THE PRIVATE EQUITY REVIEW

TENTH EDITION

Editor
Stephen L Ritchie

THE LAWREVIEWS

The Private Equity Review

Tenth Edition

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Stephen L Ritchie

The Law Reviews

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PREFACE

The tenth edition of *The Private Equity Review* follows a turbulent year for dealmakers in 2020. Uncertainties created by the global covid-19 pandemic triggered a significant slowdown in deal activity in the first and second quarters. However, a combination of central bank interventions, fiscal stimulus, optimism about a vaccine and better virus management led to frenetic third and, especially, fourth quarters. The net result was that the number and value of global buyouts increased significantly over 2019's already robust activity, while there was a noticeable decline in private equity exits. The year 2020 also saw a flurry of IPO and merger and acquisition activity by special purpose acquisition corporations, or SPACs, some formed by private equity sponsors and others formed by other dealmakers. Fundraising activity was also strong, notwithstanding the pandemic, with aggregate capital of nearly US$1 trillion raised, as institutional investors remained extremely interested in private equity as an asset class because of its continued strong performance. As a result, private equity funds have record amounts – by one estimate, nearly US$1.5 trillion – of available capital, or dry powder. PE funds' dry powder (and the need to deploy it), together with competition from SPACs, sovereign wealth funds, family offices and pension funds, led to very competitive transactions being completed at increasing leverage levels and purchase price multiples. This has caused private equity firms to become even more creative as they seek opportunities in less competitive markets or in industries where they have unique expertise.

The year 2020 showed once again the resilience of the private equity market and the creativity of private equity dealmakers. Given PE funds' creativity and available capital, we are confident that private equity will continue to play an important 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, and to further expand its reach and influence, even in the face of potential 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. *The Private Equity Review* has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 25 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

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

I want to thank everyone who contributed their time and labour to making this tenth 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 2021

Part I

FUNDRAISING

Chapter 3

CAYMAN ISLANDS

Nicholas Butcher and Iain McMurdo[1]

I GENERAL OVERVIEW

The Cayman Islands (Cayman) are home to 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. While 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 2020, there was a total of 31,144 ELPs registered in Cayman. This is a 9 per cent increase on 2019 and more than four times the 2006 number of 6,468. The years since the 2008 financial crisis have seen impressive numbers of annual partnership registrations. Following a dip in the number of new registrations, 2020 saw a return to increasing numbers. In 2020, the figure of new partnerships stood at 4,510, compared with 4,328 in 2019, although this is not as high as the peak in 2018 of 5,007 registrations. In 2017, the figure stood at 3,782, in 2016 it was 3,356 and in 2015 it was 3,377.

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. While 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 while 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 Law received a comprehensive review and overhaul in 2014 resulting in a new statute, now the Exempted Limited Partnership Act 2018 (the ELP Law). The ELP Law 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.

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 its business is undertaken outside Cayman, no taxes or duties, either directly or by way of withholding,

1 Nicholas Butcher 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.

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 appears to be currently 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 with respect to a side letter; now 20 or 30 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 2020 remained robust, spanning a wide range of investment strategies and geographic 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 that have always been required to register with CIMA pursuant to the Mutual Funds Act (2020 Revision). However, in February 2020, Cayman passed the Private Funds Act, 2020 which also requires private (i.e., closed-ended) funds to register with CIMA. Among other requirements, the new law requires prescribed details with respect to 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. In late 2020, CIMA also introduced prescribed disclosures for marketing materials for a registered private fund (Content Rules).

Outside of the requirements of this new 2020 Act, 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 Law.

The usual legal form of a Cayman private equity fund is an ELP formed under the ELP Law. While 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 avoiding 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, only claim 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 up 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 apply 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 Law. 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, which 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. Since the overhaul of the ELP Law in 2014, 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 (2021 Revision).
4 Section 4(2) of the ELP Law.
5 ibid.
6 Section 4(4) of the ELP Law.
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 Law 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 with respect to 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 Law sets out a series of 'safe harbours', which are deemed not to amount to taking part in the conduct of the business. Probably the most helpful of these is as follows:

> *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 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, only to participate 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, while the Contracts Act (1996 Revision) could apply with respect to pre-contractual

8 Section 14(2) of the ELP Law.
9 Section 20(1) of the ELP Law.
10 Section 34 of the ELP Law.

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 (2019 Revision) 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 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 with respect to tax treatment, transmission of investor information under regulatory laws (see Section III) and a statement that the ELP is only authorised to carry on business outside the Cayman Islands. This latter point is significant to the parameters for the solicitation of investors in Cayman.

While a Cayman company is not allowed, under the Companies Law, 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 either be resident overseas or will be 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]

While 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);

11 Penal Code (2019 Revision), Sections 247, 248 and 257.

12 Section 175 of the Companies Act (2021 Revision).

13 Section 38 of the ELP Law.

14 Pursuant to Section 183 of the Companies Act (2021 revision), an overseas company selling securities from the Cayman Islands will first need to register as a foreign company under the Companies Law.

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;
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, and it is, therefore, 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 Law 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. While 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 these do not infringe either public policy or common law principles with respect to fiduciary exculpation.

III REGULATORY DEVELOPMENTS

The principal regulatory development of recent times concerning private equity funds in Cayman is the Private Funds Act, 2020, 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 (2020 Revision) (SIBL). This requires that a manager or adviser either be 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.

15 Section 19 of the ELP Law.

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 SIBL or is a high-net-worth person (HNW). As most private equity funds are institutional, the latter test is usually relied upon 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.

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 SIBL, provided 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 SIBL.

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 his or her 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 the Financial Reporting Authority of the Cayman Islands, pursuant to the Proceeds of Crime Act (2020 Revision) of the Cayman Islands, if the disclosure relates to criminal conduct or money laundering, or a police officer of the rank of constable or higher; or the Financial Reporting Authority, pursuant to the Terrorism Act (2018 Revision) of the Cayman Islands, if the disclosure relates to involvement with terrorism or terrorist financing and property. Such a report shall not be treated as a breach of confidence or of any restriction upon 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 there are no taxes 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 are currently expected. Finally, Cayman legislated away the unhelpful decision in the English case of *Mercury*[19] through changes to the Companies

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

17 id., Paragraph 2, Schedule 2A.

18 Section 38 of the ELP Law.

19 *R (on the application of Mercury Tax Group Ltd) v. HM Revenue & Customs* [2008] EWHC 2721.

Law. In summary, the judgment in *Mercury* appeared to require physical rather than electronic closings, which would create obvious impracticalities in the context of modern multi-jurisdictional transactions. The changes to the law effectively allow the contractual parties to determine how agreements will be deemed executed.

The ELP Law was revised in 2014. Principal amendments included:

a enabling the LPA to confirm to whom the GP's good faith duty is owed in given circumstances;

b confirming that, subject to the LPA, LPs do not owe fiduciary duties;

c simplifying the mechanics for admissions of new LPs and transfers of partnership interests; and

d introducing a short-form dissolution procedure.

Cayman has 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.

Revisions to the ELP Law were introduced in early 2013 to authorise the holding of the register of limited partnership interests other than at the registered office, provided that, on request from the Tax Information Authority of the Cayman Islands, details must be made available at the registered office.[20]

The European Alternative Investment Fund Managers Directive (AIFMD) came into force in the European Union (EU) and adhering Member States of the European Economic Area (EEA) 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.

Cayman private equity funds will, subject to limited exceptions, be classified as alternative investment funds (AIFs) under 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 (1) non-EEA-based AIFMs marketing Cayman Islands private equity funds to investors in the EEA; and (2) 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 Financial Action Task Force (these requirements also apply to the jurisdiction in which the AIFM is based, if that is outside the Cayman Islands).

20 Section 29 of the ELP Law.

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 the '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 successfully marketed into the EEA under the private placement regime since 2014. At the time of writing, the EU 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 EU Commission, it is also possible for Cayman Islands private equity funds to form part of master-feeder structures, whereby Irish or Luxembourg-domiciled AIFs are used to market to EEA investors pursuant to the AIFMD passport while the Cayman Islands funds are offered to US, Asian or other global investors. The use of parallel fund structures has also become popular, ie. 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 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 it remains 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 2020 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

It is fair to say that in the first decade of this century, we witnessed a rise in the formation of successor leveraged buyout funds, with investment periods becoming shorter as sponsors successfully deployed capital in acquisitions. However, in recent years, investment periods have moved back to a more traditional cycle of four to five years. In addition, managers have been seeking to use follow-on investment and recycling provisions to their fullest extent with a view to timing the market on the launch of their next fund. Fundraising conditions (both in terms of fund size and speed to market) remained strong in 2020 and the Cayman Islands continues to be the favoured jurisdiction for fund managers.

The ELP continues to be the favoured vehicle for private equity funds, although 2020 witnessed a decline from the record year of 2018 for the jurisdiction with respect to the number of partnerships formed (4,355 in total, representing a 11 per cent decrease on the peak in 2018). However, this exceeds the numbers formed in any other year, including the banner years of 2007, 2008 and 2017, respectively, and augurs well for the future resurgence of private equity fund formation in the Cayman Islands. There is 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 year was an extremely busy year given that all existing private equity funds caught under the Private Funds Act, 2020 had to register with CIMA and resulted in approximately 12,000 funds being regulated by CIMA in the initial six-month deadline of the new regulatory regime. There has been little change if any in the number of funds being launched under the new regime as investors and managers have accepted that the Cayman Islands is keeping pace with existing international best practices.

It is a characteristic of the Cayman funds industry, since its first inception, that the country has been able to marry robust laws with a pragmatic commercial approach to business. We expect 2021 to be a busy year for the Cayman Islands legislature and that Cayman will continue to refine its laws to ensure it maintains its preferred status among private equity sponsors around the world. As the Cayman Islands continues to respond and adapt to regulatory changes around the world and improve the laws relating to the investment vehicles preferred by sponsors and investors alike, we expect that the next few years will witness a significant growth in the jurisdiction's share of the private equity and venture capital fund formation market.

Appendix 1

ABOUT THE AUTHORS

NICHOLAS BUTCHER

Maples Group

Nicholas Butcher is the Ireland office managing partner of Maples and Calder, the Maples Group's law firm. He advises on all aspects of investment funds and specialises in both hedge fund and private equity transactions. Nicholas has extensive experience of corporate, partnership and trust structures (including Japan-focused retail funds) and also advises on securities investment business law, as well as on listings on the Cayman Islands Stock Exchange and other worldwide exchanges.

Nicholas joined the Maples Group in 2004. He was previously a partner with Hammonds (now Squire Patton Boggs) in London, specialising in mergers and acquisitions, as well as public company corporate finance and, prior to that, for Speechly Bircham in London.

Nicholas has been recognised as a leading lawyer in *IFLR1000*, a rated practitioner in *The Legal 500*, and a leading practitioner in *Who's Who Legal: Private Funds*, and he has been ranked as a noted practitioner by *Chambers Global*.

IAIN MCMURDO

Maples Group

Iain McMurdo is a partner in the 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 in the Cayman Islands and, prior to that, worked for Freshfields in London, specialising in takeovers and mergers.

Who's Who Legal has ranked Iain as one of the most highly regarded individual offshore lawyers in private funds and he was recognised as *Who's Who Legal*'s 2015 lawyer of the year (private funds). Iain has been featured in *Latin Lawyer 250*, recognised as a leading lawyer in *The Legal 500* and *IFLR1000*, and in Legal Media Group's *Expert Guides*. He has also been ranked in Band 1 as a notable practitioner by *Chambers Global*.

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