



Private Equity

in 33 jurisdictions worldwide

Contributing editor: Casey Cogut

2011



Published by
Getting The Deal Through
in association with:

Advokatfirmaet Steenstrup Stordrange DA
Advokatfirman Delphi
Appleby
Beiten Burkhardt
Borenus & Kemppinen
Bowman Gilfillan
Broseta Abogados
Carey Olsen
Dalgalarando, Romero & Cía Abogados
Esin Law Firm
Gilbert + Tobin
Gowling Lafleur Henderson LLP
HJM Asia Law & Co LLC
Homburger
Kennedy Van der Laan NV
Hamelink & Van den Tooren NV
Kromann Reumert
Latournerie Wolfrom & Associés
Lee & Ko
Lima Netto, Campos, Fialho, Canabrava Advogados
Loyens & Loeff Luxembourg
Lydian
Narasappa, Doraswamy & Raja
O'Melveny & Myers LLP
Proskauer Rose LLP
Salomon Partners
Simpson Thacher & Bartlett LLP
Slaughter and May
Wiesner & Asociados Ltda
WongPartnership LLP
Yangming Partners

Private Equity 2011

Contributing editor:

Casey Cogut
Simpson Thacher & Bartlett LLP

Business development managers

Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers

Ellie Notley
Sarah Walsh

Marketing assistants

Alice Hazard
William Bentley

Subscriptions manager

Nadine Radcliffe
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Nina Nowak

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Senior subeditor

Kathryn Smuland

Production editor

Anne Borthwick

Subeditors

Chloe Harries
Davet Hyland

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Private Equity 2011

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
2011

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 March 2011, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law

Business

Research

Global Overview Casey Cogut, William Curbow, Kathryn King Sudol and Atif Azher <i>Simpson Thacher & Bartlett LLP</i>	3
FUND FORMATION	
Australia Adam Laura & John Williamson-Noble <i>Gilbert + Tobin</i>	7
Bermuda Sarah Demerling (née Moule) <i>Appleby</i>	13
Brazil Luciano Fialho de Pinho, Clara Gazzinelli de Almeida Cruz and Bruno Ribeiro Carvalho <i>Lima Netto, Campos, Fialho, Canabrava Advogados</i>	21
British Virgin Islands Michael J Burns, Valerie Georges-Thomas, James McConvill and Christian Victory <i>Appleby</i>	28
Canada Myron B Dzulynsky, Vince F Imerti and Bryce A Kraeker <i>Gowling Lafleur Henderson LLP</i>	34
Cayman Islands Bryan Hunter and Richard Addlestone <i>Appleby</i>	40
Chile Felipe Dalgalarando H <i>Dalgalarando, Romero & Cía Abogados</i>	47
China Caroline Berube <i>HJM Asia Law & Co LLC</i>	54
Denmark Lisa Bo Larsen <i>Kromann Reumert</i>	61
England & Wales Bob Barry <i>Proskauer Rose LLP</i>	67
Finland Paulus Hidén and Sanna Lindqvist <i>Borenus & Kempainen</i>	75
Germany Thomas Sacher, Steffen Schniepp and Michael Hills <i>Beiten Burkhardt</i>	80
Guernsey Ben Morgan, Geoff Ward-Marshall and Emma Penney <i>Carey Olsen</i>	86
India Siddharth Raja and Chitra Raghavan <i>Narasappa, Doraswamy & Raja</i>	93
Jersey Robert Milner and James Mulholland <i>Carey Olsen</i>	101
Luxembourg Marc Meyers <i>Loyens & Loeff Luxembourg</i>	107
Netherlands Louis Bouchez, Floor Veltman and Maurits Bos <i>Kennedy Van der Laan NV</i> Jan van den Tooren and Reinier Noort <i>Hamelink & Van den Tooren NV</i>	115
Singapore Low Kah Keong <i>WongPartnership LLP</i>	122
Spain Julio Veloso and Javier Morera <i>Broseta Abogados</i>	127
Sweden Anders Lindström, Anders Björk and Peter Sjögren <i>Advokatfirman Delphi</i>	134
United States Thomas H Bell, Barrie B Covit, Jason A Herman, Jonathan A Karen, Glenn R Sarno and Michael W Wolitzer <i>Simpson Thacher & Bartlett LLP</i>	141
TRANSACTIONS	
Australia Peter Cook and Rachael Bassil <i>Gilbert + Tobin</i>	150
Belgium Peter De Ryck <i>Lydian</i>	157
Brazil Luciano Fialho de Pinho and Flávio Santana Cançado Ribeiro <i>Lima Netto, Campos, Fialho, Canabrava Advogados</i>	163
Canada Harold Chataway, Daniel Lacelle, Ian Macdonald and Jason A Saltzman <i>Gowling Lafleur Henderson LLP</i>	168
Cayman Islands Stephen James, Simon Raftopoulos and Samuel Banks <i>Appleby</i>	174
Chile Felipe Dalgalarando H <i>Dalgalarando, Romero & Cía Abogados</i>	178
China Caroline Berube <i>HJM Asia Law & Co LLC</i>	184
Colombia Mauricio Rodríguez and Eduardo A Wiesner <i>Wiesner & Asociados Ltda</i>	192
Denmark Bent Kemplar and Vagn Thorup <i>Kromann Reumert</i>	197
Finland Maria Carlsson, Andreas Doepel, Antti Hemmilä, Ari Kaarakainen, Sanna Lindqvist, Jukka Leskinen and Timo Seppälä <i>Borenus & Kempainen</i>	202
France Pierre Lafarge, Jean-Luc Marchand, Claire Langelier, Jennifer Sourisse and Maxime Boh-Masson <i>Latournerie Wolfrom & Associés</i>	208
Germany Thomas Sacher, Steffen Schniepp and Michael Hills <i>Beiten Burkhardt</i>	215
Hong Kong Benita Yu and Clara Choi <i>Slaughter and May</i>	220
India Siddharth Raja and Neela Badami <i>Narasappa, Doraswamy & Raja</i>	227
Indonesia Joel Hogarth <i>O'Melveny & Myers LLP</i>	234
Korea Je Won Lee and Geen Kim <i>Lee & Ko</i>	240
Netherlands Louis Bouchez, Fenna van Dijk, Floor Veltman and Maurits Bos <i>Kennedy Van der Laan NV</i> Jan van den Tooren and Reinier Noort <i>Hamelink & Van den Tooren NV</i>	245
Norway Robert Sveen and Odd Erik Johansen <i>Advokatfirmaet Steenstrup Stordrange DA</i>	252
Russia Anton Klyachin and Igor Kuznets <i>Salomon Partners</i>	257
Singapore Wai King Ng and Liam Kheng Tay <i>WongPartnership LLP</i>	262
South Africa Lele Modise and David Anderson <i>Bowman Gilfillan</i>	268
Spain Julio Veloso, Javier Morera and Juan Manuel Pérez <i>Broseta Abogados</i>	277
Sweden David Averstén, Michael Juhlin, Peter Sjögren, Clas Romander and Emma Dansbo <i>Advokatfirman Delphi</i>	283
Switzerland Dieter Gericke, Reto Heuberger and Jürg Frick <i>Homburger</i>	291
Taiwan Robert C Lee and Claire Wang <i>Yangming Partners</i>	297
Turkey Ismail G Esin <i>Esin Law Firm</i>	303
United States William Curbow, Kathryn King Sudol and Atif Azher <i>Simpson Thacher & Bartlett LLP</i>	309

Cayman Islands

Stephen James, Simon Raftopoulos and Samuel Banks

Appleby

1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction?

Private equity funds structured in the Cayman Islands invest in companies at various stages of their development as investors are attracted to the Cayman Islands' tax-neutral status, familiar common law legal system and sophisticated regulatory regime.

As a preferred private equity jurisdiction, commonplace transactions include:

- leveraged buyouts;
- mezzanine funds;
- private investments in public equities;
- fund organisations;
- recapitalisations;
- acquisitions; and
- divestitures.

Direct or synthetic secondary transactions have become increasingly common as they provide liquidity to private equity investors by allowing them to sell positions in private equity funds and liquidate stakes in private equities.

Although exempt Cayman companies are also used, the most commonly utilised structure for private equity funds is the Cayman Islands exempted limited partnership (ELP).

2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or become public companies?

Private equity funds seem to now accept that they will come under the scrutiny of the regulators sooner rather than later. As such, they are aligning their business and corporate governance with best practices expected by the regulators.

The rationale for going private or public is not usually driven by Cayman law concerns, and it is necessary to look at the details of each transaction individually. Obviously, private companies have less of a reporting burden, but public companies will have greater access to capital and liquidity.

3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What is the role of a special committee in such a transaction where members of the board are participating or have an interest in the transaction?

Directors of Cayman companies, in their capacity as agents, have certain duties of care, diligence and skill in addition to a fiduciary duty

to act honestly, bona fide and in the best interests of the company. A director need not exhibit in the performance of his or her duties a greater degree of skill than may reasonably be expected from a person of his or her knowledge and experience. The test is partly objective (the standard of the reasonable person) and partly subjective (the reasonable person is deemed to have the knowledge and experience of the particular director). A director is therefore not expected to exercise skill that he or she does not possess.

Decisions of English courts (which will be of persuasive effect in the Cayman Islands) have held directors to be under a duty to act in good faith when giving shareholders advice whether to accept a takeover offer for their shares, whether as members of the board or a special committee. The directors are under no obligation to give such advice; but if they do, the advice should not be given for their own improper reasons.

In determining what is meant by 'the company' when assessing to whom the directors owe the duty, this is normally interpreted to mean the company as a separate legal entity in addition to the shareholders of the company when considered as a whole, both present and future. It may also be that as a company approaches insolvency, the duty of the directors may be extended to include a consideration of the interests of the creditors as well.

There is a general rule that directors are required not to put themselves into a position where there is a conflict (actual or potential) between their personal interests and their duties to the company or between their duty to the company and a duty owed to another person. Special committees comprising directors and management independent of the transaction under consideration are able to provide a more objective review and authorisation process. As such, governing boards often delegate their authority to approve and consummate the transaction to these special committees in order to protect themselves from any allegations of conflict or unjust enrichment.

4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

No specific legal issues arise in connection with disclosure issues in going-private transactions, other than the obligation on the directors to discharge their fiduciary duty as noted in question 3.

5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

There are no specific timing considerations for a going-private or other private equity transaction other than those concerning business combinations (ie, restructuring, buyout, merger or consolidation) discussed below.

In transactions involving Cayman companies, there are squeeze-out provisions permitted by the Companies Law (as defined below).

Where the holders of not less than 90 per cent in value of the shares affected have approved the transaction, the transferee company may, at any time within two months after the expiration of four months from the date of the offer, give notice to any dissenting shareholder that it desires to acquire such shares from the dissenting shareholder and where such notice is given the transferee company shall, within one month from the date on which the notice was given, be entitled and bound to acquire such shares on the same terms of the scheme or contract as per the approving shareholders. Note that the minority or dissenting shareholder may, within one month from the date it receives notice, make an application to court should it seek to oppose the sale of its shares.

The Companies Law (2010 Revision) permits Delaware-style mergers and consolidations between Cayman companies and as between Cayman companies and foreign companies provided the surviving company is a Cayman Islands company. Proposed changes to the Companies Law are expected to permit such mergers where the surviving company is a foreign entity.

6 Purchase agreements

What purchase agreement provisions are specific to private equity transactions?

Besides the standard terms contained in these types of purchase agreements, we have begun to notice an increasing emphasis on the following provisions:

- scope of representations and warranties;
- indemnification clauses (these have become much wider);
- financial covenants (these are now being looked at with increasing scrutiny);
- fees (the issue of fees, whether reverse-breakup fees or commissions, have also become the subject of complex and substantive negotiations); and
- conditions precedent to final completion.

7 Participation of target company management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues?

The directors may participate and become a part of a compensation-based structure provided:

- any conflict of interest is disclosed;
- they are not placed in a position where they could be seen to be breaching their fiduciary duties to the company; and
- there are no circumstances giving rise to unjust enrichment.

Under Cayman law, directors are required not to put themselves in a position where there is a conflict (actual or potential) between their personal interests and their duties to the company or between their duty to the company and a duty owed to another person. At common law, however, and therefore in Cayman, the company is at liberty to waive completely the rules protecting it as principal in dealings in which the directors have an interest. Most private Cayman companies have articles of association that allow directors to attend, be counted in the quorum and usually also to vote on transactions in which they have an interest so long as their interest is disclosed. There are no statutory disclosure requirements. Generally, however, directors may not use the company's assets, opportunities or information for their own personal profit. There are no statutory or regulatory restrictions or disclosure requirements in relation to principal executive compensation issues under Cayman law.

Update and trends

The Cayman Islands continues to experience a relative boom in private equity transactions due to buyers having large amounts of cash on balance sheets and targets carrying relatively low valuations as a result of depressed economic activity. Whereas in recent years potential target companies were holding out for pre-crisis valuations and potential buyers were looking for distressed deals, more recently the buy side and sell side have come closer together, resulting in more transactions getting across the line.

Mergers and acquisitions are viewed as a way for companies to immediately enhance revenues and competitiveness. As commodity prices rise, natural resource and energy sector companies continue to be extremely attractive targets for private equity transactions.

8 Tax issues

What are the basic tax issues involved in private equity transactions? Give details regarding the tax status of a target, deductibility of interest based on the form of financing and tax issues related to executive compensation. Can share acquisitions be classified as asset acquisitions for tax purposes?

There are no tax issues in the Cayman Islands. As a matter of law, currently no tax is payable by any exempt company or ELP on any share issues, acquisitions and dispositions or based on income or capital gain.

9 Existing indebtedness

What issues are raised by existing indebtedness at a potential target of a private equity transaction? How can these issues be resolved?

In addressing this indebtedness, there is no concept of 'unlawful financial assistance' under Cayman law where the target is a Cayman company that would impact on the target's capacity to assist in this regard. This negates the need for a complicated 'whitewash' procedure.

10 Debt financing structures

What types of debt are used to finance going-private or private equity transactions? Do margin loan restrictions affect the debt financing structure of these transactions? Are there any other restrictions in your jurisdiction on the use of debt financing for private equity transactions?

There are no Cayman-specific issues that arise in relation to the nature of debt used to finance these transactions. That being said, although not a specific issue under Cayman law, the types of debt financing in private equity transactions generally involve secured senior and mezzanine debt. Sometimes, the debt granted to the private equity firm will be in the form of loaned stock or PIK (payment-in-kind) notes. Larger private equity transactions will generally involve syndicated debt. There are no regulatory restrictions under Cayman Islands law on the use of debt financing for private equity transactions.

11 Debt and equity financing provisions

What provisions relating to debt and equity financing are typically found in a going-private transaction? What other documents set out the expected financing?

It is commonplace to utilise the standard-form generic provisions and no special considerations need to be taken in relation to these documents under Cayman law.

12 Fraudulent conveyance and other bankruptcy issues

Do private equity transactions involving leverage raise 'fraudulent conveyance' or other bankruptcy issues? How are these issues typically handled in a going-private transaction?

Under the new provisions of the Companies Law, which came into effect on 1 March 2009, every disposition of property by the company at an undervalue (ie, either for no consideration or for significantly less than the value of the relevant property) with intent to defraud its creditors shall be voidable at the instance of the liquidator. The burden of establishing an intent to defraud lies with the liquidator and any action to unwind such a disposition must be brought within six years of the disposition. The Cayman Islands courts do not take into account contingent and prospective liabilities and the test for solvency of a Cayman company is whether or not, on a cashflow test, the company is able to pay its debts.

13 Shareholders' agreements

What are the key provisions in shareholders' agreements covering minority investments or investments made by two or more private equity firms?

Shareholders' agreements (that also include the company as a party afford all shareholders enforcement rights as against other shareholders and the company. This alleviates the necessity of having to rely on the company to enforce rights pursuant to the constitutional documents or on derivative actions in the face of inactivity by the company.

Due to the limited protection afforded to minority shareholders under Cayman law, the terms of the shareholders' agreement (although usually generic and consistent with the expectations of a US or UK law document) should also contain minority rights clauses (eg, rights to information, to appoint or remove directors, to provide tag-along or drag-along provisions, pre-emption rights on new share issues and transfer of existing shares) to ensure adequate protection for such shareholders.

14 Limitations on transaction size

Do private equity firms have limitations on the size of transactions they may engage in?

No. Recent transactions have extended into the billions of dollars.

15 Exit strategies and investment horizons

How do the exit strategies and investment horizons of private equity firms affect the structuring and negotiation of leveraged buyout transactions?

Although Cayman law is of no direct application, exit strategy and investment horizons are key considerations for private equity firms in leveraged buyout transactions and, accordingly, these provisions are carefully and comprehensively included in all transaction documents. Whether a clearly defined hard exit date or fulfilment of conditions to exit is reflected in the documents depends on the terms of each specific transaction.

16 Principal accounting considerations

What are some of the principal accounting considerations for private equity transactions?

The accounting treatment afforded to these transactions is a matter that is usually decided on by the relevant auditors using GAAP best practices and no specific points of Cayman law are therefore relevant. As there are no Cayman GAAP, international, US, UK and Canadian GAAP are specifically utilised according to the genesis of the underlying transaction.

17 Target companies and industries

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

Cayman law has no direct application here. Companies of all manner and all industries incorporated in the Cayman Islands have become target companies, including oil and gas, renewable energy, software, natural resources, biotech and manufacturing, to name but a small sample. There are no industry-specific regulatory schemes that limit the potential targets of private equity firms.

18 Cross-border transactions

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

Cayman companies can merge with foreign companies provided the surviving entity continues as a Cayman company. Cayman

APPLEBY

Stephen James
Simon Raftopoulos
Samuel Banks

ssjames@applebyglobal.com
sraftopoulos@applebyglobal.com
sbanks@applebyglobal.com

Clifton House, 75 Fort Street
PO Box 190
Grand Cayman KY1-1104
Cayman Islands

Tel: +1 345 949 4900
Fax: +1 345 949 4901
www.applebyglobal.com

companies cannot currently merge with a foreign company if the surviving entity continues existence as a foreign company. However, pending changes to the Cayman Islands' Companies Law are expected to allow such mergers.

There are no financial assistance restrictions applicable in the Cayman Islands and therefore, save for the merger restrictions described above, no specific structuring issues arise in respect of cross-border going-private or private equity transactions as a matter of law.

19 Club and group deals

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

Cayman law has no direct application here other than the necessity of securing waivers of conflicts from each participant in favour of the Cayman firm acting for the syndicate. Typically, each participant is advised by its own onshore counsel in the negotiation and review of the transaction materials.

20 Issues related to certainty of closing

What are the key issues that arise between a seller and a private equity buyer related to certainty of closing? How are these issues typically resolved?

There is a greater focus on delayed payment of compensation and consideration with lengthy periods between execution and actual closing in order to satisfy conditions subsequent. Payouts are being made subject to expiration of escrow periods or achievement of performance targets in an effort to alleviate risk. Termination fees in the form of liquidated damages continue to increase due to the high costs incurred by both parties in the context of a transaction.

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
Climate Regulation	Pharmaceutical Antitrust
Construction	Private Antitrust Litigation
Copyright	Private Equity
Corporate Governance	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Environment	Restructuring & Insolvency
Franchise	Right of Publicity
Gas Regulation	Securities Finance
Insurance & Reinsurance	Shipping
Intellectual Property & Antitrust	Tax on Inbound Investment
Labour & Employment	Telecoms and Media
Licensing	Trademarks
Life Sciences	Vertical Agreements

**For more information or to
purchase books, please visit:
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