characteristic of the Cayman funds market: the vast majority of Cayman private equity funds are established by managers that are not themselves resident in the jurisdiction. The Cayman market facilitates the trading activities of the onshore funds industry, and in this sense the trends we see in Cayman are very much a coefficient of the trends experienced or developed in the United States, Europe, Asia and other major markets. The flexibility of Cayman law allows the manager or sponsor to replicate or accommodate deal terms driven by onshore factors and requirements.

If Cayman does not make the market trends, it certainly mirrors them. The lead-in time for deals currently appears to be increasing and, in some cases, lasts for many months. Increased investor expectation for transparency is reflected in a higher prevalence of side letters along with requests for valid and binding legal opinions – previously, it was unusual to issue an enforceability opinion in respect of a side letter; now dozens of opinions might be issued on a single closing.

Successful managers are still able to raise significant funds using Cayman structures. Even allowing for the fact that not every Cayman ELP is formed to serve as the investment vehicle for a private equity fund, transactions in the jurisdiction in 2022 remained robust, spanning a wide range of investment strategies and geographical focus.

II LEGAL FRAMEWORK FOR FUNDRAISING

Prior to 2020, closed-ended private equity funds (i.e., funds in which the capital is locked up for the duration or at least a substantial part of the life of the fund and investors do not have the option to purchase or redeem their interests at their own request) were not required to register with the Cayman financial regulator, the Cayman Islands Monetary Authority (CIMA). This contrasts with open-ended funds, which investors can withdraw at their own option and which have always been required to register with CIMA pursuant to the Mutual Funds Act (As Revised). However, in February 2020, Cayman passed the Private Funds Act (PFA), which also requires private (i.e., closed-ended) funds to register with CIMA. Among other requirements, the PFA requires prescribed details in respect of the fund to be filed with CIMA and for the fund to have its accounts audited annually by a Cayman-based auditor. Valuation and segregation of asset rules also apply. CIMA has also introduced prescribed disclosures for marketing materials for registered private funds (the Content Rules).

Outside of the requirements of the PFA, the legal basis for the fundraising and ongoing investment activities of a Cayman ELP private equity fund is dictated by the contractual relationship established by, and the disclosures set out in, the offering memorandum, subscription agreement and any other ancillary agreement (most notably side letters), and the ELP Act.

The usual legal form of a Cayman private equity fund is an ELP formed under the ELP Act. Although a private equity fund can be, and sometimes is, structured as a company (including, since the introduction of a new law in 2016, a limited liability company (LLC)) or trust, the ELP model has two advantages: it allows US managers in particular to use the

same vehicle as they do for their domestic offering while preserving freedom of contract through the limited partnership agreement (LPA), and at the same time avoid the constraints of the maintenance of capital doctrine that applies to a Cayman company.

Maintenance of capital is the price of limited liability for a company. In general terms, it means that the issued capital of a company cannot be reduced or simply returned to investors. The original intention under English law was to enable a concerned investor to carry out a due diligence exercise, based on the enquiry of the company or inspection of public records, to ascertain the capitalisation of a company. That investor could then form its own view as to whether to invest based on the strength of the covenant implied by the size of the company's share capital. The argument followed that this was an important creditor protection as, given limited liability and separate legal personality, a creditor could, in the usual course of events, claim only against the company, not its shareholders or directors. It therefore followed that the capital needed to be preserved or maintained so that it would be available to satisfy claims. Accordingly, rules, both statutory and common law, grew to maintain capital, and these are still reflected in modern Cayman company law. For example, a Cayman company cannot reduce its share capital without a court order, special rules apply to the purchase or redemption of its own shares, and pure capital (i.e., capital representing the par, or nominal, value of a company's shares) cannot ordinarily be distributed to shareholders.[3]

None of these requirements applies to an ELP, as there is no equivalent of the corporate maintenance of capital doctrine under Cayman partnership law. This is because the general partner (GP) of an ELP has unlimited liability for all the debts and obligations of the partnership to the extent that its assets are inadequate.[4] Conversely, the limited partners (LPs), as the name implies, are not so liable (subject to two important exceptions noted below).[5] This gives investors – the LPs in a Cayman private equity fund formed as an ELP – the best of both worlds: limited liability but with an almost unfettered ability to receive a return of capital in any situation subject only to the terms of the LPA underpinning the ELP.

An ELP is, in fact, a collection of contractual rights and obligations expressed through the terms of the LPA, which operates under agency principles through the GP and which has a limited liability wrapper for its LPs courtesy of the ELP Act. As the GP both acts for the ELP and has unlimited liability, there are qualifying criteria: at least one GP must be a Cayman company, another Cayman ELP or a natural person resident in Cayman. It can also be an overseas company, including, for these purposes, a Delaware LLC, that registers in Cayman as a foreign company.[6] This is short of a migration of the foreign company to Cayman and there is no reincorporation in Cayman, but a registered office is required along with submission of an annual return and, as discussed below, it can then fall subject to certain Cayman laws. Overseas partnerships can also register in Cayman to qualify as the GP of an ELP. There appears to be no overall preference for choice of qualification, although, in the majority of cases, either a Cayman company or a foreign-registered company will be used.[7]

3 See, for example, Sections 14 to 19 and Section 37 of the Companies Act (As Revised).

4 Section 4(2) of the ELP Act.

5 ibid.

6 Section 4(4) of the ELP Act.

7 We should note for completeness that for onshore reasons it is common to see a mezzanine ELP used as the immediate GP to the private equity fund itself, but that mezzanine ELP will itself need a GP, which, in turn, will typically be one of the corporate models described.

There are no qualifying criteria for LPs; however, an LP is subject to certain statutory restrictions, again being the price for limited liability. Specifically, an LP is passive. In fact, it is prohibited under the ELP Act from taking part in the conduct of the business of the ELP, and the law requires that all contracts, agreements and the like are entered into by the GP on behalf of the ELP.[8]

This leads on to the first of the exceptions to limited liability noted above: in summary, an LP that takes part in the conduct of the business of the ELP can lose limited liability in respect of a third party that deals with that ELP and that reasonably believes the LP to be a GP.[9] However, all is not lost for an LP that wants to exert internal control on the activities of the partnership, as the ELP Act sets out a series of safe harbour provisions, which are deemed not to amount to taking part in the conduct of the business. Probably the most helpful of these is: 'consulting with and advising a general partner or consenting or withholding consent to any action proposed, in the manner contemplated by the partnership agreement, in respect of the business of the exempted limited partnership'.

This is because this is usually sufficient to enable an LP to participate in an advisory committee of the partnership without concern that it could lose limited liability. This is a potential area for tension for an LP that wants to exert control over a GP and, therefore, by extension, the ELP itself. We advise that the golden rule for an 'active passive' LP is, first, to participate only internally within the partnership and dealing only with other partners and never with third parties and, second, to have those internal controls expressly documented in the LPA so as far as possible to come within the letter of the safe harbour set out above.

The second exemption to limited liability is clawback on insolvency. If an LP receives a capital – not a profit – distribution and the ELP is insolvent on a cash flow test at the time the payment is made and the LP has actual knowledge of the insolvency, then that LP can become liable to return the distribution together with interest.[10]

In short, to complete the description of the legal form of an ELP, the partnership does not have separate legal personality: it contracts through the GP, and property vested into the partnership or expressed to be held in its own name is, in fact, held by the GP. Legal actions would be initiated by the GP on behalf of the partnership. Finally, subject to the terms of the LPA, an ELP can have perpetual succession.

In terms of the fundraising itself, Cayman has a disclosure-based legal system; outside of the Content Rules there are no prescribed rules for the content of an offering memorandum for a closed-ended private equity fund. However, whatever is or is not said may potentially be actionable. In addition to a contractual claim under the contracts constituted by the offering memorandum, the subscription agreement and any ancillary agreement (such as a side letter), liability could also arise under principles of negligent or fraudulent misrepresentation, whereas the Contracts Act (As Revised) could apply in respect of pre-contractual misrepresentation. To complete the line-up of civil claims, an action for deceit could also arise under tort laws. Finally, in the case of criminal deception, the Penal Code (As Revised) could apply.[11]

All this means that the role of adequate disclosure to mitigate the liability of the ELP (along with, possibly, its GP and promoters), as well as to explain the investment terms, strategy and risk factors, is crucial. If an investor (i.e., an LP in the context of an ELP) can

8 Section 14(2) of the ELP Act.

9 Section 20(1) of the ELP Act.

10 Section 34 of the ELP Act.

11 Penal Code (As Revised), Sections 247, 248 and 257.

show reliance on a disclosure in the offering memorandum and breach of that disclosure that has resulted in damage, then a claim could ensue. This applies equally to the adequacy of risk factors, for example, as it does to more readily apparent contractual terms such as a statement as to the quantum of fees to be charged by the GP or sponsor.

Specific Cayman disclosures that might be expected, in addition to the investment narrative, terms and risk factors, include the legal form (and especially that the fund, if an ELP, does not have separate legal personality) and the exceptions to limited liability described above. Also typically included would be a statement in respect of tax treatment, transmission of investor information under regulatory laws (see Section III) and a statement that the ELP is authorised to carry on business only outside the Cayman Islands. This latter point is significant to the parameters for the solicitation of investors in Cayman.

Although a Cayman company is not allowed, under the Companies Act (As Revised), to offer its securities for sale to the public unless those securities are listed on the Cayman Islands Stock Exchange,[12] there is no equivalent for an ELP; however, as shall be seen, an ELP is expressly prohibited from transacting business with the public in the Cayman Islands. In fact, this is what 'exempted' in the legal description of an ELP signifies, as only an exempted limited partnership is entitled to apply for the tax exemption certificate (TEC) described in Section III.[13]

Although there are no equivalents to securities registration statements or investment promotions in Cayman, the legal requirement that the business of an exempted company or partnership must be undertaken outside Cayman means that it cannot generally deal with the public in Cayman (unless, in the case of a company, its securities are first listed on the local exchange). In practice, this means that the investors in a Cayman private equity fund will be either resident overseas or other Cayman-exempted entities. One Cayman-exempted vehicle can deal with another as, ultimately, their respective businesses are carried out outside, rather than within, Cayman. As the vast majority of Cayman funds are established with exempted status, the restriction does not usually create an issue in practice; however, occasionally, a fund will want to take in a Cayman-resident, non-exempt investor. Whether it can lawfully do so will depend on whether the fund has made an offer to the public in Cayman such that it is carrying out business with the public in Cayman.[14]

Although specific advice must be sought prior to making an offer in the Cayman Islands, we can extract the following general principles:

a marketing materials can be sent to a limited number of pre-selected investors;

b marketing visits should be made on a one-off basis and should be specific to a limited number of pre-selected investors (unless made on a reverse enquiry basis);

c local immigration and licensing requirements may apply;

d the fund can be marketed via a website or other electronic means by the sponsor to the extent that the website is not provided through an internet or electronic service provider (e.g., from a server) in the Cayman Islands;

e unsolicited calls from investors can be responded to, but the making of calls by the sponsor could trigger the public business test;

12 Section 175 of the Companies Act (As Revised).

13 Section 38 of the ELP Act.

14 Pursuant to Section 183 of the Companies Act (As Revised), an overseas company selling securities from the Cayman Islands will first need to register as a foreign company under the Companies Act.

f outside of the Content Rules, there are no express requirements for the content of marketing materials and, subject to the public offer prohibition, no prescribed minimum or maximum number of offerees; and

g it is advisable that the following jurisdiction-specific statement is included in any offering memorandum or equivalent: 'No offer or invitation to subscribe for [partnership interests] can be made or is made hereby to the public in the Cayman Islands.'

In the vast majority of cases, the sponsor or manager of a Cayman private equity fund will be based onshore, and the fiduciary or other obligations of that sponsor or manager may in part be governed by laws of its own jurisdiction and also the laws of the jurisdiction in which the offer is made; however, the liability, if any, of the sponsor or manager will also be governed by the nature of the contractual arrangements it has with the fund, the scope of its services and obligations, and the extent of any limitation of liability and indemnification. Common carve-outs for exculpation provisions in the context of a Cayman investment fund are fraud, wilful default and gross negligence. Cayman does not have a settled definition of 'gross negligence'; therefore, it is usual to see either an express definition or an import of a standard by reference to other laws, usually, in the context of the US market, those of Delaware or New York.

No discussion of fiduciary duties and liability would be complete without referencing the standard for the GP itself. The ELP Act contains a statutory standard that cannot be contracted out of: the GP is required to act at all times in good faith and, subject to the LPA, in the interests of the partnership.[15] There is no statutory standard of fair dealing. Although the good faith duty is fixed by statute, the actions of the GP can be subject to contractual limitation of liability and indemnification provisions, although care must be taken to ensure that these do not infringe either public policy or common law principles in respect of fiduciary exculpation.

III REGULATORY DEVELOPMENTS

The principal regulatory development of recent times concerning private equity funds in Cayman is the introduction of the PFA in 2020, discussed above, which, in summary, requires closed-ended funds to register with CIMA. Previously, only open-ended funds in which investors can withdraw their interests at their own option were required to register.

An investment manager or sponsor domiciled or registered in Cayman as a foreign company and carrying out investment management or advice will be subject to Cayman's Securities Investment Business Act (As Revised) (SIBA). This requires that a manager or adviser be either licensed by or registered with CIMA. Since 2019, the previous category of 'excluded persons' is no longer available and, accordingly, at a minimum and, apart from as described below when the GP is a non-registrable person, registration is required. Registration is possible where the person to whom the services are provided (i.e., the private equity fund itself) is either a 'sophisticated person' within the definitions set out in SIBA or is a high net worth person (HNW). As most private equity funds are institutional, the latter test is usually relied on, as this sets the threshold for HNWs at US$5 million in total (as opposed to net) assets.[16] The typical Cayman Islands private equity fund will easily reach this benchmark.

15 Section 19 of the ELP Act.

16 Section 2 of SIBA. A different definition applies to an HNW natural person.

Of course, it is often the case that the GP will provide investment management or advice services to the ELP fund. However, there will be no requirement to register under SIBA, provided that it is not separately remunerated for its services other than in its capacity as GP under the LPA and does not otherwise hold itself out as providing such services generally.[17] In these circumstances, the GP will be a non-registrable person for the purposes of SIBA.

The private equity fund itself will also be subject to certain reporting requirements: if any person resident in Cayman knows or suspects, or has reasonable grounds for knowing or suspecting, that another person is engaged in criminal conduct or money laundering, or is involved with terrorism or terrorist financing or property, and the information for that knowledge or suspicion came to their attention in the course of business in the regulated sector, or other trade, profession, business or employment, the person will be required to report that knowledge or suspicion to (1) the Financial Reporting Authority of the Cayman Islands (FRA), pursuant to the Proceeds of Crime Act (As Revised) of the Cayman Islands if the disclosure relates to criminal conduct or money laundering, or (2) a police officer of the rank of constable or higher, or the FRA pursuant to the Terrorism Act (As Revised) of the Cayman Islands, if the disclosure relates to involvement with terrorism or terrorist financing and property. Such report shall not be treated as a breach of confidence or of any restriction on the disclosure of information imposed by any enactment or otherwise.

Invariably, a private equity fund will be structured as an exempted vehicle in Cayman, meaning that it cannot do business with the public in Cayman. In the context of an ELP, this means that, in return for a fee of approximately US$1,800, it can apply to the government for, and expect to receive, a TEC. The TEC will confirm that no law subsequently enacted in Cayman imposing any tax to be levied on profits, income, gains or appreciations shall apply to that ELP, or to any of its partners, in respect of the operations or assets of that ELP or the partnership interests of its partners. The TEC will also usually confirm that any such taxes and any tax in the nature of estate duty or inheritance tax shall not be payable in respect of the obligations of the ELP or the interests of its partners.[18]

Currently, the TEC has insurance value only as, under current Cayman law, no taxes are levied in Cayman that would be applicable to an exempted private equity fund. Naturally, investors in the fund will be taxed at applicable local rates when proceeds are repatriated to their own jurisdiction, but there is no first instance charge to tax in Cayman; however, virtually all funds apply for a TEC.

As will be apparent from the foregoing, there have been no relevant changes in Cayman tax law over the past year, and none is currently expected.

Cayman also adopted, in 2014, a Contracts (Rights of Third Parties) Act, which confers on third parties, via an opt-in requirement, a right of enforcement even if they are not a party to an agreement, if the actual contracting parties intend to give that right. In the context of an LPA, this means that third-party rights under an indemnity provision, for example, can be enforced by that third party even though it is not a signatory to the LPA.

The European Alternative Investment Fund Managers Directive (AIFMD) came into force in the European Union and adhering Member States of the European Economic Area from 22 July 2013. Since then, the AIFMD legal and regulatory analysis of Cayman private equity funds has become relatively settled, and they have been successfully managed and marketed under the AIFMD regime.

17 id., Paragraph 2, Schedule 2A.

18 Section 38 of the ELP Act.

Cayman private equity funds will, subject to limited exceptions, be classified as alternative investment funds (AIFs) under the AIFMD.

The identification of each fund's alternative investment fund manager (AIFM) requires a more detailed legal analysis on a case-by-case basis. This includes a review of which entity is performing the majority of the portfolio management or risk management functions, and whether those functions are delegated. In general, this analysis tends to result in the GP or the delegate investment adviser of the GP (e.g., a Cayman GP or a US, EU or Asian delegate adviser) being designated as the AIFM.

Irrespective of the location of the AIFM, different provisions of the AIFMD apply to non-EEA-based AIFMs marketing Cayman Islands private equity funds to investors in the EEA, and EEA-based AIFMs that perform risk management or portfolio management functions for Cayman Islands funds, even if they are not marketing to EEA investors.

At the time of writing, the Cayman Islands complies with the principal requirements for the marketing of non-EEA AIFs into the EEA on a private placement basis. In particular, CIMA has signed the requisite cooperation agreements with the majority of EU Member States, and the Cayman Islands is not listed as a non-cooperative country and territory by the Financial Action Task Force (these requirements also apply to the jurisdiction in which the AIFM is based, if that is outside the Cayman Islands).

AIFMs must also comply with reporting, disclosure and asset stripping and EU private equity rules. If the AIFM is based in the EEA, it will need to appoint a depositary to the Cayman Island fund under a 'depo lite' regime. Finally, individual EEA Member States are permitted to impose additional restrictions and, accordingly, in some EEA markets, local securities laws or marketing rules supplement the foregoing provisions.

In compliance with these provisions, Cayman Islands private equity funds have been marketed successfully into the EEA under the private placement regime since 2014. At the time of writing, the European Commission has not yet extended the AIFMD marketing passport to any non-EEA jurisdictions. However, the Cayman Islands has been favourably assessed, and in 2019 the Cayman Islands amended certain key financial laws to align with AIFMD requirements and facilitate the marketing of Cayman Islands funds to EEA investors. It also remains to be seen whether the UK will permit wider marketing post-Brexit, now that it is no longer formally bound by EU requirements.

Pending a decision on the marketing passport by the European Commission, it is also possible for Cayman Islands private equity funds to form part of master-feeder structures, whereby Ireland- or Luxembourg-domiciled AIFs are used to market to EEA investors pursuant to the AIFMD passport, whereas the Cayman Islands funds are offered to US, Asian or other global investors. The use of parallel fund structures has also become popular, for example, where an EEA version of the Cayman Islands private equity fund is set up for marketing in the EEA.

There are limited exemptions from these marketing rules, including where reverse solicitation rules apply; for dedicated single-investor funds; or where the AIFM manages closed-ended unleveraged assets of less than €500 million.

AIFMs will need to consider carefully the application of the AIFMD to such funds before any marketing or management activities are undertaken in the EEA.

Cayman has adopted comprehensive automatic exchange of information regimes, and reporting financial institutions have both due diligence and annual reporting obligations in Cayman. Both the Organisation for Economic Co-operation and Development's (OECD) Common Reporting Standard and the US Foreign Account Tax Compliance Act have

mandatory application in the jurisdiction. Notifications are made to the Cayman Islands Tax Information Authority administered by the government's Department for International Tax Cooperation.

In 2017, Cayman introduced a new requirement for a beneficial ownership register. Subject to any available exemptions, companies and LLCs are now required to complete and maintain a beneficial ownership register at their Cayman Islands-registered office with a licensed corporate service provider.

In the same year, Cayman introduced the Tax Information Authority (International Tax Compliance) (Country-by-Country Reporting) Regulations 2017. In summary, these Regulations implement in the jurisdiction the model legislation published under the OECD's Base Erosion and Profit Shifting Action 13 Report (Transfer Pricing Documentation and Country-By-Country Reporting).

Following an overhaul of its anti-money laundering (AML) and terrorist financing regulations (the AML Regulations) in 2017, Cayman continues to revise its AML Regulations to ensure that they remain in line with current Financial Action Task Force recommendations and global practice. In summary, the AML Regulations have been expanded in scope to apply to a wider range of Cayman entities, to require the appointment of natural persons as AML officers, and to clarify principles of delegation and reliance in the context of outsourcing the administration of the AML Regulations. In 2020, the AML Regulations were further updated to implement observations made by the Caribbean Financial Action Task Force.

In further response to and compliance with OECD base erosion and profit shifting standards, Cayman has adopted the International Tax Co-operation (Economic Substance) Act (As Revised) and associated regulations. This law brings in reporting and economic substance requirements for certain Cayman entities, with reporting made to the Cayman Islands Tax Information Authority.

An administrative fines regime was introduced in 2020, which gives CIMA the power to levy fines for administrative breaches of rules or laws regulated by CIMA.

IV OUTLOOK

Although down from the heights of 2021, fundraising conditions (in terms of both fund size and speed to market) remained strong in 2022, and Cayman continues to be the favoured jurisdiction for fund managers.

The ELP continues to be the favoured vehicle for private equity funds. The year 2021 was a record one for the jurisdiction in respect of the number of partnerships formed (5,778, compared with 4,510 in 2020). The year 2022 was a slower one for fundraising in private equity globally but, despite challenging market conditions, 4,684 new partnerships were registered in the Cayman Islands in 2022. There continues to be strong interest from the United States and Europe – traditionally, significant markets for Cayman – but also increasing interest from Latin America and Asia (notably China, Korea and Japan).

The past few years have been extremely busy following the introduction of the Private Funds Act 2020, which required all private equity funds within the scope of the Act to register with CIMA. The new requirements introduced by the Private Funds Act have had little effect on the number of funds being launched in Cayman, as investors and managers have accepted that Cayman is keeping pace with existing international best practices. The year 2023 has also started strongly for the Cayman private equity industry despite volatility in the public markets.

It is a characteristic of the Cayman funds industry that, since its first inception, the country has been able to marry robust laws with a pragmatic commercial approach to business. We expect 2023 to be a busy year for the Cayman legislature and that Cayman will continue to refine its laws to ensure that it maintains its preferred status among private equity sponsors around the world. As Cayman continues to respond and adapt to regulatory changes around the world and to improve the laws relating to the investment vehicles preferred by sponsors and investors alike, we expect that the next few years will witness significant growth in the jurisdiction's share of the private equity and venture capital fund formation market.

Appendix 1

ABOUT THE AUTHORS

PATRICK ROSENFELD

Maples Group

Patrick Rosenfeld is a partner in the Cayman Islands funds and investment management team at Maples and Calder, the Maples Group's law firm. He specialises in the formation and restructuring of all types of investment funds and advises clients in the asset management industry. He also has extensive experience of international debt capital markets, structured finance and securitisation transactions.

SHERYL DEAN

Maples Group

Sheryl Dean is a partner in the Cayman Islands funds and investment management team at Maples and Calder, the Maples Group's law firm. She specialises in private equity fund structures and investments and represents a wide range of sponsors, from large institutions to boutique and start-up investment managers, advising on the structuring, formation and operation of private funds and on downstream transactions and portfolio investments. Sheryl advises sponsors on their carry allocation and management vehicles. She also works on a number of related corporate transactions, including consortium deals and joint ventures, co-investments, buyouts and restructurings.

IAIN MCMURDO

Maples Group

Iain McMurdo is a partner in the Cayman Islands funds and investment management team and global head of private equity at Maples and Calder, the Maples Group's law firm, specialising in the formation of private equity funds and advising on their resulting downstream transactions. He also works extensively with hedge fund managers and their onshore counsel, advising on the structuring and ongoing maintenance of hedge funds. Iain represents large financial institutions and investment managers, including well-known sponsors of private equity and hedge funds, as well as boutique and start-up investment managers. Iain joined the Maples Group in 2008. He was previously a partner at an international law firm.

MAPLES GROUP

Ugland House
South Church Street
Grand Cayman KY1-1104
Cayman Islands
Tel: +1 345 949 8066
Fax: +1 345 949 8080
patrick.rosenfeld@maples.com
sheryl.dean@maples.com
iain.mcmurdo@maples.com
www.maples.com

ISBN 978-1-80449-156-0