



# Private Equity

Fund formation and transactions  
in 42 jurisdictions worldwide

# 2009

Contributing editor: Casey Cogut



Published by  
**GETTING THE DEAL THROUGH**  
in association with:

Advokatfirman Delphi  
Appleby  
Batalla Abogados  
Blake, Cassels & Graydon LLP  
Bowman Gilfillan  
Carey Olsen  
CHSH Cerha Hempel Spiegelfeld Hlawati  
Dillon Eustace  
Esinlsmen  
G Breuer  
Gide Loyrette Nouel  
Hamelink & Van den Tooren NV  
Hernández & Cía Abogados  
HJM Asia Law & Co LLC  
Homburger  
Jones Day  
Kennedy Van der Laan NV  
Kromann Reumert  
Latournerie Wolfrom & Associés  
Lee & Ko  
Lepik & Luhaäär LAWIN  
Loyens & Loeff, Luxembourg  
Lydian  
Moussas & Tsibris  
Mundie e Advogados  
Navarro Abogados  
Nishith Desai Associates  
P+P Pöllath + Partners  
Proskauer Rose LLP  
Rodés & Sala  
SAI Consultores, SC  
Salomon Partners  
Simpson Thacher & Bartlett LLP  
Slaughter and May  
Smaliukas, Juodka, Beniusis & Partners  
Stoica & Asociatii – Attorneys at Law  
Wiesner & Asociados Ltda, Abogados  
WongPartnership LLP  
Yangming Partners

## Private Equity 2009

### Contributing editor

Casey Cogut  
Simpson Thacher & Bartlett LLP

### Business development manager

Joseph Samuel

### Marketing managers

Alan Lee  
Dan Brennan  
George Ingledew  
Edward Perugia  
Robyn Hetherington  
Dan White  
Tamzin Mahmoud  
Elle Miller

### Marketing assistant

Ellie Notley

### Subscriptions manager

Nadine Radcliffe  
Subscriptions@  
GettingTheDealThrough.com

### Assistant editor

Adam Myers

### Editorial assistants

Nick Drummond-Roe  
Charlotte North

### Senior production editor

Jonathan Cowie

### Subeditors

Jonathan Allen  
Laura Zúñiga  
Kathryn Smuland  
Sara Davies  
Ariana Frampton  
Sarah Dookhun

### Editor-in-chief

Callum Campbell

### Publisher

Richard Davey

### Private Equity 2009

Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910  
© Law Business Research Ltd  
2009

No photocopying: copyright  
licences do not apply.

ISSN 1746-5524

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of February 2009, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions.  
Tel: 0870 897 3239

Law

Business

Research

<b>Global Overview</b> Casey Cogut, William Curbow and Kathryn King Sudol <i>Simpson Thacher &amp; Bartlett LLP</i>	<b>3</b>
<b>FUND FORMATION</b>	
<b>Bermuda</b> Sarah Moule <i>Appleby</i>	<b>6</b>
<b>British Virgin Islands</b> Valerie Georges-Thomas <i>Appleby</i>	<b>13</b>
<b>Canada</b> J Rob Collins and Frank P Arnone <i>Blake, Cassels &amp; Graydon LLP</i>	<b>19</b>
<b>Cayman Islands</b> Bryan Hunter and André Ebanks <i>Appleby</i>	<b>23</b>
<b>China</b> Caroline Berube, Linford Liu, Patrick Pu, Ivy Yang and James Yule <i>HJM Asia Law &amp; Co LLC</i>	<b>29</b>
<b>Denmark</b> Vagn Thorup and Lisa Bo Larsen <i>Kromann Reumert</i>	<b>35</b>
<b>England &amp; Wales</b> Timothy Drake <i>Proskauer Rose LLP</i>	<b>40</b>
<b>Germany</b> Amos Veith <i>P+P Pöllath + Partners</i>	<b>48</b>
<b>Guernsey</b> Ben Morgan, Geoff Ward-Marshall and Emma Penney <i>Carey Olsen</i>	<b>54</b>
<b>India</b> Vikram Shroff and Richie Sancheti <i>Nishith Desai Associates</i>	<b>60</b>
<b>Ireland</b> Andrew Lawless and Sean Murray <i>Dillon Eustace</i>	<b>66</b>
<b>Italy</b> Bruno Castellini, Stefano Crosio and Velislava Popova <i>Jones Day</i>	<b>73</b>
<b>Jersey</b> Andrew Weaver and Mark Lewis <i>Appleby</i>	<b>80</b>
<b>Luxembourg</b> Gilles Dusemon and Marc Meyers <i>Loyens &amp; Loeff, Luxembourg</i>	<b>85</b>
<b>Mauritius</b> Malcolm Moller <i>Appleby</i>	<b>92</b>
<b>Netherlands</b> Louis Bouchez, Floor Veltman and Maurits Bos <i>Kennedy Van der Laan NV</i> Jan van den Tooren and Reinier Noort <i>Hamelink &amp; Van den Tooren NV</i>	<b>99</b>
<b>Singapore</b> Low Kah Keong <i>WongPartnership LLP</i>	<b>106</b>
<b>Spain</b> Carlos de Cardenas, Victor Domenech, Alejandra Font, Javier Morera and Julio Veloso <i>Rodés &amp; Sala</i>	<b>111</b>
<b>Sweden</b> Anders Lindström, Anders Björk and Peter Utterström <i>Advokatfirman Delphi</i>	<b>118</b>
<b>United States</b> Thomas H Bell, Barrie B Covit, Jason A Herman, Glenn R Sarno and Michael W Wolitzer <i>Simpson Thacher &amp; Bartlett LLP</i>	<b>124</b>
<b>TRANSACTIONS</b>	
<b>Argentina</b> Diego Fissore <i>G Breuer</i>	<b>131</b>
<b>Austria</b> Albert Birkner and Hasan Inetas <i>CHSH Cerha Hempel Spiegelfeld Hlawati</i>	<b>137</b>
<b>Belgium</b> Peter De Ryck <i>Lydian</i>	<b>143</b>
<b>Brazil</b> Arthur R Viñau and Ricardo P C Villela <i>Mundie e Advogados</i>	<b>149</b>
<b>Canada</b> J Rob Collins and Frank P Arnone <i>Blake, Cassels &amp; Graydon LLP</i>	<b>155</b>
<b>Cayman Islands</b> Stephen James and Simon Raftopoulos <i>Appleby</i>	<b>160</b>
<b>China</b> James Yule, Ivy Yang, Patrick Pu and Caroline Berube <i>HJM Asia Law &amp; Co LLC</i>	<b>164</b>
<b>Colombia</b> Mauricio Rodríguez A and Eduardo A Wiesner <i>Wiesner &amp; Asociados Ltda, Abogados</i>	<b>171</b>
<b>Costa Rica</b> Rodrigo Zelaya <i>Batalla Abogados</i>	<b>176</b>
<b>Denmark</b> Vagn Thorup and Bent Kempler <i>Kromann Reumert</i>	<b>180</b>
<b>England &amp; Wales</b> Timothy Drake <i>Proskauer Rose LLP</i>	<b>185</b>
<b>Estonia</b> Geri Kilusk <i>Lepik &amp; Luhaäär LAWIN</i>	<b>191</b>
<b>France</b> Pierre Lafarge, Claire Langelier and Nicolas Duboille <i>Latournerie Wolfrom &amp; Associés</i>	<b>196</b>
<b>Germany</b> Andres Schollmeier <i>P+P Pöllath + Partners</i>	<b>202</b>
<b>Greece</b> Michael Tsibris <i>Moussas &amp; Tsibris</i>	<b>207</b>
<b>Hong Kong</b> Benita Yu and Risen Tan <i>Slaughter and May</i>	<b>211</b>
<b>India</b> Archana Rajaram and Amrita Singh <i>Nishith Desai Associates</i>	<b>217</b>
<b>Ireland</b> Andrew Lawless and Sean Murray <i>Dillon Eustace</i>	<b>223</b>
<b>Italy</b> Bruno Castellini, Stefano Crosio and Velislava Popova <i>Jones Day</i>	<b>227</b>
<b>Korea</b> Wonkyu Han and Je Won Lee <i>Lee &amp; Ko</i>	<b>232</b>
<b>Lithuania</b> Robert Juodka, Inga Martinkute, Tomas Venckus, Vaida Pacenkaite, Arunas Kasparas, Ramunas Svencionis and Mindaugas Rimkus <i>Smaliukas, Juodka, Beniusis &amp; Partners</i>	<b>238</b>
<b>Mexico</b> Juan Pablo Martínez Velasco and Luis Alberto Aziz Checa <i>SAI Consultores, SC</i>	<b>244</b>
<b>Netherlands</b> Louis Bouchez, Floor Veltman and Maurits Bos <i>Kennedy Van der Laan NV</i> Jan van den Tooren and Reinier Noort <i>Hamelink &amp; Van den Tooren NV</i>	<b>248</b>
<b>Peru</b> Juan Luis Hernández, Alfredo Filomeno and Alvaro del Valle <i>Hernández &amp; Cía Abogados</i>	<b>255</b>
<b>Romania</b> Cristiana I Stoica <i>Stoica &amp; Asociatii – Attorneys at Law</i>	<b>260</b>
<b>Russia</b> Anton Klyachin and Igor Kuznets <i>Salomon Partners</i>	<b>264</b>
<b>Singapore</b> Ng Wai King and Dawn Law <i>WongPartnership LLP</i>	<b>269</b>
<b>South Africa</b> David Anderson and Shahid Sulaiman <i>Bowman Gilfillan</i>	<b>275</b>
<b>Spain</b> Julio Veloso, Javier Morera and Víctor Domenech <i>Rodés &amp; Sala</i>	<b>283</b>
<b>Sweden</b> David Aversten, Clas Romander, Peter Sjögren and Michael Juhlin <i>Advokatfirman Delphi</i>	<b>289</b>
<b>Switzerland</b> Dieter Gericke, Reto Heuberger and Jürg Frick <i>Homburger</i>	<b>295</b>
<b>Taiwan</b> Robert C Lee and Claire Wang <i>Yangming Partners</i>	<b>301</b>
<b>Turkey</b> Ismail Esin and Arzum Gunalcin <i>Esinlsmen</i>	<b>306</b>
<b>Ukraine</b> Karl Hepp de Sevelinges and Ilyia Tkachuk <i>Gide Loyrette Nouel</i>	<b>310</b>
<b>United States</b> William Curbow and Kathryn King Sudol <i>Simpson Thacher &amp; Bartlett LLP</i>	<b>315</b>
<b>Uruguay</b> Alfredo Navarro Castex and Alfredo H Navarro <i>Navarro Abogados</i>	<b>322</b>

# British Virgin Islands

Valerie Georges-Thomas

Appleby

---

## Formation and terms operation

### 1 Forms of vehicle

What legal form of vehicle is typically used for leveraged buyout (LBO) 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 LBO fund may be constituted as a business company limited by shares under the BVI Business Companies Act 2004, as amended (the Act), which is the most common form of vehicle used by private equity funds under British Virgin Islands (BVI) law. An LBO fund may also be formed as an international limited partnership under the Partnership Act 1996, as amended (the Partnership Act).

A BVI company has a separate legal personality from its shareholders. Section 27 of the Act provides that a company incorporated thereunder is a legal entity in its own right separate from its members and continues its existence until it is dissolved. As such, subject to the Act, the debts and liabilities of a BVI company are its own and not those of its shareholders.

Under BVI law, a BVI limited partnership does not, like a company, have a separate legal personality and the general partners thereof are liable jointly for the debts and obligations of the partnership incurred while each is a general partner of the partnership.

---

### 2 Forming an LBO fund vehicle

What is the process for forming an LBO fund vehicle in your jurisdiction?

#### Formation

The process for the incorporation of an LBO fund as a company (limited by shares) is straightforward. The company is formed by its proposed first registered agent submitting to the registrar of corporate affairs (the registrar), the memorandum and articles of association of the company duly signed by the registered agent as subscriber along with the registered agent's consent to act in the approved form and the prescribed fee. If the registrar is satisfied that the provisions of the Act have been complied with, the registrar will register the memorandum and articles of association, allot a unique number to the company and issue a certificate of incorporation. The company will be incorporated from the date specified in its certificate of incorporation. A company is generally incorporated within one business day of the submission of its documents to the registrar.

There are certain compulsory matters that must be included in the memorandum of association of a company including the name of the company, the type of company, the name and address of its first registered agent and address of its first registered office and in the case of a company limited by shares, a statement of the maximum number of shares the company is authorised to issue (or that it is authorised

to issue an unlimited number of shares), the classes of shares the company will be authorised to issue and a statement of the rights attaching to each class of shares where two or more classes of shares are authorised. Otherwise, the terms of the memorandum and articles of association of a company are flexible and can be tailored to suit the intended structure of the transaction.

The formation of a BVI international limited partnership is also a straightforward two-step process. Two or more persons (a general partner and at least one limited partner) must execute articles of partnership, which equate to a partnership agreement and essentially contain the internal regulations of the partnership and submit them to the intended registered agent of the partnership. Thereafter, a memorandum of partnership which shall be subscribed by the registered agent must be submitted to the registrar of Limited Partnerships. The memorandum of partnership must include the name of the partnership, the objects and purposes for which the partnership is established, the term, if any, of the partnership, the name and address of the registered agent of the partnership, the name and address of each general partner and in the case of an international limited partnership, a statement that the limited partnership will not carry on certain activities as set out in the Partnership Act. Upon receipt of the memorandum of partnership and the prescribed fee, the registrar of limited partnerships will register the memorandum of partnership and issue a certificate of limited partnership to the partnership. The partnership will begin its existence on the date shown in its Certificate of Limited Partnership. A limited partnership can be registered in one business day.

The articles of partnership are required to be submitted to the registered agent of the limited partnership only. They are not required to be filed publicly and are not open to inspection by the public.

#### Regulation

The Mutual Funds Act 1996, as amended (the Mutual Funds Act) governs mutual funds under BVI law. A mutual fund is defined thereunder as:

*A company incorporated, a partnership formed, a unit trust organised or other similar body formed or organised under the laws of the BVI or of any other country or jurisdiction which (a) collects and pools investor funds and (b) issues shares (defined as a share of a company, an interest in a mutual fund partnership and a unit in a unit trust) that entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in a part of the net assets of the company, the partnership, the unit trust or other similar body.*

The Mutual Funds Act does not use the term 'open-ended' or 'closed-ended'. However, pursuant to the definition of a mutual fund, only funds of an open-ended nature that is, funds which issue and redeem

shares on a continuous basis are funds within the meaning of the Mutual Funds Act. The Mutual Funds Act therefore regulates open-ended funds and their managers and administrators. It does not regulate closed-ended funds. LBO and private equity funds are typically structured as closed-ended with investors not having an ability to realise their investment in the fund until the fund disposes of its underlying investments at the end of a fixed period of operation. Where an LBO fund is structured as a closed-ended fund, it will not be subject to regulation under the Mutual Funds Act and can commence its business as soon as it has been incorporated or formed under BVI law.

If the LBO fund is structured to operate as an open-ended fund, it must complete the relevant regulatory process under the Mutual Funds Act before it can commence business.

### Fees

An LBO fund formed as a company limited by shares will be subject to registration fees upon incorporation and annual government license fees, the amount of which, in each case, is based on the number of shares it is authorised by its memorandum of association to issue. Where the company is authorised to issue no more than 50,000 shares, the registration fees upon incorporation and annual government license fees will be US\$350. Where the company is authorised to issue more than 50,000 shares, the registration fee upon incorporation and the annual government licence fees will be US\$1,100.

A BVI limited partnership will be subject to a registration fee upon formation and annual government licence fees of US\$500.

If the LBO fund falls to be regulated by the Mutual Funds Act, it will be subject to an annual recognition fee of \$350 as a recognised private or professional fund.

The LBO fund, whether constituted as a company or as a limited partnership, will be required to appoint a registered agent and have a registered office in the BVI and will be subject to the annual fees of its duly appointed registered agent for the provision of such services. The quantum of such fees varies among registered agents.

### Services providers

Service providers involved in the constituting of a BVI LBO fund will include BVI legal counsel who will assist with the drafting of the fund's documentation and advise on all BVI law issues and the duly appointed registered agent of the entity who will facilitate the incorporation or formation process.

### Minimum capital requirements

There are no minimum capital requirements under BVI applicable to a company or a partnership being structured for the purpose of a private equity transaction.

### 3 Requirements

Is an LBO 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 BVI law for the functionaries of a LBO fund, including its administrator, custodian and corporate secretary to be domiciled in the BVI.

A company incorporated under the Act must at all times have a registered office and a registered agent in the BVI. Similarly, a limited partnership is required by the Partnership Act to have a registered agent and a registered office in the BVI at all times.

In terms of books and records, a company must keep at the office of its registered agent, a copy of its memorandum and articles of

association, an imprint of its seal, a register of members and register of directors maintained in accordance with the Act or a copy each thereof and copies of all notices and other documents filed by the company in the previous ten years. Copies of minutes of meetings and resolutions of members and directors can be maintained at the registered offices of the company or elsewhere within or outside of the BVI provided that if such records are maintained outside the BVI, the company must provide its registered agent with a written record of the physical address of the place or places at which such records are kept. A company is also required to keep records that are sufficient to show and explain the company's transactions and will, at any time, enable the financial position of the company to be determined with reasonable accuracy.

The general partners of a limited partnership are required to maintain at the registered office of the limited partnership a register of limited partnership interests in which shall be recorded the name and address and amount and dates of contributions of each partner and the amount and date of any payment representing a return of any part of a partner's contribution. A limited partnership is also required to keep such accounts and records as the general partners consider necessary or desirable to reflect the partnership's financial position.

### 4 Access to information

What access to information about an LBO 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?

Any member of the public can carry out a search of the public records of a company available at the Registry of Corporate Affairs for a prescribed fee. A similar search can be conducted of the public records of limited partnership at the Registry of Limited Partnerships also on payment of a prescribed fee. A search of the public records of a company will reveal its memorandum and articles of association and any amendments thereto, its certificate of incorporation, details of whether the annual government licence fees of the company have been paid, details of any charges filed by the LBO company or any chargee on its Register of Registered Charges and any notice of appointment of liquidator where the company is being liquidated. A BVI company is required by law to maintain a register of shareholders and a register of directors and to maintain the registers or copies thereof at its registered offices but it is not required to file such registers publicly at the Registry. The records of the company maintained at its registered office are confidential and a member of the public will only be able to inspect or obtain copies of such records with the express authorisation of the company.

A search at the Registry of Limited Partnerships of the public records of a limited partnership will yield the memorandum of partnership of the partnership and where amendments have been made to the memorandum of partnership, a supplementary memorandum of partnership detailing the amendments and the certificate of limited partnership of the limited partnership. The file will also contain details as to whether annual license fees have been paid and any other documents required by the Partnership Act to be filed at the Registry of Limited Partnerships such as articles of dissolution where the limited partnership is being wound up. A limited partnership is not required by law to file its articles of partnership or its register of limited partnerships or publicly elsewhere and therefore information as to its limited partners and the amount of their capital contributions will not be available to the public.

## 5 Limited liability for third-party investors

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

Notwithstanding the basic principle of corporate legal personality of a BVI company, which the BVI courts will invariably be keen to uphold, the BVI courts will likely be guided by the various decisions of the English courts in setting aside the separate personality of a company in circumstances where a company is being used for the purpose of fraud or as a mechanism to avoid a legal obligation or where it is established that there has been dishonesty or abuse of the corporate form or in the case of a group of companies where the justice of the case requires that the companies within the that group should be regarded as a single economic entity.

A limited partner of a BVI limited partnership is not liable for the debts and obligations of the partnership. A limited partner is liable to the partnership only for the difference between his contribution as actually made and that stated in the articles of partnership as having been made and for any unpaid contribution that the articles of partnership state would be made in the future. However, a limited partner could be held liable as a general partner if it is also a general partner or he or she participates in the control of the partnership business and any persons transacting business with the limited partnership reasonably believe, based upon his conduct, that he is a general partner. The Partnership Act makes provision for circumstances in which a limited partner may be involved in the partnership's activities without the danger of liability. For example, a limited partner will not be deemed to be engaged in 'control of the partnership business' (ie, not subject to liability to third parties) by reason only of the limited partner being a contractor or agent of the partnership, consulting or advising the general partner, acting as surety or guarantor for the limited partnership or voting on certain matters such as the sale of assets or incurring indebtedness otherwise than in the ordinary course of business.

## 6 Fund manager's fiduciary duties

What are the fiduciary duties owed to an LBO 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 business and affairs of a BVI company under the Act are managed by or under the direction or supervision of its board of directors. The Act gives statutory footing to the equitable and common law duties owed by a director. Accordingly, a director must act honestly and in good faith with and in what the director believes to be in the best interests of the company. A director must also exercise his powers as a director for a proper purpose and shall not act or agree to the company acting in a manner that contravenes the Act or the memorandum and articles of association of the company. The Act enshrines the common law duty of care and skill and accordingly, a director must exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account the nature of the company, the nature of the decision, his position and the nature of the responsibilities undertaken by him. The duties specified in the Act are not intended to be exhaustive and a director would also be subject to the equitable duty of not putting himself in a position where his duty and his interest may conflict and he may be liable for breach of any secret or unauthorised profit that he makes out of his office.

The duties owed by the directors to a company are statutory and it is therefore doubtful that they can be varied by agreement and if

the duties are variable by agreement, the extent to which this can be done is likely to be very limited.

The business of a limited partnership is managed and controlled by its general partners. The general partners have a duty in accordance with the Partnership Act to render true accounts and full information of all things affecting the partnership, to account for private profits from any transaction concerning the partnership and a duty not to compete with the partnership. In addition, as a matter of common law, the general partners owe various fiduciary duties to the limited partners including the duty to act honestly, in good faith and with due care and loyalty. The common law duties of a general partner could likely be varied by agreement of the partners.

## 7 Gross negligence

Does your jurisdiction recognise a 'gross negligence' (as opposed to 'ordinary negligence') standard of liability applicable to the management of an LBO fund?

As a matter of general principle, BVI law does not recognise a separate tort of negligence amounting to gross negligence.

## 8 Other special issues or requirements

Are there any other special issues or requirements particular to LBO 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?

There are no other special BVI law issues or requirements applicable to an LBO fund formed under BVI law particularly where the LBO fund is structured as a non-regulated closed-ended fund. We confirm in particular, that there are no restrictions on transfers and withdrawals of shares or interests other than what may be contained in the fund's documentation, no restrictions on operations generally, no modifications required to ensure fiscal transparency and no special investor rights arising on matters such as the removal of the investment manager or early termination of the entity other than what may be contained in the fund's documentation. There are also no limitations on the number of investors an LBO fund may have unless it is to be structured as a private open-ended fund.

A foreign LBO company may re-domicile under the laws of the BVI if the laws of the jurisdiction in which it is registered permits it to continue in another jurisdiction including the BVI. There is no regime under the Partnership Act for the re-domiciling of a foreign domiciled partnership under BVI law.

## 9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of LBO funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the LBO fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the LBO fund's sponsor (eg, automatic trigger of dissolution or removal rights at fund level)?

The bankruptcy, insolvency, change of control or restructuring of the institutional sponsors of a BVI constituted LBO fund will not have any legal or regulatory consequences for the LBO fund under BVI law, particularly if the fund is not regulated under the Mutual Funds Act. In particular, such events will not result in the automatic dissolution of an LBO fund company or limited partnership or the removal of shareholders' rights in the entity.

---

**Regulation, licensing and registration**
**10 Principal regulatory bodies**

What are the principal regulatory bodies that would have authority over an LBO fund and its manager in your jurisdiction, and what are the audit and inspection rights available to those regulators?

The Financial Services Commission (the Commission) is the principal regulatory body in the BVI. The Commission will have power to inspect the books and records and audit the fund to ensure compliance with the Mutual Funds Act and regulations thereunder only if it is a regulated fund under the Mutual Funds Act. As previously discussed, most LBO funds and private equity funds fall outside of the scope of the Mutual Funds Act and therefore outside of the Commission's supervision.

**11 Governmental requirements**

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

Where the fund is structured as a closed-ended fund and therefore not subject to any regulation by the Mutual Funds Act, it will not be subject to any governmental approvals, licensing or registration requirements (whether as a mutual fund, investment company or otherwise) under BVI law.

If the LBO falls to be regulated by the Mutual Funds Act, it will be required to be recognised as a private or as a professional fund thereunder before it can commence its business or manages or administer its affairs in or from within the BVI.

**12 Registration of investment adviser**

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

There are no licensing requirements under the Mutual Funds Act or any other BVI law applicable to the manager of a BVI constituted LBO fund where the fund is itself a closed-ended fund under BVI law. The licensing requirements under the Mutual Funds Act regulate managers and administrators of open-ended funds only and apply only if the manager or administrator is domiciled in the BVI or is a foreign domiciled manager or administrator operating through a branch or representative office in the BVI. There are no licensing requirements under BVI law for the officers or directors of a BVI LBO fund.

**13 LBO fund manager – requirements**

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

There are no prescribed qualifications or other requirements under BVI law applicable to the manager of a BVI LBO fund that is not regulated by the Mutual Funds Act.

For an LBO fund constituted as a company, the Act provides that the following would be disqualified for appointment as the director thereof (i) an individual who is under 18 years of age; (ii) a person who is a disqualified person within the meaning of section 260(4) of the Insolvency Act; (iii) a person who is a restricted person within the meaning of section 409 of the Insolvency Act; (iv) an undischarged bankrupt; and (v) a person who, in respect of a particular company, is disqualified by the memorandum and articles of association from being a director of the company.

---

**Taxation**
**14 Tax obligations**

Would an LBO 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 an LBO fund to qualify for applicable tax exemptions.

A BVI company and all dividends, interests, compensation and other amounts paid by the company to persons who are not resident in the BVI are exempt from the BVI Income Tax Act and any capital gains realised with respect to the shares, debts obligations or other securities of the company by persons who are not resident in the BVI are exempt from all forms of taxation under BVI law.

An international limited partnership is also exempt from the provisions of the Income Tax Act. All payments made by an international limited partnership to persons not resident in the BVI and all capital gains realised with respect to an interest in an international limited partnership held by persons who are not resident in the BVI are exempt from the Income Tax Act.

There is no stamp duty payable on instruments relating to transfers of property to or by a company or an international limited partnership, on instruments relating to transactions in respect of the shares of a company or the interests of an international limited partnership or on instruments relating to the business of a company or an international limited partnership. No BVI estate, inheritance, succession tax or other charge is payable by persons not resident in the BVI with respect to any shares of a company or an interest in an international limited partnership.

The fund will not be required to withhold taxes under BVI law with respect to distributions made to investors.

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

Would non-resident investors in an LBO fund be subject to taxation or return-filing requirements in your jurisdiction?

Non-resident investors in a BVI LBO fund would not be subject to taxation or return filing requirements under BVI law.

**16 Local tax authority ruling**

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

It would not be necessary for the fund to obtain any such opinion under BVI law.

**17 Organisational taxes**

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

There are no organisational taxes to be paid under BVI law with respect to the organisation of an LBO fund under BVI law.

**18 Special tax considerations**

Please describe briefly what special tax considerations, if any, apply with respect to an LBO fund's sponsor.

No special tax considerations will apply with respect to an LBO fund's sponsor under BVI law.

**19 Tax treaties**

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

There is a tax information exchange agreement (TEIA) between the United States (US) and the United Kingdom (UK) including the BVI and the BVI recently signed TIEAs with the UK and Australia.

The TEIA with the US provides for the competent authorities in the US and the BVI to cooperate on the provision of information relating to the administration and enforcement of the domestic laws of the each jurisdiction concerning taxes and tax matters covered by the TEIA. Such information must be provided on request, in accordance with the requirements of the TEIA and without regard to whether the conduct being investigated would constitute a crime had it occurred in the territory of the requesting party.

The TEIAs between the BVI and the UK and Australia were signed in October 2008 and will enter into force upon each jurisdiction completing its legislative procedures. The TEIAs will enable the jurisdictions to request information relevant to a tax matter under investigation in order to enforce their domestic laws. In addition to the TEIAs, the BVI and the UK also signed an agreement for the avoidance of double taxation with respect to taxes on income which will benefit BVI and UK residents. The BVI and Australia also signed an agreement for the allocation of taxing rights with respect to certain income of individuals.

**20 Other significant tax issues**

Are there any other significant tax issues relating to LBO funds organised in your jurisdiction?

No.

**Selling restrictions and investors generally****21 Legal and regulatory restrictions**

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

Under current local law, there are no legal or regulatory restrictions under BVI law on the offering or sale of interests in a BVI constituted LBO fund including no restrictions or requirements with regard to the types of investors to whom the fund may be offered. There are currently no securities laws in the BVI and no laws that have any bearing on how and to whom the offering of interests in an LBO fund are made.

**22 Types of investor**

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

There are none.

**23 Identity of investors**

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in an LBO fund (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?

There are no ongoing filings with or notifications required to be made to the Commission with regard to the identity of investors in an LBO

**Update and trends**

There have been no significant developments in recent years in the laws of the BVI that have a bearing on private equity funds. However, new legislation in the form of the Securities and Investment Business Act is in the pipeline and due to come into force during 2009. The Securities and Investment Business Act is expected to supersede the Mutual Funds Act, encompass all existing mutual funds legislation and bring under regulation several financial activities that are currently unregulated under BVI law including the giving of investment advice, broker dealing activities, marketing and the securities market. The new legislation may possibly also have a bearing on private equity funds.

There is also a Regulatory Code due to come into force in 2009 which will impact primarily licensees under the Mutual Funds Act and other regulatory legislation but it will not have any impact on closed-ended funds as far as we are aware.

fund constituted under BVI law. If the LBO fund is a non-regulated fund under BVI law (that is, if it is a closed-ended fund), it would not be required to make any filings or notifications to the Commission upon a change of ownership, management or control of the LBO fund or its manager.

**24 Licences and registrations**

Does your jurisdiction require that the person offering interests in an LBO fund have any licences or registrations?

No.

**25 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 an LBO fund or the individual members of the sponsor.

A BVI constituted LBO fund will be subject to and must comply with the Anti-Money Laundering Regulations, 2008 (the Regulations) and the Anti-Money Laundering and Terrorist Financing Code of Practice 2008 (the Code of Practice). The fund must obtain verification of the identity of all persons subscribing for shares or interests in the LBO fund and confirmation of the source of any funds received by the fund from subscribers. The Regulations specify certain circumstances where full verification documentation on the identification of a subscriber may not be required, for example, where the subscriber is a 'regulated person' or a 'foreign regulated person' as defined in the Regulations but the exceptions will not apply where the fund or the person handling the transaction on behalf of the fund, knows or suspects that the subscriber is engaging in money laundering.

In terms of record keeping, the Regulations require the LBO fund to maintain a record of all transactions carried out by or on behalf of the fund (such as records sufficient to identify the source and recipient of payments from which investigating authorities will be able to compile an audit trail for suspected money laundering) and any reports made by it to the BVI Financial Investigations Agency (FIA) and all inquiries relating to money laundering received by it from the FIA.

**Exchange listing****26 Listing**

Are LBO 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?

There is no securities exchange in the BVI. BVI private equity funds can and frequently do list on securities exchanges in other jurisdictions including the Bermuda Stock Exchange, AIM and the Irish Stock Exchange.

**27 Restriction on transfers of interests**

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

As noted in question 26, there is no securities exchange in the BVI.

**Participation in LBO transactions****28 Legal and regulatory restrictions**

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

There are no legal or regulatory restrictions.

**29 Compensation and profit-sharing**

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.

There are no legal or regulatory issues under BVI law.

# APPLEBY

**Valerie Georges-Thomas**

**vthomas@applebyglobal.com**

No 56 Administration Drive  
Wickhams Cay 1  
Road Town  
Tortola  
British Virgin Islands

Tel: +1 284 494 4742  
Fax: +1 284 494 7279  
www.applebyglobal.com

# GETTING THE DEAL THROUGH

## Annual volumes published on:

Air Transport	Merger Control
Anti-Corruption Regulation	Mergers & Acquisitions
Arbitration	Mining
Banking Regulation	Oil Regulation
Cartel Regulation	Patents
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Equity
Dispute Resolution	Product Liability
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Environment	Restructuring & Insolvency
Franchise	Securities Finance
Gas Regulation	Shipping
Insurance & Reinsurance	Tax on Inbound Investment
Intellectual Property & Antitrust	Telecoms and Media
Labour & Employment	Trademarks
Licensing	Vertical Agreements

**For more information or to  
purchase books, please visit:**  
[www.GettingTheDealThrough.com](http://www.GettingTheDealThrough.com)



Strategic research partners of  
the ABA International section



THE QUEEN'S AWARDS  
FOR ENTERPRISE  
2006



The Official Research Partner of  
the International Bar Association