

# Private equity in Guernsey: market and regulatory overview

David Crosland, Tony Lane, Emma Penney and Alex Mauger  
Carey Olsen

[global.practicallaw.com/7-564-8905](http://global.practicallaw.com/7-564-8905)

## MARKET OVERVIEW

### 1. How do private equity funds typically obtain their funding?

Investors typically comprise pension funds, insurance companies, funds of funds, sovereign wealth funds, endowments, supra-national investors, family offices and high net worth individuals, and come from a very broad geographic base.

### 2. What are the current major trends in the private equity market?

In the private equity industry at large there is increased transaction activity both on acquisitions and exits.

On the buy side there is a huge amount of committed capital to deploy. In addition, activity is being fuelled by solid debt markets and the emergence of alternative sources of credit in the form of debt funds, mezzanine funds and direct lending by large investors.

On the sell side, the IPO market remains positive (although less buoyant than last year) and funds are taking advantage by launching IPOs of their portfolio companies. Also, trade sales coming back as corporates look to spend cash piles amassed over the last few years.

There have been huge regulatory changes with the implementation of Directive 2011/61/EU on Alternative Investment Fund Managers (AIFMD) and the Volcker Rule, forcing a large scale restructuring of many managers and funds.

### 3. What has been the level of private equity activity in recent years?

#### Fundraising

The fundraising market has been very positive in the last 12 months, with a number of new entrants to the market successfully raising maiden funds and established managers raising successor funds. We continue to see an increase in the number of clients looking to structure their funds offshore following the introduction of the AIFMD and the UK's Partnerships (Accounts) Regulations.

Statistics from the Guernsey Financial Services Commission (GFSC) show that the net asset value of total funds under

management and administration has increased to GB£224.8 billion (at September 2015).

#### Investment

Guernsey's economy is dominated by the funds and financial services industry. Guernsey's experience dates back to the early 1980s when private equity funds were in their infancy. We have seen a number of local businesses reach a size that brings them into scope for potential investments by private equity funds. Therefore, there have been a number of transactions particularly in the fund administration and fiduciary sectors.

#### Transactions

At the end of 2009 Intertrust Group (one of the world's largest trust and corporate management services firms) was sold to a Dutch investor, Waterland Private Equity Investment. At the end of 2012, Intertrust Group was acquired from Waterland by Blackstone, one of the world's largest private equity firms.

Silverfleet Capital acquired Guernsey based firm Ipes, that provides third party fund administration services, for GB£50m in April 2013. Offshore firm Ogier sold its fiduciary business in a management buyout backed by private equity company Electra Partners at the beginning of 2014.

#### Exits

Private equity investment into Guernsey is still in its infancy and therefore there has not been much exit activity. The buyout of Intertrust and Ipes (from RJD Partners) were secondary transactions, while BV Investment Partners exited the Butterfield Fulcrum Group through a trade sale. There has not yet been an IPO of a local Guernsey business.

## REFORM

### 4. What recent reforms or proposals for reform affect private equity in your jurisdiction?

#### Partnerships

**Limited liability partnerships.** In response to increasing demand for limited liability partnership structures in Guernsey, and following the successful adoption of these structures in other jurisdictions, the Limited Liability Partnerships (Guernsey) Law, 2013 (LLP Law) came into force on 13 May 2014.

**Limited partnerships.** The Limited Partnerships (Guernsey) Law 1995 (as amended) (LP Law) is expected to be revised during 2016, enabling further flexibility in the use of limited

partnerships. Some of the key proposals and recommendations are to:

- Allow a limited partnership to bear the same name as one of its limited partners (or a distinctive part of their name).
- Allow a limited partnership to elect to have separate legal personality during its lifetime.
- Permit the amalgamation, migration and consolidation of limited partnerships.
- Increase the activities that limited partners can undertake without losing the protection of limited liability.
- Introduce the concept of protected cell limited partnerships.

### Foundations

On 7 January 2013, the Foundations (Guernsey) Law 2012 (Foundations Law) came into force, that allows for the creation of Guernsey foundations. The Foundations Law is intended to reflect accepted civil law characteristics of foundations, but tailored for the requirements of Guernsey's clients.

### Companies

The Companies (Guernsey) Law 2008, as amended (Companies Law) introduced a modern and streamlined company law regime, and certain minor changes and improvements were implemented in 2014 and 2015 as a result of feedback from industry and legal professionals.

### AIFMD

With respect to the AIFMD, Guernsey currently operates a dual regime for locally based AIFMs (that is, an AIFMD compliant regime and a non-AIFMD regime). Promoters therefore have flexibility to choose an AIFMD-compliant structure (which can be helpful when marketing to European Investors) or a structure that is out of scope and which therefore does not have to comply with the requirements of the AIFMD.

There are two aspects of Guernsey's AIFMD regime:

- The AIFMD (Marketing) Rules 2013. The purpose of these rules is to ensure that Guernsey funds being marketed into the EEA meet the requirements of Articles 42 and 43 of the AIFMD, comply generally with the marketing requirements of the relevant EEA States, and require that the GFSC is notified of any marketing into an EEA State within 14 calendar days of commencement of the marketing.
- The AIFMD Rules 2013. These Rules provide that Guernsey AIFMs and depositaries may opt to comply with an AIFMD-equivalent regime. In particular, AIFMs may need to demonstrate compliance to those EEA States that may require non-EEA AIFMs to be subject to an AIFMD-equivalent regime in order to market under the private placement regime of the particular EEA state. It is hoped that the Rules will allow Guernsey AIFMs to avail themselves of an AIFMD passport when these passports become available to non-European Economic Area (EEA) AIFMs, which was anticipated to be from 2016 but is now anticipated to be later.

In addition, the two aspects of Guernsey's AIFMD regime will allow Guernsey AIFMs and Guernsey depositaries to offer services to both AIFs marketed under national private placement regimes and passported AIFs, when passporting is extended to non-EEA AIFMs and AIFs.

If passporting is extended to non-EEA AIFMs, Guernsey funds will continue to be capable of being marketed into the EEA under national private placement rules until at least 2018. In

this respect the GFSC has signed co-operation agreements with 27 EEA regulators.

## TAX INCENTIVE SCHEMES

### 5. What tax incentive or other schemes exist to encourage investment in unlisted companies? At whom are the incentives or schemes directed? What conditions must be met?

Guernsey has its own tax regime and does not levy any capital gains, inheritance or value added taxes. Income is taxed at 20% (after allowances) and an individual that is tax resident in Guernsey can elect to cap his tax liability for any year of charge at GB£220,000. In light of this benign tax environment there are no specific tax incentives or schemes with the particular objective of encouraging investment.

## FUND STRUCTURING

### 6. What legal structure(s) are most commonly used as a vehicle for private equity funds in your jurisdiction?

Guernsey limited partnerships are internationally recognised vehicles for private equity funds, with investors attracted by their tax transparent status. Unit trusts are used much less frequently. Similarly, limited companies are occasionally adopted, typically where a listing is desired.

Private equity funds are typically structured as closed-ended limited partnerships with another listed partnership or corporate entity appointed to act as its general partner. The general partner may or may not delegate certain of its investment management duties to a regulated investment manager. The fund must appoint a locally licensed administrator.

Some private equity funds are structured as closed-ended companies with a listing, but these structures are in the minority.

Corporate vehicles are usually used for hedge funds, although it is also possible to use limited partnerships. The Companies Law allows for a number of different forms of company, for example incorporated cell companies and protected cell companies. These are commonly used for hedge funds and are particularly useful for managers wishing to establish a number of sub-funds that share many similar features. In this way, the cells can each have different investment objectives, invest in different asset classes, or be hedged against different currencies. The statutory basis for the segregation between cells provides comfort to investors that each cell is properly ring-fenced.

### 7. Are these structures subject to entity level taxation, tax exempt or tax transparent (flow through structures) for domestic and foreign investors?

#### Companies and unit trusts

Companies and unit trusts registered or authorised as collective investment schemes by the GFSC are eligible to apply for exempt tax status (*see Question 5*). For tax resident companies, Guernsey operates a business tax regime referred to as "zero/ten". Under this scheme the general rate of tax is 0%. The 0% rate is applied to most Guernsey companies with the following exceptions:

- Rental income from Guernsey property: taxed at 20%.

- Income from Guernsey property development: taxed at 20%.
- Specific activities within the banking sector: taxed at 10%.
- Activities regulated by the Guernsey Competition and Regulatory Authority: taxed at 20%.
- Regulated insurance and fiduciaries activities: taxed at the intermediate rate of 10%.

### Limited partnerships

Guernsey limited partnerships are tax transparent for Guernsey tax purposes and are therefore not treated as taxable entities in Guernsey. This tax transparent status is internationally recognised. Under current Guernsey law, any income of a Guernsey limited partnership that is wholly derived from its international operations (as defined in the Income Tax (Guernsey) Law 1975, as amended (Income Tax Law)) and any interest paid to a limited partner, is not regarded as arising or accruing from a source in Guernsey in the hands of that limited partner if:

- Being an individual, he is not solely or principally tax resident in Guernsey.
- Being a company, it is not tax resident in Guernsey.

Accordingly, distributions received by partners from their interest in Guernsey limited partnerships are disregarded partnership income for the purposes of Guernsey tax law and practice. This is provided that the income does not arise from a business carried on by the limited partner in Guernsey through a permanent establishment situated in Guernsey. Tax is not deducted in Guernsey from these distributions, whether direct or by way of withholding.

Limited partners that are resident for tax purposes in Guernsey may be liable to tax in Guernsey on income derived from the operations of a private equity fund structured as a Guernsey limited partnership.

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### 8. What (if any) structures commonly used for private equity funds in other jurisdictions are regarded in your jurisdiction as being tax inefficient (whether by not being recognised as tax transparent or otherwise)? What alternative structures are typically used in these circumstances?

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Guernsey limited partnerships benefit from the same tax treatment as limited partnerships in other commonly used jurisdictions such as England, Delaware and the Cayman Islands. Funds structured as unit trusts and companies can apply for tax-exempt status under Guernsey law.

## FUND DURATION AND INVESTMENT OBJECTIVES

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### 9. What is the average duration of a private equity fund? What are the most common investment objectives of private equity funds?

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#### Duration

Private equity funds are typically structured with a term of ten to twelve years, with the possibility of extension with investor consent.

### Investment objectives

The funds typically target maximum capital appreciation, with investors receiving a preferred return of 8% before the manager begins receiving carried interest. Capital gains are driven by operational improvements at the portfolio company, much more than the financial engineering of several years ago.

## FUND REGULATION AND LICENSING

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### 10. Do a private equity fund's promoter, principals and manager require authorisation or other licences?

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New private equity promoters must be approved as promoters by the GFSC before establishing a fund, and the GFSC has a policy of selectivity with respect to these promoters.

Where a new promoter proposes to launch a collective investment scheme that will be fast tracked as a registered fund or a qualifying investor fund (QIF) (*see below*), the new promoter approval process is delegated to the fund's locally licensed administrator. The administrator warrants to the GFSC that the promoter meets its requirements as to fitness and propriety.

Any person or entity appointed to carry out specified restricted activities in or from within Guernsey in respect of a fund will need to be licensed by the GFSC under the Protection of Investors (Bailiwick of Guernsey) Law 1987, as amended (POI Law) before the relevant fund consent can be issued. The long-form application process relating to the issue of a licence under the POI Law usually takes from four to eight weeks. There is a fast-track application process available that will be processed by the GFSC with a view to the licence being provided within ten business days from receipt of the completed application. This is available for parties seeking to provide management services to a QIF or a registered fund (*see below*).

Directors appointed to an entity licensed under the POI Law must be pre-approved by the GFSC.

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### 11. Are private equity funds regulated as investment companies or otherwise and, if so, what are the consequences? Are there any exemptions?

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#### Regulation

Most Guernsey private equity funds will constitute closed-ended collective investment schemes for Guernsey purposes and therefore must be registered or authorised by the GFSC under the POI Law.

For registered funds, one application is submitted to the GFSC. The application includes copies of final or near final fund documents including:

- The offering memorandum.
- Constitutional documents and service provider agreements.
- Declarations from the fund's administrator that, among other things, it has performed sufficient due diligence to be satisfied that the promoter and the associated parties to the fund are fit and proper.

The application is processed by the GFSC within three business days.

For a closed-ended authorised fund, an application to the GFSC is necessary for consent under the Authorised Closed-Ended Investment Scheme Rules 2008. An authorised closed-

ended fund is authorised by the GFSC following a three stage application process, that usually takes four weeks.

An authorised fund can elect to be a QIF. A QIF is approved by the GFSC within a maximum period of three business days following receipt of the application documents. Only qualified investors are permitted to invest in a QIF. A qualified investor means a professional investor, an experienced investor or a knowledgeable employee. Each is defined in the GFSC's Qualifying Investor Funds guidance note.

### Exemptions

There are no express exemptions available. However, the GFSC applies the following criteria in determining whether or not an entity is a collective investment scheme:

- Pooling of contributions of investors.
- Third party management of the portfolio assets.
- Spread of risk.

If any of these features is lacking, the structure may not be regarded as a collective investment scheme. For example, carried interest, executive co-investment schemes and single investor structures typically fall out of scope. Joint venture and club arrangements can also fall outside if it can be shown that there is no true pooling of investor monies. Vehicles formed to acquire a single asset are not treated as funds due to a lack of spread of risk.

## 12. Are there any restrictions on investors in private equity funds?

The following restrictions apply:

- Authorised closed-ended funds: there are no restrictions.
- Funds authorised using the fast-track QIF application process: qualified investors only.
- Registered closed-ended funds: there are no restrictions on the type of investor, and marketing to the public in Guernsey is permitted subject to the laws and regulations governing the promotion of such funds. These funds can be offered to regulated entities in Guernsey, or to the public in Guernsey by entities appropriately licensed by the GFSC without restriction.

Guernsey collective investment schemes that have obtained exempt tax status should monitor the level of Guernsey resident beneficial owners. This is because if they constitute a majority holding, the scheme's exempt tax status could be compromised.

## 13. Are there any statutory or other maximum or minimum investment periods, amounts or transfers of investments in private equity funds?

There are no statutory minimum or maximum investment periods. Equally there are no statutory restrictions on the transfer of interests in private equity funds (with transfers being governed by the constitutional documents of the fund). There are also no maximum or minimum investment sizes.

## INVESTOR PROTECTION

### 14. How is the relationship between the investor and the fund governed? What protections do investors in the fund typically seek?

The relationship between investors and the fund is governed by the fund's constitutional documents (typically the limited partnership agreement, articles of incorporation or unit trust instrument). To supplement these agreements, investors commonly seek bespoke provisions in a side letter.

In private equity funds, investors typically negotiate a number of different protections, including:

- Clearly defined investment objectives and limits.
- Key man suspension events.
- The ability to remove the general partner with or without cause.
- The approval of any conflicts of interest by the limited partner advisory committee.

## INTERESTS IN PORTFOLIO COMPANIES

### 15. What forms of equity and debt interest are commonly taken by a private equity fund in a portfolio company? Are there any restrictions on the issue or transfer of shares by law? Do any withholding taxes or capital gains taxes apply?

#### Most common form

Due to Guernsey's benign tax environment and flexible company and partnership laws, private equity funds investing into Guernsey are given almost complete flexibility to structure their deal.

The absence of any capitalisation rules or withholding tax regime means that the deal structuring is driven by external tax factors. There has been extensive use of equity including:

- Ordinary and preference shares.
- Convertible securities.
- Payment in kind (PIK) notes.
- Other debt instruments, senior and mezzanine facilities and other sources of credit.

#### Other forms

Shareholder loans are still commonly used and high yield bonds have become increasingly attractive. In particular, quoted Eurobonds are often used to avoid UK withholding tax on interest and appear to be a tried and tested structure for partly debt funded private equity acquisition vehicles with a low risk of HMRC challenge. The Channel Islands Stock Exchange (CISX) is often used to list Eurobonds due to the reduced documentation, administration and flexibility of that stock exchange.

#### Restrictions

Directors of a Guernsey company can issue shares provided they are permitted to do so by the company's memorandum or articles, or by way of resolution of the company (*Companies Law*).

Shares in a Guernsey company are transferable in the manner prescribed by its memorandum and articles, which may or may not contain restrictions.



The Companies Law does not provide any statutory rights of pre-emption on the issue or transfer of shares.

### Taxes

Guernsey currently does not levy taxes on capital inheritances, capital gains, gifts, sales or turnover (unless the varying of investments and the turning of these investments to account is a business or part of a business). In addition, there are no estate duties (apart from registration fees and *ad valorem* duty for a Guernsey Grant of Representation where the deceased dies leaving assets in Guernsey which require presentation of such a grant).

No stamp duty is chargeable in Guernsey on the issue, transfer, disposal or redemption of shares.

Provided a company maintains exempt tax status, shareholders who are not resident in Guernsey, Alderney or Herm for tax purposes can receive distributions from a Guernsey company without deduction of Guernsey income tax and the company is also not required to withhold Guernsey tax on these distributions.

Shareholders who are resident for tax purposes in Guernsey (which includes Alderney and Herm) will incur Guernsey income tax at the applicable rate on a distribution paid to them. The company will be required to provide the Director of Income Tax in Guernsey with such particulars relating to any distribution paid to Guernsey resident shareholders as the Director of Income Tax may require.

### BUYOUTS

#### 16. Is it common for buyouts of private companies to take place by auction? If so, which legislation and rules apply?

Sellers typically use an auction process where potential buyers are likely to be private equity funds, rather than trade buyers. Guernsey's involvement in the private equity industry largely relates to the establishment and operation of the private equity fund, rather than the buyout transaction itself. In general, Guernsey private equity funds acquire companies in other jurisdictions, meaning that the laws and regulations of that other jurisdiction apply to the buyout transaction. If a privately owned and unregulated Guernsey company is the target of the buyout, there are no specific local laws or rules which would govern the buyout process.

#### 17. Are buyouts of listed companies (public-to-private transactions) common? If so, which legislation and rules apply?

Public-to-private transactions are reasonably common, particularly for companies that have found it difficult to raise capital in recent years and for which a listing may no longer be suitable. The applicable legislation depends on the jurisdiction of the target company. If the target company is a listed Guernsey company, the City Code on Takeovers and Mergers would be likely to apply and govern the process of the offer.

#### Principal documentation

#### 18. What are the principal documents produced in a buyout?

Most buyouts by Guernsey private equity funds do not involve a Guernsey target. The principal documents reflect the legal or

commercial requirements of the private equity fund's deal team, or the target's jurisdiction.

#### Buyer protection

#### 19. What forms of contractual buyer protection do private equity funds commonly request from sellers and/or management? Are these contractual protections different for buyouts of listed companies (public-to-private transactions)?

The terms of the buyout are rarely determined by Guernsey considerations as the target company is usually located in another jurisdiction. While private equity buyouts of Guernsey companies do occur, these are not sufficiently frequent to allow local trends to develop. As a result, the deal terms usually follow the practice of the private equity fund's deal team, or the target's jurisdiction. Buyer protection measures are not permitted for buyouts of listed companies governed by the City Code on Takeovers and Mergers.

#### 20. What non-contractual duties do the portfolio company managers owe and to whom?

Non-contractual duties arise under the portfolio company's local law. Most buyouts by Guernsey private equity funds do not involve a Guernsey target. If a Guernsey company is the target, the directors and some senior employees of the target owe fiduciary duties to that company (including as to confidentiality) as a matter of common law. All employees owe an implied duty of trust and confidence in relation to the employment relationship. The consent of the portfolio company's board of directors should be obtained before confidential information is provided to the private equity fund or possible investors.

#### 21. What terms of employment are typically imposed on management by the private equity investor in an MBO?

Private equity backed MBOs involving Guernsey employees are extremely rare and there are no typical terms in the local market.

#### 22. What measures are commonly used to give a private equity fund a level of management control over the activities of the portfolio company? Are such protections more likely to be given in the shareholders' agreement or company governance documents?

Most buyouts by Guernsey private equity funds do not involve a Guernsey target. The management control measures adopted reflect the legal or commercial requirements of the private equity fund's deal team, or the target's jurisdiction. Typically, the minimum requirements include board representation and the right to receive detailed management information. It is common for there to be specified reserved matters, being material actions that can only be taken with shareholder approval.

## DEBT FINANCING

### 23. What percentage of finance is typically provided by debt and what form does that debt financing usually take?

The proportion of the acquisition price comprised of debt varies from deal to deal, although it has been increasing as banks return to the lending market and new sources of credit appear. In particular, a raft of senior loan and mezzanine debt fund launches have provided alternative sources of finance. Debt capital markets have also been buoyant and high yield bonds have formed an important part of acquisition finance in the past 12 months.

Despite this, senior bank debt still provides the majority of debt finance.

#### Lender protection

### 24. What forms of protection do debt providers typically use to protect their investments?

#### Security

The primary form of lending to private equity funds is in the form of short term bridge or "capital call" facilities where funds are drawn down pending receipt of commitments from investors. Historically the bank has taken security over the fund's bank account and an assignment of the general partner's call rights. In recent years there has been a shift such that many lenders are now willing to accept a mere irrevocable power of attorney from the general partner, granting it authority to issue drawdowns to limited partners on a default event.

Guernsey companies are often used as holding structures and, where leverage is applied in the structure the Guernsey companies often provide security by way of:

- Guarantee.
- First ranking share charge over the shares of any subsidiaries.
- Security over any bank account they may hold.

#### Contractual and structural mechanisms

Contractual subordination is common under Guernsey law. It is usually achieved by entering into a subordination agreement or an inter-creditor agreement.

An agreement between a Guernsey company and any of its creditors as to the subordination of the debts due to that creditor to the debts due to the company's other creditors is recognised in the liquidation of a Guernsey company (*section 419(1)(c), Companies Law*).

#### Financial assistance

### 25. Are there rules preventing a company from giving financial assistance for the purpose of assisting a purchase of shares in the company? If so, how does this affect the ability of a target company in a buyout to give security to lenders? Are there exemptions and, if so, which are most commonly used in the context of private equity transactions?

Financial assistance is lawful in Guernsey provided that the directors of the Guernsey company giving the financial assistance certify, among other things, that the Guernsey

company will, immediately after giving the financial assistance, satisfy the solvency test prescribed by the Companies Law. Broadly speaking, this test provides that the company must be able to pay its debts as they become due and that the value of its assets is greater than the value of its liabilities.

#### Insolvent liquidation

### 26. What is the order of priority on insolvent liquidation?

#### Partnerships

On the dissolution of a limited partnership, the assets of the partnership are distributed in the following order (*section 32, LP Law*):

- To creditors other than partners, to the extent otherwise permitted by law, in satisfaction of partnership debts.
- To limited partners who are creditors and who are not also general partners, to the extent otherwise permitted by law, in satisfaction of partnership debts other than debts described in the next bullet point.
- Subject to the provisions of the partnership agreement, to partners in the following order:
  - to limited partners for the return of their contributions or, where appropriate, for the release of their obligations to make contributions;
  - to limited partners for their share of the profits on their contributions;
  - to general partners other than for capital and profits;
  - to general partners in respect of capital;
  - to general partners in respect of profits.

#### Companies

On a Guernsey company's winding-up, the company's assets are realised and applied in satisfaction of the company's debts and liabilities *pari passu* (that is, proportionally). Any surplus is then distributed (subject to the company's articles of incorporation) to the members of the company.

This general rule is subject to any:

- Rule of law as to preferential payments.
- Agreements between the company and any creditor as to subordination.
- Agreement between the company and any creditor as to set-off.

The Preferred Debts (Guernsey) Law 1983 (as amended) ranks classes of debt that are paid in priority to all other debts in insolvency proceedings. These include:

- Any rents owing to a landlord by his tenant secured by goods subject to tacit hypothecation.
- Tax payable to the Guernsey authorities on a Guernsey employee's wages.
- A proportion of an employee's wages.
- Holiday pay.
- Unpaid income tax.
- Unpaid social security contributions.
- The costs of the liquidator in a winding-up.

Creditors with security interests are entitled to enforce their security interest outside of the insolvency of the company, and therefore their claims are satisfied in priority to other claims.

If the secured party or its nominee is not registered as the holder of the collateral, the secured party's priority is preserved when any insolvency proceedings begin in Guernsey against the debtor. However, if Guernsey law applies, title to the collateral may vest in the relevant insolvency officer for the purposes of realisation of the collateral.

Where a security interest is created in the collateral (including registration of the secured party or its nominee as registered holder of the collateral), the Royal Court has the power in *désastre* proceedings to both:

- Vest the secured party's rights in the arresting creditor.
- Direct that the collateral secured by the security agreement is sold or applied by HM Sheriff in the following order:
  - payment of the costs and expenses of the sale;
  - discharge of any prior security interest;
  - discharge of all monies properly due to the secured party;
  - payment, in priority order, of any other secured parties;
  - if any balance remains, payment to the debtor or other appropriate person in the event of the debtor's insolvency.

In relation to security over real estate, the first in time of registration prevails. Bonds registered on the same day have equal priority.

In relation to security over intangible movable property, priority between security interests in the same collateral is determined by the order of creation of those security interests (*Security Interests Law*).

### Equity appreciation

#### 27. Can a debt holder achieve equity appreciation through conversion features such as rights, warrants or options?

Guernsey companies can, subject to any restrictions in their constitutional documents or other agreements binding on the company, grant rights to subscribe for or to convert any security (including debt securities) into shares. This is subject to the directors having authority to issue shares as required by the Companies Law.

## PORTFOLIO COMPANY MANAGEMENT

#### 28. What management incentives are most commonly used to encourage portfolio company management to produce healthy income returns and facilitate a successful exit from a private equity transaction?

The terms of management incentives within the portfolio company are rarely determined by Guernsey considerations as the portfolio company, and its management, is usually located in another jurisdiction. As a result, the deal terms usually follow the practice or requirements of the private equity fund's deal team, or the practice in the portfolio company's jurisdiction.

#### 29. Are any tax reliefs or incentives available to portfolio company managers investing in their company?

The tax regime that is applicable to portfolio company managers depends on the tax residency of those managers and it is highly unlikely that these managers will be tax resident in Guernsey. If any of these managers are tax resident in Guernsey, the absence of capital gains tax provides structuring opportunities.

#### 30. Are there any restrictions on dividends, interest payments and other payments by a portfolio company to its investors?

##### Companies

There are no restrictions on returning capital to shareholders, provided that the company is solvent. A Guernsey company can pay distributions and dividends out of any source (not merely from profits available for distribution) provided that the company is able to satisfy the requirements of the solvency test under the Companies Law.

##### Limited partnerships

There are no restrictions on returning capital to limited partners, provided that the limited partnership is solvent. The return of capital can be clawed back within one year of the distribution if the partnership either:

- Is insolvent immediately following the payment.
- Becomes insolvent within six months of the payment.

#### 31. What anti-corruption/anti-bribery protections are typically included in investment documents? What local law penalties apply to fund executives who are directors if the portfolio company or its agents are found guilty under applicable anti-corruption or anti-bribery laws?

It is an offence for a person or their agent to corruptly accept or obtain (or attempt to give or obtain) any gift as a reward for (or an inducement to) doing any act or making any omission in relation to his office or position, or his principal's affairs or business (*Prevention of Corruption (Bailiwick of Guernsey) Law 2003, as amended (Corruption Law)*). The Corruption Law applies the offence to any person in public office in any country.

It is an offence for a Guernsey person or company to do or omit to do anything in a country outside of Guernsey, if the act or omission would, if done in Guernsey, constitute an offence under the Corruption Law. Where a Guernsey company is found guilty of such an offence, the directors may also be found guilty, if the offence is proved to have been committed with their consent or connivance (or to be attributable to any neglect on their part).

Foreign enforcement agencies can attempt to prosecute Guernsey companies and their directors, if both:

- They are involved in bribery or corruption.
- They or the company have a link with that foreign jurisdiction.

In particular, the UK Bribery Act has implications for additional jurisdictions including the Channel Islands. This is because

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bribery offences that are committed outside the UK may be prosecuted in the UK if the person offering or accepting the bribe has a close connection to the UK (*Bribery Act*). A close connection includes being a British citizen, British Overseas Territories citizen or a British National. The Bribery Act also includes non-UK (that is, Guernsey and Jersey) companies and partnerships that carry on a business, or part of a business, in any part of the UK.

## EXIT STRATEGIES

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### **32. What forms of exit are typically used to realise a private equity fund's investment in a successful company? What are the relative advantages and disadvantages of each?**

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There are no Guernsey-specific issues in relation to exit. Please refer to *Question 32, Private equity in UK (England and Wales): market and regulatory overview*.

### **33. What forms of exit are typically used to end the private equity fund's investment in an**

### **unsuccessful/distressed company? What are the relative advantages and disadvantages of each?**

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There are no Guernsey-specific issues in relation to exit. Please refer to *Question 33, Private equity in UK (England and Wales): market and regulatory overview*.



## PRIVATE EQUITY/VENTURE CAPITAL ASSOCIATIONS

### The British Private Equity & Venture Capital Association (BVCA) - Channel Islands Working Group (CIWG)

**W** [www.bvca.co.uk](http://www.bvca.co.uk)

**Status.** BVCA - CIWG is a non-governmental organisation.

**Membership.** Comprises of senior professionals from the private equity and venture capital industry.

**Principal activities.** Seeks to enhance BVCA engagement with the Channel Islands community as well as advise the BVCA on strategy concerning issues that are specific to private equity funds in the Channel Islands.

**Published guidelines.** Not applicable.

**Information sources.** Not applicable.

### Channel Island Private Equity and Venture Capital Association (CIPEVCA)

**W** Not applicable.

**Status.** CIPEVCA is a non-governmental organisation.

**Membership.** Private equity firms having an established place of business in the Channel Islands.

**Principal activities.** A forum for discussion of common issues pertaining to the management of private equity funds in the Channel Islands.

**Published guidelines.** Not applicable.

**Information sources.** Not applicable.

### The Guernsey Investment Fund Association (GIFA)

**W** [www.gifa.org.gg](http://www.gifa.org.gg)

**Status.** The Guernsey Investment Fund Association (GIFA) was established in 1989 as a trade association to represent the Island's growing fund management industry.

**Membership.** Membership spans the whole spectrum of the Island's investment community, including fund managers, administrators, custodians, non-executive directors as well as professional firms such as lawyers and accountants who are closely involved in the work of the investment business industry.

**Principal activities.** GIFA represents Guernsey's growing fund management industry.

**Published guidelines.** Not applicable.

**Information sources.** Not applicable.

### Guernsey International Business Association (GIBA)

**W** [www.giba.gg](http://www.giba.gg)

**Status.** Guernsey International Business Association (GIBA) is the representative body of the financial services industry in Guernsey.

**Membership.** GIBA has a membership consisting of all the major financial institutions and professional firms in Guernsey.

**Principal activities.** GIBA has a governing Council comprising of representatives of all sectors of the industry, that meets on a monthly basis to discuss all current issues affecting the industry. GIBA representatives sit on sub-committees and working groups, working in consultation with States of Guernsey government committees and regulators on domestic and international issues relevant to the financial services industry. GIBA also maintains links with similar bodies in other jurisdictions in order to discuss matters of mutual international interest.

**Published guidelines.** Not applicable.

**Information sources.** Not applicable.

### Guernsey Finance

**W** [www.guernseyfinance.com](http://www.guernseyfinance.com)

**Status.** Guernsey Finance is a joint industry and government initiative to defend and promote the long term reputation, stability and development of Guernsey as an international centre of excellence for financial services.

**Membership.** The non-executive Board of Directors is made up of industry and Government representatives and is chaired by Jim Gilligan a non-executive Director.

**Principal activities.** Under the leadership of Fiona Le Poidevin, Chief Executive of Guernsey Finance, the agency ensures that the core values and competencies of the island's finance sector are accepted and respected by the international community, and that financial business development flows are enhanced.

**Published guidelines.** Guernsey Finance produces articles, fact sheets and reports in respect of banking, funds, insurance and private wealth.

**Information sources.** Not applicable.

## ONLINE RESOURCES

**Guernsey Financial Services Commission****W** [www.gfsc.gg](http://www.gfsc.gg)**Description.** The official website of the Guernsey Financial Services Commission. This website contains relevant legislation, rules, guidance and application forms. The website also provides access to the public register of regulated entities.**Royal Court of Guernsey****W** [www.guernseylegalresources.gg](http://www.guernseylegalresources.gg)**Description.** An official website maintained by the Royal Court of Guernsey and containing copies of legislation, both in its official original form and in unofficial consolidated form.

## Practical Law Contributor profiles

**David Crosland, Partner**

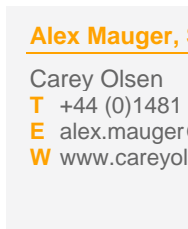
Carey Olsen

**T** +44 (0)1481 741556**E** [david.crosland@careyolsen.com](mailto:david.crosland@careyolsen.com)**W** [www.careyolsen.com](http://www.careyolsen.com)**Tony Lane, Senior Associate**

Carey Olsen

**T** +44 (0)1481 732086**E** [tony.lane@careyolsen.com](mailto:tony.lane@careyolsen.com)**W** [www.careyolsen.com](http://www.careyolsen.com)**Professional qualifications.** England and Wales, Solicitor, 2004; Advocate of the Royal Court of Guernsey, 2011**Areas of practice.** Corporate and commercial; investment funds and private equity; listing services; establishment of institutional closed-ended investment funds particularly private equity, real estate and infrastructure funds.**Professional qualifications.** England and Wales, Solicitor, 1998 (currently non-practising); Advocate of the Royal Court of Guernsey, 2010**Areas of practice.** Corporate and commercial; investment funds and private equity; listing services; mergers and acquisitions.**Emma Penney, Senior Associate**

Carey Olsen

**T** +44 (0)1481 732058**E** [emma.penney@careyolsen.com](mailto:emma.penney@careyolsen.com)**W** [www.careyolsen.com](http://www.careyolsen.com)**Alex Mauger, Senior Associate**

Carey Olsen

**T** +44 (0)1481 741520**E** [alex.mauger@careyolsen.com](mailto:alex.mauger@careyolsen.com)**W** [www.careyolsen.com](http://www.careyolsen.com)**Professional qualifications.** England and Wales, Solicitor, 2007**Areas of practice.** Corporate and commercial; investment funds and private equity; listing services; mergers and acquisitions; restructuring and insolvency; banking and finance.**Professional qualifications.** England and Wales, Solicitor, 2009**Areas of practice.** Corporate and commercial; investment funds and private equity; listing services; mergers and acquisitions; banking and finance.