Expert Guide

www.corporatelivewire.com

Investment Funds

January/February 2012

FMA ALFI AVCAL PwC Clifford Chance White & Case and more...

Corporate LiveWire

Chief Executive Officer
Osmaan Mahmood

Publisher and Editor in Chief
Jake Powers

Managing Director – De Luxe
Andrew Walsh

Art Director
Adeel Lone

Staff Writers
Mark Johnson
Ehan Kateb
Nasareo Lazzaro

Contributing organizations
The Fund Management Association (FMA) ¦ The Association of the Luxembourg Fund Industry (ALFI) ¦ Dillon Eustace ¦ CACEIS Investor Services ¦ PwC ¦ SGH Martineau ¦ Hassans International Law Firm ¦ Guernsey Finance ¦ Whitmill Trust Company Limited ¦ Skadden ¦ Clifford Chance ¦ Nixon Peabody ¦ White & Case ¦ The Australian Private Equity & Venture Capital Association Limited (AVCAL) ¦ Kanga & Co¦ Dezan Shira & Associate ¦

Marketing Manager
Sylvia Estrada

Production Manager
Sunil Kumar

Account Managers
Ibrahim Zulfqar
Norman Lee
Sarah Kent
Mark Parker

Accounts Assistant
Jenny Hunter

Editorial Enquiries
Editor@corporatelivewire.com

Advertising Enquiries
advertising@corporatelivewire.com

General Enquiries
info@corporatelivewire.com

Corporate LiveWire
27 Old Gloucester Street
London
WC1N 3AX
United Kingdom
Tel: +44 (0) 203 372 5741
Fax: +44 (0) 203 014 8511
www.corporatelivewire.com

Contents Page

Europe

North America

Global

Middle East

Asia/Australia

Directory

CORPORATE LiveWire

Introduction

By Jake Powers

It will come as little surprise that the current market conditions remain challenging. In reality, the next twelve months will ask some difficult questions of many companies in the market.

The recent trend in private equity has been a decrease in the level of capital raised. In fact, the global fundraising figures have been on the fall for a number of years and the aggregate capital raised in 2011 was almost fifty per cent down from the peak. Despite these findings, managers have reported good relationships with investors and some positive results and fundraising targets have been met.

In January 2011 the Institutional Limited Partners Association issued a revised version of the "Private Equity Principles". There are three significant guiding principles set out in the Guidelines; alignment of interest, governance and transparency. The Guidelines have not brought about a period of collective bargaining by LPs but the provisions suggested by the Guidelines have been extensively discussed in recent fund-raisings. Because of the current market conditions it is always difficult to assess the impact but as we see the economic situation progress they are sure have a stiff evaluation.

Italian firm BS Private Equity were removed from a private fund under 'no-fault divorce' provisions and were the first European fund manager to experience this. The procedure simply allows a majority of investors in the fund to agree to remove the general partner in circumstances where there has been no cause on the part of the general partner and to either terminate the fund or appoint a new general partner in its place. This action suggests that we will be seeing more examples of general partners being removed in these situations in the coming years.

Towards the end of 2011, the Council of the European Union released a progress report on the proposal for a Council Directive and Regulation on VAT in the insurance and financial services industries. This is proving to be a very difficult subject as it is an area where the majority of states are currently failing to agree on the appropriate way forward. The ultimate aim will be to have a greater level of consistency in the VAT treatment of fund management and could lead to all fund management services becoming exempt from VAT.

We have recently seen the introduction of an exemption from the tax consequences of the offshore funds rules for private equity funds. The government has brought in an exemption from tax changes under the offshore fund rules where the fund invests in trading companies or trading groups. This has come after concerns were raised that HMRC's interpretation of rules meant that a limited partnership combined with an offshore holding SPV might be caught. This is a change that many companies had been hoping for and discussing for some time and the introduction will come as a relief in many cases.

Last year we also witnessed a new range of anti-avoidance measures aimed at taxing employment income provided through third parties. The legislation is very broadly drafted and has created additional worries for UK managers because of the complexity of the rules. Further discussion around this area is ongoing and it is likely we will see further changes in this area.

On 16 November 2011 ESMA set out advice to the European Commission on implementing measures of the Alternative Investment Fund Managers Directive ("AIFMD"). The European Commission is now engaged in the process of preparing the implementing legislation with the assistance of ESMA's advice and measures should be adopted by the middle of this year.

We are expecting to see several regulatory developments which will affect institutional investors in private funds. The developments in Europe to regulatory capital and solvency rules are likely to make private equity and real estate fund commitments less attractive from the perspective of regulated investors.

We are expecting a number of tax developments throughout 2012 and most should improve the operation of regulated and listed funds. This suggests a particular direction of travel for HM Treasury, with significant improvements to the REIT and Investment Trust rules to make these regimes more attractive. As the AIFMD brings additional compliance burdens to the managers of unauthorised funds, and with the relaxation of rules on remittances for non-domiciled investors investing directly in certain shares, we would expect investment managers to be looking at all structuring options carefully.

The Finance Bill which we are to see introduced this year contains improvements to the tax regime for real estate investment trusts. Changes include the abolition of the 2% entry charge, the relaxation of the restrictions on what sorts of assets may be held in a REIT, allowing REITs to be listed on AIM and a relaxation of the requirement that the REIT's shares be widely held.

Finally, HM Treasury has launched a consultation to introduce a new tax transparent regulated open-ended fund. The primary purpose is intended for UCITS master funds with the aim of attracting more of this business to the UK. HM Treasury is particularly interested to know whether assets invested in unauthorised funds might, in the future, be held in these new vehicles particularly if, under the NURS and QIS regulatory regimes, the frequency of redemption dates is less than for regulated UCITS funds.

Professional Officers - a well-established regulated status in the Isle of Man

By Ita Mc Ardle

FMA ISLE OF MAN
FUNDMANAGEMENTASSOCIATION

A **IFMD** - Isle of Man assured and confident that it can be part of the structure from initiation.

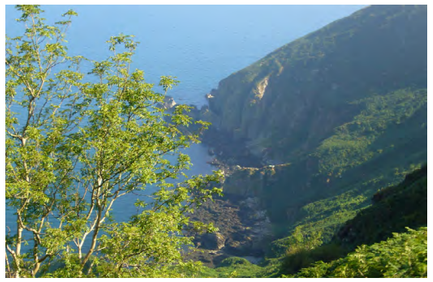
In the wake of the financial crisis that exploded from 2008 onwards and the effects of that on funds one issue has been the subject of harsh exposure. That is the corporate governance of funds suffering exposures and, more particularly, the acts or omissions of the directors of such funds. Differing concepts of ethics, probity and morality have been particularly explored in recent months as litigation has progressed in various affected jurisdictions.

Manifold "perfect frauds" which have involved complicit or, more usually, ill informed, boards have been revealed to have occurred including in onshore jurisdictions that tend to adopt moral high ground. "Madoff", "Petters", "subprime lending", lack of independence of custodians have become buzzwords of which we are all painfully aware. How governing bodies have coped with the challenges arising as a result has been at the forefront of discussion.

As all who have ever been involved in the drafting of funds' offering materials will testify, great efforts are made to provide for contingencies that have not been, and may not ever be, faced. While those were, at best, hypothetical and, at worst, improbable, the need to provide for them may have been practically dismissed. 2008 hit viciously and the improbable became reality and the hypothetical became fact.

Perceived wisdom was tested in different ways; would the funds' documents, having been dusted off, cope with the legal and insolvency situations being faced? More critically, did the boards have the capacity, resources and experience to deal with the situation?

In the funds industry, governing bodies most usually consist of non-executive directors ("NEDs") with the investment management being done by another party. One would expect that such NEDs would be "fit and proper" individuals i.e. skilled, ethically sound and morally competent. Regrettably, experience showed that this was often not the case. Many funds' NEDs proved to have little grasp of the affairs of the business, often by virtue of the number of boards on which they sat. In some situations, as was highlighted by the Weavering case in Cayman1 and subsequent press reportage, NEDs are often hopelessly ill equipped to act appropriately as NEDs or are NEDs of a staggering amount of companies. I regret to say that this latter scenario is a firmly established model in some offshore jurisdictions.



The Isle of Man ("IOM") has seen, and continues to see, steady growth in its financial services business including the funds sector and the independent custodian is a firlmly embedded obligation . The aim of the participants in this highly successful industry has been to provide quality business with a first class regulatory environment. Everyone involved has subscribed to that ethos, from industry and trade associations to government and regulator2. To that end, as early as 2000 individuals on the IOM holding more than 10 directorships of independent entities have been subject to regulation as "Professional Officers"3.

Application for a license to act as a Professional Officer involves inter alia assessment of fitness, propriety and experience and, following issue, leads to on-going regulatory compliance and reporting requirements and indemnity insurance maintenance. As a model, this regulation is, I believe, without compare in the offshore space, although some of IOM's competitor jurisdictions may now follow.

The FSC is now working on a comprehensive code of corporate governance for governing bodies that will consolidate the various IOM statutory and regulatory provisions as a best practice guide. This will be supported by codifying the criminal and enforcement regime for breach of current statutory obligations for governing bodies of Isle of Man companies. The FSC also maintains "Guidance on the responsibilities and duties of directors under the laws of the Isle of Man"1. This is mandatory reading for everyone acting as a Director in IOM.

All of the foregoing demonstrates the continuing strong stance that the IOM has always taken; quality over volume and discernment over post box. This stance has led to those prepared to act as directors and members of governing bodies taking their position very seriously, whether regulated as a Professional Officer or exempt. Capacity, in terms of ability and in absolute number of positions is a key consideration. The Isle of Man considers this a fundamental element of its continuing determination to be the thought leader in effective and efficient standards of corporate governance.

Isle of Man Funds has been working closely and consistently with the FSC, the government, AIMA and other external advisors to follow the development of the AIFMD. To say that it has been and continues to be a roller coaster is an understatement. The political motivations behind the conception of the creature have been much discussed. I suggest that the storm of 2008 that might have been said to have spawned the AIFMD may have been brought under control by market forces, for example leverage is now virtually non–existent, it is also true to say that the scapegoats, private equity and hedge funds, have now been shown not to have had any significant responsibility. We must all bear in mind that such funds are a tiny percentage of global financial services business and the overwhelming majority of them are based in the US. Their impact in Europe has been marginal at most.

AIMA representative Anna Larris spoke to a large audience of industry representatives and regulators on Wednesday 18 January at the Manx Museum in the IOM. The resulting comfort for all was that we in the Isle of Man are as up to speed and as engaged and well prepared as we can be bearing in mind that the directive is only at Level 2 in the Lamfalussy Structure that is being followed. The FSC has reaffirmed its commitment to the already drafted products which will be available to meet the final requirements.

This again showcases the Isle of Man at the forefront of measured and qualitative response to external challenges.

Ita Mc Ardle was appointed Chair of the Isle of Man Funds Association (formerly Isle of Man Fund Management Association "FMA")on 19 December 2010 . Isle of Man Funds was established 25 years ago to support and develop the Funds industry in the Isle of Man . It has a broadly based membership of 60 companies and individuals representing Administrators, Custodians, Managers, Lawyers, Accountants and Directors among others. Isle of Man Funds runs numerous events both for both continuing education of its members and to promote the Isle of Man based industry generally which include attendance at international conferences , hosting conferences and seminars in various jurisdictions and an annual lunch in London to which an invitation is highly prized. Ita can be contacted at ita@itamcardle.com.

Global Investment Fund Industry Hit by A Regulatory Tsunami

By Marc Saluzzi & Susanne Weismüller

Since the outset of the financial crisis, the financial services industry has been faced with a host of regulatory initiatives, which it has to analyse, comment on as part of consultation procedures and finally put into practice. The cumulative impact of various regulatory initiatives on the global investment fund industry is uncertain and should be analysed, in order to assess whether the design of effective regulation could lead to possible detrimental effects. This articles aims to highlight the most crucial initiatives, which are often referred to as a real regulatory tsunami.

Regulations for investment funds

The European legislative framework for **Undertakings for Collective Investment in Transferable Securities** (UCITS), i.e. funds that are mainly marketed to retail investors, was only revised in 2009. Although this revision made many changes that have not yet been introduced into national law in all EU member states, another legislative proposal is expected for mid-2012, which will introduce three further sub-topics for discussion. The first concerns the role and liability of depositaries with a view to protecting investors. The EU Commission wants to iron out the existing differences in the interpretation of depositary functions and bring the regulations in line with those of the **Alternative Investment Fund Managers Directive** (AIFMD).

The second topic proposes the introduction of appropriate remuneration for UCITS managers based on the provisions of the AIFMD and the Capital Requirements Directive (CRD). The third topic covers the idea of harmonising sanctioning regimes with a view to achieve a level playing field in the EU.

The AIFMD harmonises regulations for all investment funds and fund managers not subject to the UCITS Directive, and needs to be implemented into national law by mid of 2013. Along the lines of the European passport for UCITS funds, this directive includes the introduction of a passport for the cross-border sale of alternative investment funds without any specific approval procedures in the various countries in which they are sold. After a transition period, non-European funds or fund managers could also take advantage of this measure. Fund managers must register as managers of alternative investment funds by 2014.

The Dodd Frank financial market reform is the US equivalent to the European AIFMD. However, it may also affect current market practices regardless of the residency of the market players concerned. It establishes amongst other things a comprehensive regulatory framework for the U.S. over-the-counter derivatives markets, which will also impact non-U.S. swap market participants involved in these markets. Moreover, the so called Volcker rule will significantly limit the proprietary trading, hedge fund and private equity fund activities of investment managers that are affiliated with banking entities.

In December 2011, the European Commission published two further legislative proposals for investment funds, which aim to create a separate framework for **social entrepreneurship funds** on the one hand, and **venture capital funds** on the other hand. The new rules aim to facilitate the cross-border fundraising and investments by venture capital funds. Furthermore, the "European Social Entrepreneurship Funds" label is supposed investors to identify funds that focus on investing in European social businesses. Once the requirements defined in the proposal are met, managers of social investment funds would be able to market their funds across the whole of Europe.

Other regulatory measures

In addition to the initiatives described above, which apply directly to the fund sector, there are many other regulatory procedures that impact the entire financial services industry.

For example, the green paper on a European corporate governance framework established that **corporate governance** and social responsibility are fundamental factors in strengthening the confidence of citizens in the single market. Corporate governance covers procedures governing management and control of companies, and defines a host of relations between a company's executive management and board and its shareholders and other stakeholders. The European Commission is expected to publish a legislative proposal by July 2012.

PRIPs is an acronym standing for **packaged retail investment products** (e.g. certificates, equities and bonds). After a consultation procedure has been carried out, a parliamentary bill on this subject is expected to be passed at the beginning of 2012. The purpose of the bill is to standardise pre-contractual information for private investors in order to facilitate comparisons between individual products thereby helping investors make appropriate investment decisions.

The European fund industry is also currently busy with the proposed revision of the **Markets in Financial Instruments Directive** (MiFID), and the proposal for a regulation on markets in financial instruments which will amend the **Regulation on OTC derivatives, central counterparties and trade repositories** (EMIR).

The legislative process for EMIR has not yet been concluded. It aims at introducing a number of measures, including:
- A reporting obligation for OTC derivatives
- a clearing obligation for eligible OTC derivatives
- measures to reduce counterparty credit risk and operational risk for bilaterally cleared OTC derivatives
- common rules for central counterparties (CCPs) and for trade repositories
- rules on the establishment of interoperability between CCPs.

Taxation of investment funds

There is currently one main topic with regard to the taxation of investment funds, namely the introduction of a financial transaction tax (FTT), which is seen as compensation from the financial services industry for the national and international problems arising from the bank and government bailouts following the financial crisis. This tax would be charged on the value of all transfers of equities, bonds, fund units, currencies and derivatives.

Until now, EU member states have disagreed on the question of whether the taxation of financial transactions taking place solely in Europe would harm local financial centres and lead to the transfer of business to financial markets outside Europe. A consultation procedure carried out by the European Commission has already shown that it will be difficult to find a way for all parties involved to reach agreement.

From a global perspective, the Foreign Account Tax Compliance Act (FATCA) will have a big impact on financial institutions worldwide, including investment funds. FATCA is a US law and is designed to combat tax evasion by US citizens. The US government hopes to implement and apply its

tax regulations efficiently by imposing strict reporting requirements and a threatened 30% withholding tax for non-compliance. For its part, the financial services industry still hopes to mitigate the future changes in relation to the implementation rules, which have yet to be announced, by preparing extensive opinions on the issue.

There are many other regulatory measures that have to be followed by the different stakeholders (e.g. on short sales and credit default swaps, the Capital Requirements Directive, credit rating agencies, pensions and on the way insurance companies invest in investment funds), so that this article cannot be exhaustive, but aims at giving an overview on the most important upcoming changes. We can only say that it's more essential than ever before to keep up to date with current regulatory proposals, and see how this regulation impacts you and your customers. ALFI, for its part, produces analysis and opinion on the various proposals and lobbies regulators worldwide on behalf of its members.

The Association of the Luxembourg Fund Industry (ALFI) is the representative body of the Luxembourg investment fund community.

Created in 1988, the Association today represents over one thousand Luxembourg domiciled investment funds, asset management companies and a wide range of service providers such as depositary banks, fund administrators, transfer agents, distributors, legal firms, consultants, tax experts, auditors and accountants, specialist IT providers and communication companies.

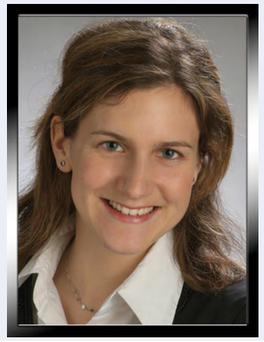
The Luxembourg Fund industry is the largest fund domicile in Europe and a worldwide leader in cross-border distribution of funds. Luxembourg-domiciled investment structures are distributed on a global basis in more than 60 countries with a particular focus on Europe, Asia, Latin America and the Middle East. The organization can be contacted at **+352 22 30 26 1** *or by email at* **info@alfi.lu**.

Mr Saluzzi is the Chairman of ALFI, the Association of the Luxembourg Fund Industry.

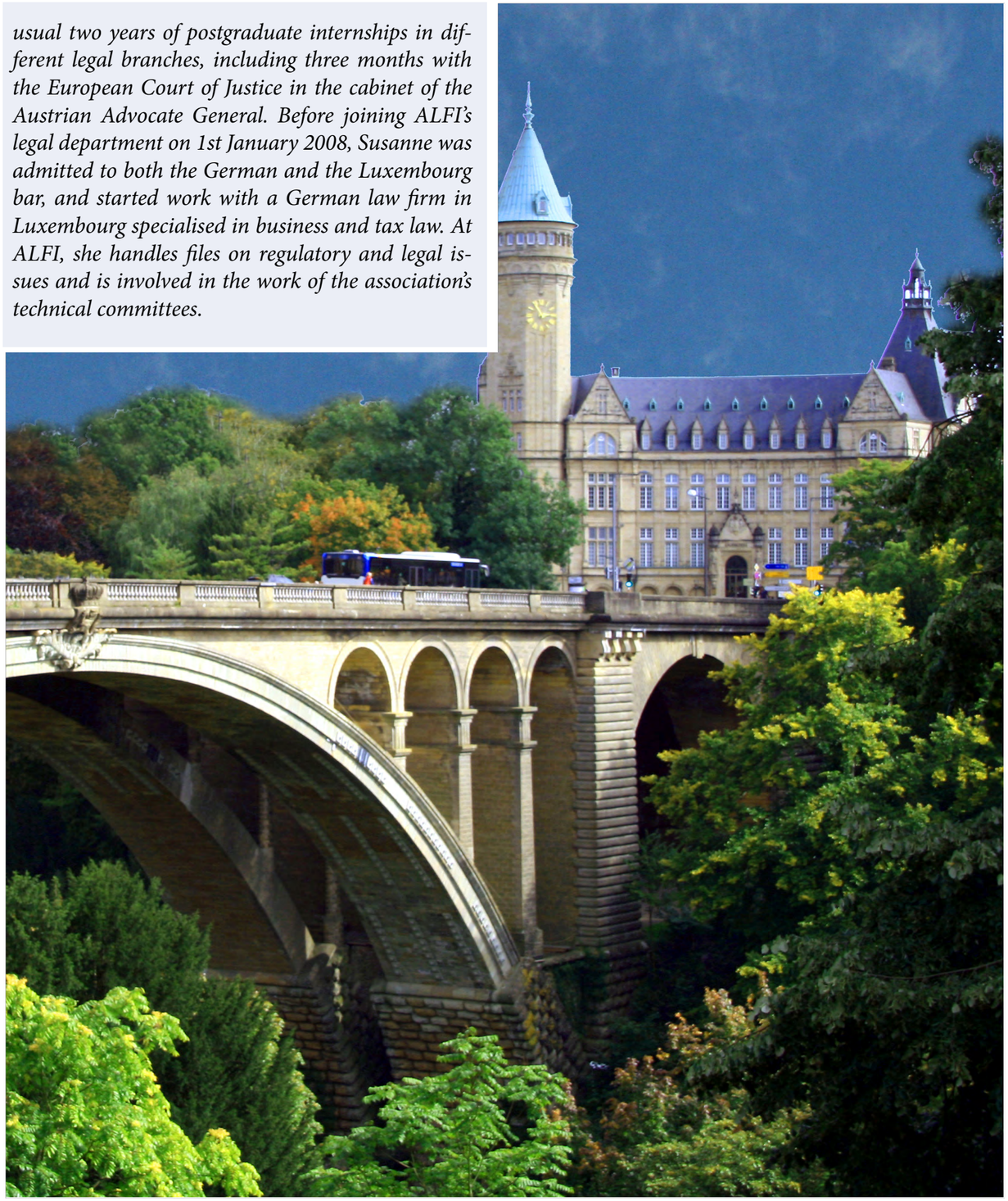
Mr Saluzzi has been on the board of ALFI since 2001. He later joined the Strategic Advisory Committee and in 2009 he became Chairman of the ALFI Alternatives Committee.

He brings over 25 years experience in the Investment Management Industry in Luxembourg and in the US. He is French and graduated from the Institut Superieur de Gestion in Paris in 1986. He then joined PricewaterhouseCoopers and became a partner in 1996. Between 2006 and 2010 Mr Saluzzi led the PwC Global Asset Management team.

He is now the partner responsible for PwC Luxembourg Financial Services practice and as such a member of the firm's country leadership team. Mr Saluzzi is a member of the CSSF-OPC Committee, advising the Luxembourg regulator on laws and regulations impacting the fund industry in Luxembourg.



Susanne Weismüller works as a legal adviser at ALFI. She holds a German degree in law with a specialisation in European Law and Public International Law. After completing four years at university, she did the usual two years of postgraduate internships in different legal branches, including three months with the European Court of Justice in the cabinet of the Austrian Advocate General. Before joining ALFI's legal department on 1st January 2008, Susanne was admitted to both the German and the Luxembourg bar, and started work with a German law firm in Luxembourg specialised in business and tax law. At ALFI, she handles files on regulatory and legal issues and is involved in the work of the association's technical committees.



Irish Funds Industry Update

By Andrew Bates

DILLON EUSTACE

DUBLIN HONG KONG NEW YORK TOKYO

Notwithstanding the ongoing international economic crisis, the Irish funds industry continues to thrive with latest industry statistics highlighting that Irish domiciled fund assets have now passed the Euro 1 trillion mark. New fund launches have steadily increased, with many existing industry participants launching alternative type funds to sit alongside their long only offerings and new promoters launching Irish domiciled based products for the first time. UK and US promoters have been to the fore but it is notable that promoters from China, from Canada and from the Middle East have also launched Irish domiciled products recently.

The two dominant Irish fund products, the UCITS and the Qualifying Investor Fund (the "QIF"), are both experiencing growth across a wide spectrum of strategies and asset classes, with much of the recent focus having been on credit type strategies including loan funds; structured UCITS with formula based pay-offs; emerging market equity and fixed-income products; and many structures focusing on the distressed asset space. We have also seen a number of new products such as the first Irish UCITS CAT bond product, UCITS allowing 100% exposure to Indian government debt, actively managed ETFs as well as funds redomiciling to Ireland under the redomiciliation legislation.

Future growth is also expected from new initiatives such as the "Green IFSC", aimed at developing new funding mechanisms for green projects as well as related funds and securitisation initiatives, as well as from regulatory changes one example being the Irish QIF which is seem as being "AIFMD ready". On the flip side, like many of its competitor jurisdictions, Ireland continues dealing with Madoff related issues, including significant litigation before the Irish courts, the fallout from the MF Global bankruptcy as well as the significant challenges posed by the constant flow of new regulation.

Although well intentioned and in some cases offering new opportunities, the last few years have seen fund managers being in an almost perpetual state of regulatory review having to contend not only with new rules from different jurisdictions – for example AIMFD and Dodd-Frank – but also multiple regimes under UCITS, MiFID and AIFMD for what could instead have been a single one. Each of these changes absorb significant time and resources, sometimes without a clear justification.

The recently implemented UCITS IV Directive, for example, has required new MiFID like organisational and internal control changes to be adopted, new business plans to be prepared, revised contractual arrangements with service providers to be put in place and prospectus and constitutive documentation to be renewed. It has also meant having to address the implications of ESMA Guidelines which do not always seem to be in line with market reality, one example being the method of calculating leverage. Given that the asset managers of such funds are already subject to MiFID or an equivalent regime, it is questionable whether all of the changes were really necessary.

It is also clear that UCITS IV has led to the creation of a new service sector supporting managers in issuing the KIID, a new standard format investor information document. Although the objective behind the KIID is laudable, individual fund groups now find themselves issuing 100s of KIIDs for individual umbrella schemes at significant cost to investors and taking up much administrative time. Whether this will actually prove of real benefit to the end investor remains to be seen. Whatmay however be of real benefit to investors include the much more efficient and less costly UCITS IV cross border notification processes and the opportunities for structure rationalisation through mergers and master/feeders, all of which are now being availed off.

New challenges will also be posed by AIFMD but it will also offer many opportunities, particularly due to the introduction of a harmonised regime for cross border commercialisation of non-UCITS products. Ireland is taking all the necessary steps to ensure that the Irish QIF is, and is seen to be, AIFMD ready, leveraging off the existing recognition of the QIF as an extremely flexible product with few investment restrictions and no leverage limits which can house almost any asset class and liquidity profile. The QIF is already one of the most frequently used regulated fund structures internationally for alternative products and benefits from a fast track authorisation process while at the same time being subject to a regulatory regime requiring regulated service providers (promoter, investment manager, administrator and independent custody), annual audit and prospectus disclosures.

Linked to AIFMD developments, Ireland's introduction of re-domiciliation legislation to make it easier to move funds from offshore jurisdictions to Ireland will be of assistance to those asset management groups looking to reposition their products within onshore European regulated jurisdictions either to address current investor demands or to facilitate future investment from prospective investors looking for more regulated investment products.

A final topic of note is that of fund governance which has been very much to the fore in Ireland recently. Having only recently adopted the new organisational changes required of UCITS under UCITS IV, all Irish funds will now have to consider the implications of the new corporate governance code for funds issued at the end of last year. Although a voluntary industry code, it is expected by the Central Bank to be adopted by Irish funds. At the same time, a new fitness and probity regime for directors and senior managers of all regulated entities, including funds, came into force in Ireland at the beginning of December last year which will require directors to provide quite a significant amount of information to support their continuing relationship with funds as well as imposing a more cumbersome pre-approval regime for directors of funds and fund management groups.

It may now be time to slow down the level of regulatory change and possibly reconsider how to regulate funds by treating them properly as products and leaving the primary regulatory focus being on what is permitted to be managed within a product type (vis-à-vis the investor type permitted to invest in the product) with governance, organisational and internal control rules being applied to the asset management, distribution, administration and custody of the product and not at the product level itself.

In conclusion, we remain very optimistic for the future growth of the Irish funds industry, seeing the new opportunities as far outweighing any challenges. In many ways the industry has been reenergised by the international financial crisis and that new energy will drive us forward for many years to come.

Andrew is the head of Dillon Eustace's financial services department. His own practice principally involves advising in relation to asset management, investment funds and insurance regulatory matters. Andrew advises a large number of privately owned and institutional fund promoters in relation to the establishment of Irish funds for the retail or institutional market. Andrew is a former Council Member of the Irish Funds Industry Association and is a member of the Investment Funds division of the IBA. Andrew can be contacted on +353 1 673 1704 or by email at andrew.bates@dilloneustace.ie

Private Equity in Luxembourg

By Nicolas Palate

caceis
INVESTOR SERVICES

Despite the current economic slowdown, Private Equity remains a key feature of the economic landscape, playing a major role in the business economy as it represents a fundamental source of support to unlisted companies, throughout their lifecycle. It also permits direct and indirect investment in and promotion of innovation and new technologies, and as a result stimulates growth in the economy, as well as creating employment.

However, as an asset class, Private Equity is probably one of the less well understood segments of the current financial markets, probably due to the broad and diverse range of investment strategies which it encompasses. Compared to traditional investment funds such as UCITS, Private Equity differs in strategy, operating model, structure and objective.

This article aims to demystify the generic label of Private Equity, through some practical examples of investment strategies we come across in Luxembourg and CACEIS is one of the major service providers in this domain.

Defining Private Equity …

Private Equity is usually considered as an asset class consisting of an equity participation in operating companies not publicly traded on a recognised stock exchange. This definition yet encompasses a wide range of investment strategies that fundamentally differ in a number ways.

Let's start with a strategy that has been well known since the 80s and the RJR Nabisco/KKR deal, a Leverage Buyout, which consists in the acquisition of a mature company generating important cash flows, allowing the interest payment on the debt which is used to finance the deal.

By way of comparison, Mezzanine Investment is the common designation used for subordinated debt (also denominated junior debt due to its position in the firm's debt hierarchy, less secured debt (also denominated junior debt due to its position in the firm's debt hierarchy, less secured compared to senior debt which must theoretically be repaid before junior debt) granted to less mature companies unable to access high yield capital market.

Venture Capital refers to equity investments in recently launched companies allowing them to expand while

Distressed Investment relates to an equity or debt investment in financially distressed companies, often accompanied by corporate restructuring. Last but not least, Growth Capital describes equity investments in relatively mature companies that are looking for capital to further expand their reach, either to enter new markets or to finance a major acquisition.

… In Luxembourg

One of the famous Private Equity success stories in Luxembourg is the emergence of Skype. Financed in 2003 by a Luxembourg Private Equity fund for EUR 20 million, Skype is now owned by Microsoft which spent USD 8.5 billion on the acquisition in 2011. Since this showcase, the Luxembourg Private Equity market has grown, new investment vehicles have been implemented, allowing a large range of investment strategies.

Real Estate Investment funds based in Luxembourg are an increasingly demanded vehicle for acquiring properties all over the world.

Some of the main European Infrastructure funds have also set-up their domicile in Luxembourg, financing brownfield (already in operation and generating cash flow) or greenfield (under development) infrastructure projects, such as general public services (water or heating production and distribution, etc.) or public/private partnerships (PPP) in transportation (highways, railway networks, transportation companies, etc.), telecommunications (fiber-optic networks), health services etc..

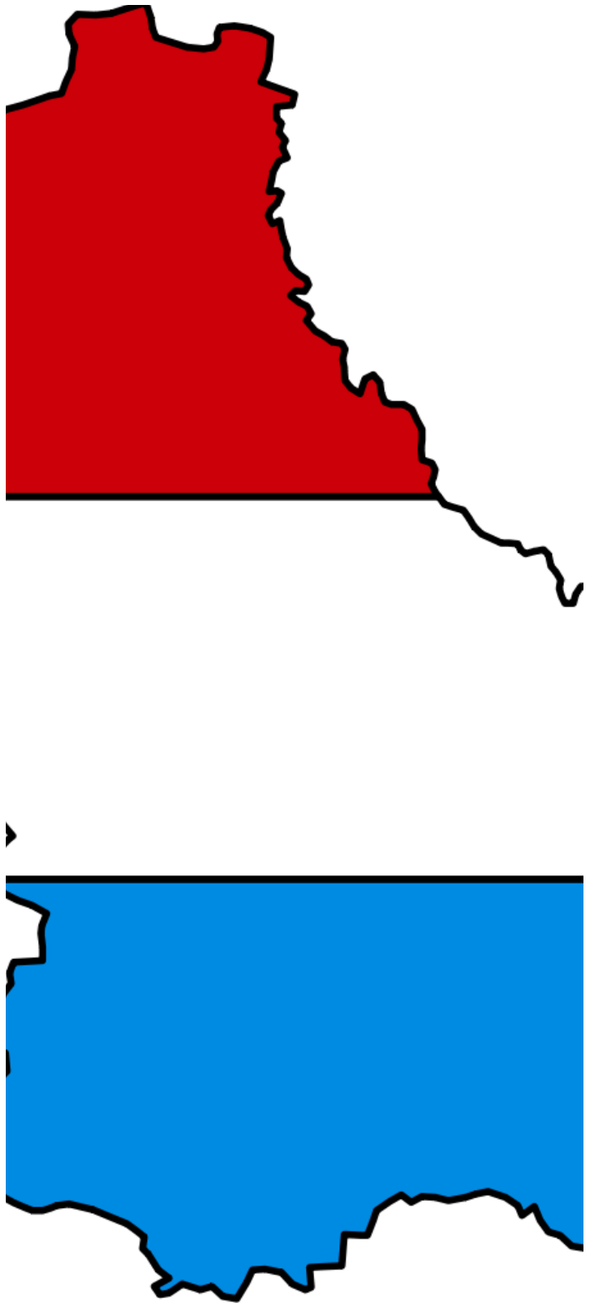
Socially Responsible Investment (SRI) is currently a very popular topic in Luxembourg. The Eurosif 2010 study defines SRIs as "a generic term covering any type of investment process that combines investors' financial objectives with their concerns about Environmental, Social and Governance issues".

Renewable Energy assets acquisition for instance, consisting in investment in a wide variety of companies engaged in the production and sale of "green" energy (hydroelectric, photovoltaic or wind energy, but also gas recovery from rubbish dumps). These assets often benefit from the political generosity of governments willing to promote green energy.

Out of the 300 existing specialised vehicles focusing on Micro-finance, several of these are located in Luxembourg. They invest through equity or debt into financial intermediaries (local banks, or institutions but also NGOs) which grant a low income population in emerging economies an opportunity to contribute to their sustainable development.

Carbon Finance is another SRI strategy. Stemming from carbon reduction objectives set for European industries by the Kyoto Protocol, Carbon investment vehicles play an intermediary role between these industries looking to decrease their emissions and investing in projects generating carbon reductions in developing countries.

Finally, the trading of exclusive and collectible commodities, such as valuable wines, precious watches, works of art, diamonds, classic cars, etc., is becoming an "in vogue" investment for Institutional clients as well as High Net Worth Individuals willing to diversify their portfolio in tangible assets allowing for de-correlation with the current volatility of traditional financial products and investment instruments.



willing to diversify their portfolio in tangible assets allowing for de-correlation with the current volatility of traditional financial products and investment instruments.

Setting up Private Equity funds in Luxembourg

Having attracted fund initiators from all over the world, Luxembourg is Europe's leading centre for the incorporation of investment funds. Since the introduction of the CSSF1 regulated vehicles, namely the SICAR2 and SIF3, respectively in 2004 and 2007, Luxembourg is the financial centre of choice for launching sophisticated investment funds, meeting the specific needs of private equity funds with diverse and specific investment strategies as described above.

CACEIS, your partner for setting up a Private Equity Investment Vehicle

The investment strategies and Private Equity specifics outlined in this article are features which CACEIS deals with daily as service provider to more than 140 Private Equity vehicles, being Luxembourg or non-Luxembourg-domiciled, regulated or unregulated investment vehicles. CACEIS has developed a considerable expertise in this domain since 2004 by setting up a dedicated and specialised Private Equity team.

CACEIS is a leading securities services provider, owned 85% by Crédit Agricole Group and 15% by BPCE Group4, with a top ranking position in the investment funds servicing business in Europe and worldwide, in which CACEIS has been active for over 25 years.

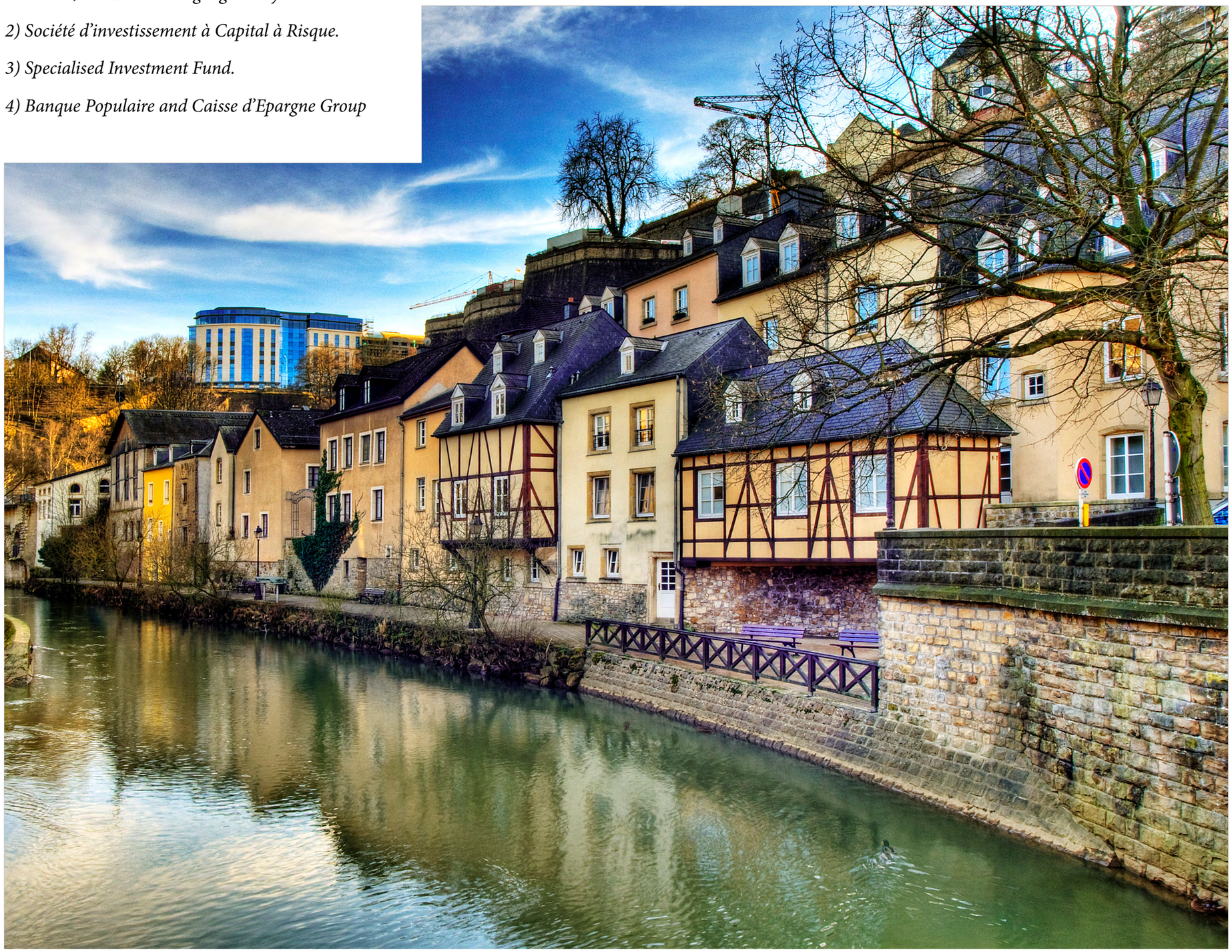
Full service or modular solutions are offered by CACEIS to Private Equity managers wishing to establish a Private Equity fund, services spanning from company secretary and domiciliation, to investor services, accounting, financial reporting, depository and custody, with a broad experience covering various investment strategies. Nicolas can be contacted on + 352 4767 2356 or by email at Nicolas.palate@caceis.com.

1) Commission de Surveillance du Secteur Financier, the Luxembourg regulatory authorities

2) Société d'investissement à Capital à Risque.

3) Specialised Investment Fund.

4) Banque Populaire and Caisse d'Epargne Group



Private Equity: Can Responsible Investment Deliver Enhanced EBITDA?

By Malcolm Preston, Lauren Koopman & Phil Case

The evolution of the sustainability agenda

Corporate response to sustainability issues has evolved as companies recognize the financial impacts. Sustainable development - the notion of being able to continue current operations indefinitely - requires the concurrent management of economic, environmental and social issues. Corporate action aimed at achieving this was historically compliance driven and concentrated on risk management. Companies were protecting their licence to operate as regulations became stricter and were guarding against negative public relations caused by environmental or social impacts.

This risk focus shifted as companies began viewing business through a sustainability lens, achieving cost savings through energy and fuel efficiencies and through waste reduction. Using sustainability to obtain new EBITDA enhancement opportunities is now being expanded beyond cost cutting to revenue growth. Companies are finding ways to use the sustainability agenda to create new products and services or to modify existing ones in order to attract and retain customers who are increasingly demanding "responsible products". Effective management of sustainability issues has become a strategic issue for large corporations, not least because these factors are increasingly linked to corporate profitability and value.

How this trend affects Private Equity firms

Private equity (PE) firms generally invest in portfolios of companies, where specific opportunities have been identified (before investing) to generate value for investors over the four-to-six years of their typical ownership period. This often highly-leveraged business model, with its focus on business efficiency and value creation, has not generally been seen to be naturally aligned with the need to take account of seemingly long-term sustainability megatrends, such as population growth or resource depletion. Furthermore, the 'private' aspect of the sector, with its perceived lack of transparency and accountability, led to concern among stakeholders that investments were not being made and managed responsibly.

However, the picture is changing. Over the past few years, an increasing number of private equity houses have begun to factor environmental, social and governance (or ESG) considerations into their investment strategies. These private equity managers are not only concerned to ensure that their investors are protected from the ESG-related regulatory, financial and reputational risks which their portfolio companies might face, but are increasingly aware that they can use ESG levers to maximize value creation.

Indeed, PwC's recent survey of 17 international PE Houses on ESG issues, showed that 93% of respondents believe that ESG issues can be a source of value, with 80% indicating that their attention to managing these issues will rise over the next 5 years. An increasing number of influential investors - particularly those who are signatories to the UN Principles of Responsible Investment - are asking for demonstration that their private equity managers are taking ESG issues into account in their investment analysis, ownership practices and long-term strategic thinking. In short, that they are "responsible investors".

How can PE firms monetize the value of responsible investment?

Leading PE firms are taking ESG considerations into account and realizing incremental value throughout the investment life cycle. This process needs to start at the pre-investment stage if sustainable development considerations are to be truly integrated into the 100 day or 180 day plans for portfolio company performance improvement that are typically initiated on acquisition. Traditionally, the focus of pre-investment ESG due diligence has been on commissioning site-specific, environmental due diligence as part of risk management. For companies operating in environmentally sensitive sectors in particular, there is still a place for this – the quantum of environmental risk or contingent liability should certainly be ascertained in advance. However, today the scope of ESG due diligence has been extended to embrace both ESG opportunities and risks, and to cover the portfolio company's entire value chain.

Having identified ESG opportunities for value creation at the pre-acquisition stage, leading PE firms ensure that they are realized during the PE house's period of ownership. Indeed, freed of the short-term spotlight of analysts in public equity markets, PE houses have a real opportunity to think and act on a slightly longer timeline – and gain a competitive advantage in the 'green race'.

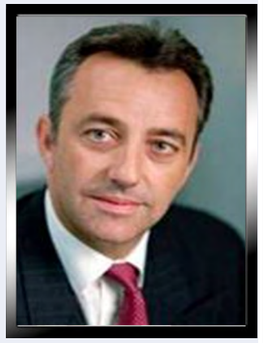
Several PE houses have recognized the influence they can wield through having control – particularly in buyout situations – and are engaging in ESG issue management not only via representation on the board, but increasingly through a deeper level of engagement with operational management teams. Indeed, several houses are starting to work in active partnership with their portfolio company management teams to identify incremental ESG value. An example is KKR's Green Portfolio Program which applies the firm's approach of assessing, measuring, and optimizing performance to help their portfolio companies manage their environmental impacts while also improving their businesses. KKR has reported some impressive results: "Through energy efficiency, waste handling, process improvements and other initiatives, participating private equity portfolio companies cumulatively have avoided approximately $365 million in operating costs, over 810,000 metric tons of greenhouse gas emissions, 2.2 million tons of waste, and 300 million liters of water since 2008". KKR is now understood to be rolling the program out to cover approximately 30 percent of companies in its global private equity portfolio.

Success in delivering value from ESG initiatives is not confined to those PE houses adopting a holistic 'cradle to grave' philosophy. Many are taking a 'retro-fit' approach. That is, they are reviewing their existing portfolios to identify opportunities to protect or enhance value which may well have been missed at a time when pre-acquisition ESG due diligence had a narrower scope. Examples include not only the "eco-efficiencies" mentioned above, but also the development of new products or services with strong ethical or environmental credentials. Such houses then have a great value story to tell at the point of exit which resonates with investors and other increasingly interested stakeholders.

In Short

Not all PE houses are yet embracing the notion of integrating sustainability considerations into the investment cycle. Nevertheless, there is evidence that consideration of environmental, social and governance issues is moving to centre stage. Those firms who are able to develop a reputation as responsible investors are likely to see tangible results through enhanced EBITDA.

Malcolm Preston is Global Head of Sustainability Services at PwC, and leads a global team of some 700 sustainability and climate change experts, with over 100 based in the UK. Malcolm's role is to drive the understanding of sustainability and climate change throughout the firm to ensure the risks and opportunities associated with these issues are considered in the advice PwC gives to its clients.



Malcolm has been a partner since 1996. Prior to joining the sustainability team he worked in the mid-market, advising fast-growing, entrepreneurial companies, and working on numerous transactions, mainly backed by PE Houses.

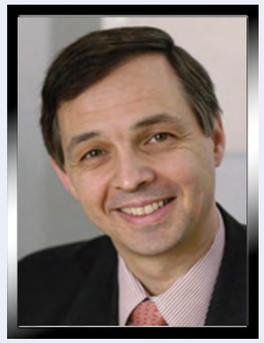
Malcolm has a BSc (hons) in Oceanography. He can be contacted on **+44 (0) 20 721 32502** *or by email at* **malcolm.h.preston@uk.pwc.com**.

Lauren is a Director in the Sustainable Business Solutions team in New York who leads work on sustainability strategy for financial institutions. She has 14 years of experience working to monetize environmental assets for corporations and financial institutions.

She works with private equity firms to integrate sustainability into investment decisions and throughout the existing portfolio. Projects have included pilots at specific portfolio companies to unlock new value drivers and work across a portfolio of companies to leverage the benefits of sustainability initiatives.

Lauren has a Masters of Environmental Engineering, an MBA and a BA in Public Policy. Lauren can be contacted on +1 646 471 5328 or by email at lauren.k.koopman@us.pwc.com.

Phil is a Director of PwC's Sustainability and Climate Change team in the UK, specialising in, and leading our sustainability work in, the private equity sector.



Phil has had extensive experience of working with private equity houses in conducting sustainability assessments of potential acquisitions, and in developing strategy, policy and procedures for implementing a sustainability programme.

He has also worked with PE Houses to develop "tools" to facilitate policy implementation, and in designing and running training events for investment professionals.

Phil is currently a member of the BVCA's Responsible Investment Advisory Board, and has co-written Guidelines for BVCA members on sustainability risk management, published in 2011. Phil can be contacted on +44 (0)20 7212 4166 or by email at philip.v.case@uk.pwc.com.

Consolidation of Investment funds expected to rise

sgh | martineau

By Kavita Patel & Andrew Stilton

It is likely that there will be a continuing move towards investment funds consolidation over the next few years, particularly venture capital trusts (VCTs) and conventional investment trusts.

In the case of VCTs, this is likely to result, in part, from proposed changes to the VCT rules which were set out in the draft 2012 Finance Bill published in December 2011. Among other changes to the rules, which are intended to ensure that VCTs are focused on higher risk investments, these revisions increase the amount which a VCT may invest in any one single company. Up until now, VCTs have been unable to invest more than £1,000,000 in any one company during any one year and, as a result, VCT fund managers have been keen to establish sister VCTs which can invest alongside each other in order to increase the amount that can be invested.

This means that VCTs, as well as investment trusts generally, incur additional legal, financial and listing costs. Such funds may also suffer from the increased administration fees associated with having more than one board of directors to manage the VCTs. With the changes to the VCT rules and, as funds mature, it often makes sense for funds to be merged together to create one larger VCT with lower running costs to benefit from economies of scale. This particularly makes sense for smaller VCTs especially those under £10m or those with over-lapping portfolios. A combined, larger vehicle should have fewer costs which can be spread over a greater asset base. This means that it can utilise its funds more efficiently by investing a greater proportion of the assets and sustaining a higher level of dividends and other returns.

SGH Martineau acts for a large number of investment funds and VCT clients and we are already seeing an increase in the number of funds being consolidated. There are two tried and tested procedures for merging funds: (i) a scheme of reconstruction under Section 110 of the Insolvency Act 1986 and (ii) a scheme of arrangement under Section 895 of the Companies Act 1986.

A Section 110 scheme means one of more of the funds being placed into solvent member's voluntary liquidation and the assets/investments transferred to the acquiring VCT, in return for shares in the acquiring company. A Section 895 scheme is a court procedure which enables the holdings in one or more of the target funds to be transferred to the acquiring company. Although a Section 110 scheme includes the ability for dissenting shareholders to be bought out by the liquidator as part of the process, this risk has been felt to be acceptable. This is due to the purchase price being that which would be received on a break-up value and tax reliefs potentially being reclaimed by HMRC, compared to using a Section 895 scheme which can be less time and cost efficient. Mergers can also be completed using a more routine offer by one company for the shares of the other, though in practice it is difficult to effect due to the number of shareholders who must agree to the offer (i.e. a greater need for positive action).

There are a number of challenges involved which investors should be aware of, including assessment of the purchase price. Each VCT needs to be carefully valued so as not to prejudice one set of shareholders. Most mergers are completed on a relative net assets basis, though more costs may be allocated to one fund in comparison to the other due to its greater need to consolidate. If valuation is an issue, it is possible to merge the funds into segregated share classes and then merged following a period of time. This can allow time for the portfolios to mature and valuations to be assessed whilst reaping the benefits of being in a merged firm immediately.

There are also other circumstances where fund consolidation is the next logical step. Sometimes a fund may be unhappy with the performance of its fund manager and so could choose to transfer that fund's assets to a more successful one. Or it could be that the focus of the investment is changing, which we are seeing more and more with VCTs in particular in light of changing rules. Fund consolidation is not just a popular move with investors – fund managers are also attracted as fees are based on the amount of funds under one roof.

For anyone considering funds consolidation, you need to ask whether the fund in question is really viable in its own right, or are the associated costs too high? The VCT market has generally felt that a two year recovery of the merger costs from the annual savings post merger is an acceptable level to put proposals to shareholders.

Consideration will also need to be given as to which fund should be the surviving company and which merger route to use. Each fund should complete due diligence on the other – and clarify if any regulations apply, to ensure this is built into the process. If a Section 110 scheme is favoured, investments also need to be checked for transfer issues and solutions worked into the process. Investments may comprise loan securities, as well as shares, which may have additional documentation and benefit of which also need to be transferred.

Care needs to be taken to ensure that the due diligence process does not infringe any confidentiality undertakings or other restrictions on disclosure of information relating to the investee company which were accepted when the original investment was made.

Where the merger results in a change of manager, it is likely that relationships with the investee companies will need to be managed very careful, as the boards of those companies may be unhappy to discover that they are dealing with somebody completely new.

Discussions will also need to be had with the funds various advisers so as to terminate their arrangements in the target funds. Where the advisers are the same for both funds, this can be achieved relatively easily without any compensation payments as such advisers see the benefit of remaining appointed to the larger vehicle. Where the advisers are different, there may be additional payments which need to be factored in when looking at the efficiency a merger would bring.

In summary, a larger investment vehicle may be significantly better placed to absorb the inevitably high running costs associated with investment funds, in particular listed companies. An enlarged vehicle should be more able to reduce costs and, as a result, maximise investment opportunities and, more importantly, shareholders returns.

sgh | martineau

Kavita is partner and head of corporate finance at top 70 UK law firm, SGH Martineau. She specialises in private equity and corporate finance transactions including the establishment of investment funds, public and private fund raising, venture capital and private equity investments, takeover, mergers and reconstructions.

Kavita has secured an impressive portfolio of work from London for the firm. Her recent work includes venture capital investments in the environmental infrastructure sector including renewables and solar energy.

Kavita sits on both the VCT Forum and VCT Technical Committee of the AIC and is a member of the EIS Association.

Kavita can be contacted on 0800 763 1645 or by email at kavita.patel@sghmartineau-uk.com.

Andrew has been a partner and member of the corporate finance team at SGH Martineau since 1985.

He specialises in private equity, mergers and acquisitions and corporate finance transactions including the establishment of investment funds, public and private fund raising, venture capital and private equity investments.

Andrew is a member of the Law Society's Standing Committee on Company Law and was actively involved in the consultation process that culminated in the enactment of the Companies Act 2006.

He can be contacted on 0800 763 1556 or by email at Andrew.stilton@sghmartineau-uk.com.

Gibraltar – Regulatory changes

By James Lasry

After nearly seven years, Gibraltar's Experienced Investor Fund regime is being updated and modernised in a continuation of the partnership between the industry, the Financial Services Commission (the FSC or Regulator) and the Government of Gibraltar. Prior to 2005, Gibraltar's fund industry comprised a handful of funds regulated under the, then, Financial Services Ordinance 1989 and a few dozen private funds.

Whilst the regime of the former worked in practice, it relied heavily on obtaining derogations from the Regulator. This made the process of authorising a fund somewhat cumbersome. On the other hand, the private funds industry grew fairly rapidly. Private funds in Gibraltar are not regulated and can only be marketed to an identifiable category of persons whose number is less than fifty. Although there are no actual statutory requirements for the production of audited accounts, a prospectus nor the engagement of a fund administrator, the industry practitioners very much insisted on these.

It was then to meet the demand of certain funds that had grown and wished to market themselves to external investors that the industry proposed to Government the enactment of the Financial Services (Experienced Investor Funds) Regulations 2005. These regulations ultimately codified what had become the practice with private funds and added a few elements to allow the funds to be marketed more extensively. Firstly, the marketing of Experienced Investor Funds (EIFs) was limited to experienced investors which were defined as investment professionals, investors who had €1million besides the value of their residential home, or investors who invested €100,000 or equivalent.

The Regulations also required the engagement of two Gibraltar based directors who are authorised by the local Regulator to act as fund directors. They also required the appointment of a local fund administrator. The authorisation process was particularly attractive as a fund was allowed to begin trading on the basis of a legal opinion issued by local counsel stating that the fund was properly established in accordance with the Regulations. A fund would have to notify the Regulator within fourteen days of its commencement of trading. The notification would be accompanied by the company's constitutional documents and Private Placement Memorandum and the regulatory fee of £2,500. The regime worked very well and is probably one of the most flexible Experienced Investor Fund regimes within a European jurisdiction.

After almost seven years of practice, industry requested certain amendments to the regime to increase its competitiveness and ease of use. The main areas of change are the permission to use certain foreign fund administrators, the expansion of the definition of experienced investors and the addition of an optional pre-launch authorisation scheme.

The principle amendment of the proposed new regulations is that under certain circumstances, foreign fund administrators are eligible to act for Gibraltar EIFs. In an attempt to achieve a balance between the requirements of some of the larger and more institutional funds to be able to use brand-name administrators and the need to protect the local administration industry, the formula is one whereby the categories of foreign administrators allowed to administer EIFs are administrators that are connected to a credit institution wheresoever established or any administrator that the Regulator and the Minister may approve with the understanding that there would be an initial approval of a list of up to thirty brand-name administrators that would be proposed by industry for such approval.

It was also proposed to expand the definition of experienced investors such that in addition to the existing classes of experienced investors, funds would be able to admit investors who are;

- A participant who has invested an aggregate of €100,000 in one or more Experienced Investor Funds;

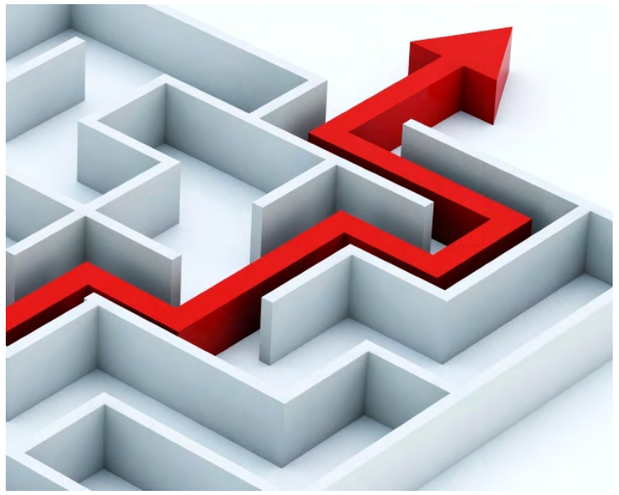
- Professional clients and defined under the Financial Services (Markets in Financial Instruments) Act 2006;

- Investors who invest €50,000 and who has been advised by a professional adviser to invest in the fund and the fund's administrator has received confirmation of such advice; and

- Investors who are investors in funds which were established outside of Gibraltar and were aimed at professional or sophisticated investors and which funds are subsequently re-domiciled to Gibraltar. This is seen as an important addition because, in light of the Alternative Investment Fund Managers directive which is scheduled to come into force in 2013, there is the expectation that a significant number of Cayman Islands funds will consider re-domiciling into an EU jurisdiction such as Gibraltar, in order to avail themselves of the marketing advantages of European domiciled funds.

The amendments to the Experienced Investor Fund Regime in Gibraltar is expected to come into force some time in early 2012 and it is anticipated that it will improve the competitiveness of the Gibraltar Fund regime while keeping the interests and objectives of investors and the Regulator intact.

It is also anticipated that the new regime will be more user friendly for the more institutional funds.



James Lasry is a partner and the head of the funds team at Hassans International Law Firm in Gibraltar. He served as Chairman of the Gibraltar Funds & Investments Association for 2 years. James advises the Government of Gibraltar on its funds legislation and was involved in the drafting of the Financial Services (Experienced Investor Funds) Regulations 2005 and their subsequent amendments in 2012.

He is fluent in English, French, Spanish and Hebrew and he read literature, music and law at John Hopkins and Bar-Ilan Universities. James is a member of the Israel Bar Association, the Law Society of England & Wales and the Gibraltar Bar.

James can be contacted on +350 200 79571 or by email at james.lasry@hassans.gi

Guernsey: The leader in private equity fund administration

Guernsey
International Finance Centre

By Fiona Le Poidevin

Guernsey has an investment fund industry with a heritage that stretches back half a century. The sector has seen a gradual yet sustained shift where the balance of business has moved from being largely retail, equity-traded/cash-based schemes to predominantly institutional, alternate and niche funds. This experience means that the Island has built a wealth of expertise and first class infrastructure for the structuring, management, administration and custody of not just traditional funds but also alternatives, in particular private equity.

Private equity in Guernsey

The net asset value of investment funds under management and administration in the Island reached just over £271 billion (US$421 billion) at the end of September 2011 – up 11.5% year on year.

The private equity and venture capital sector has seen especially strong growth, reaching more than £80 billion (US$124 billion) at the end of September 2011. The Island's reputation for excellence in this asset class has been reaffirmed by a Private Equity News / State Street survey where 61% of Chief Financial Officers (CFOs) responding said that Guernsey was their preferred destination for private equity outsourcing.

Jon Moulton, Chairman of Better Capital, gave a ringing endorsement of the Island's funds industry when speaking in front of more than 300 delegates at the Guernsey Funds Forum in London last May. Jon, who has a house in the Island and whose Guernsey-domiciled investment company is listed on the main market of the London Stock Exchange (LSE), said: "Guernsey has a very good reputation; it works very well….Guernsey needs to carry on doing what it's doing into the future and it will prosper."

Another significant figure in the private equity industry is Guy Hands, Chairman of Terra Firma. As well as the private equity firm joining the likes of Permira and Apax by establishing an operation in Guernsey, Guy has also decided to buy a property and live in the Island. This reflects the fact that Guernsey is not just an ideal location for locating management companies but is also attractive as a residence for the managers themselves.

This is no doubt helped by the fact that Guernsey has a zero rate of corporate tax as standard, no withholding tax on dividends paid, no capital gains tax, no inheritance tax and no indirect sales taxes, and personal income tax remains levied at a maximum of 20%, with a cap of £110,000 on non-Guernsey source income or £220,000 on all income.

Infrastructure and expertise

Guernsey administrators and custodians provide services to non-Guernsey funds but a large proportion of their business relates to Guernsey open and closed-ended funds, which are now promoted and sponsored by leading institutions in more than 55 financial centres globally. These can be established through a range of flexible investment vehicles such as companies, unit trusts, the Guernsey-pioneered Protected Cell Companies (PCCs), Incorporated Cell Companies (ICCs) and limited partnerships.

There is a broad range of administrators in the Island, many with specific expertise and bespoke IT solutions for alternative assets. These include specialised private equity administrators such as Ipes, Augentius, Aztec, International Administration Group (IAG) and Alter Domus as well as globally recognised names such as JP Morgan, HSBC, Northern Trust, RBC and State Street who can also act as custodians.

Guernsey's fund industry can also draw on the services provided by its banking, wealth management and risk management sectors. In addition, it is supported by a comprehensive network of investment, legal, tax, audit, accounting and actuarial advisers, including multi-jurisdictional law firms and global accountancy firms where there is specialist expertise in alternatives.

The Island's regulator, the Guernsey Financial Services Commission (GFSC), has grown a reputation for its robust yet pragmatic approach to regulation – for example, all Guernsey schemes remain regulated but 'fast track' routes have been introduced which allow for the speedy launch of funds where appropriate. In addition, Guernsey has a pool of experienced and well qualified non-executive directors maintaining high standards of corporate governance.

One of the Island's great strengths is the ability for Guernsey vehicles to list not just on the LSE but stock exchanges in Amsterdam, Frankfurt, Australia and Toronto, among others, as well as the local Channel Islands Stock Exchange (CISX), which now has more than 4,200 securities listed. Data direct from the LSE to the end of December 2011, shows that Guernsey remains home to more non-UK entities listed on its markets than any other jurisdiction globally. In addition, last year Guernsey companies received approval to list on the Hong Kong Stock Exchange (HKEx).

The international stage

Receiving approval for Guernsey companies to list on HKEx is a very positive development for our finance industry in terms of doing business in Asia. This is a key part of our efforts to diversify business flows from traditional centres such as the City of London to the 'emerging' markets of the Far East, India and Russia.

However, Europe still remains an important source of new business and that is why it was so important that we engaged early on in the discussions regarding the Alternative Investment Fund Managers (AIFM) Directive. The detail agreed so far not only provides some certainty but also places Guernsey in a good position going forward in terms of having access to the EU market. There is still much work to do but we are confident that the outcome will be positive for the future of our funds industry.

> *"The net asset value of investment funds under management and administration in the Island reached just over £271 billion (US$421 billion) at the end of September 2011 – up 11.5% year on year."*

Our position certainly will not have been harmed by the publication of several independent reports during last year. The IMF commended Guernsey's high standards of financial regulation, supervision and stability along with our robust criminal justice framework. The OECD's Global Forum built on its 'white listing' of Guernsey by endorsing the Island's ongoing commitment to tax transparency and exchange of information.

In addition, in November, the Financial Stability Board (FSB) presented a report to the G20 meeting in Cannes which placed Guernsey within the top tier of jurisdictions adhering to international standards and thereby helping to protect global financial stability. Indeed, Guernsey has now signed Tax Information Exchange Agreements (TIEAs) with 34 jurisdictions globally, including the US, China and India.

We are not blind to the fact that there are many challenges ahead. For example, the 'Zero-10' corporate tax systems of the Crown Dependencies have come under European scrutiny. The Guernsey Government expects to be able to finalise our position in the middle of this year, however, it has already made clear that we are committed to retaining a regime which is both compliant and competitive i.e. there will be continued tax neutrality for financial services products. Indeed, the exempt regime for the funds industry is in no way under threat and was actually extended in September 2011.

The waters ahead are unlikely to make for plain sailing but we will take the necessary steps to ensure that the conditions remain in place for Guernsey to continue as a leading centre for private equity fund administration into the future.

Fiona Le Poidevin – Technical Director & Deputy CEO, Guernsey Finance

Fiona joined Guernsey Finance, the promotional body for the island's finance industry, at the end of March 2011. Her role includes assisting with business development in new and emerging markets, providing technical support to industry and liaising with industry associations. Fiona can be contacted on +44 (0) 1481 720071 or by email at info@guernseyfinance.com.

To find out more about Guernsey please visit www.guernseyfinance.com.

When will the Property Freeze begin to Thaw

By Claire Keeney

Given European wide austerity measures and economic uncertainty, it is expected that 2012 will be a difficult year for the commercial and retail property fund sectors. The sovereign debt and financial crisis continues to negatively impact financial markets, specifically within Euro dominated countries in the Eurozone. Relative inaction by some European policymakers appears to have engendered a degree of uncertainty and lack of trust within the financial markets about the possibility of an effective and prolonged solution to provide financial stability.

Furthermore, the increase in the global legislative framework is impacting on the funds sector with new regulations such as the AIFM Directive, the Dodd-Frank Act, the Bribery Act, the EMIR, Solvency II and Basel II, requiring review and attention. This growth in legislative measures is substantially increasing the compliance, legal and administrative fee base attributable to the fund structures. It is therefore even more important that the firms competing for this business (across all jurisdictions) remain competitive whilst retaining their technical knowledge base, which will ensure that the business is in a position to manage the legislative demands.

Jersey continues to prove itself as the jurisdiction of choice for property structures, due to its robust regulatory governance within which flexible structures can operate competitively. Furthermore, Jersey service providers have the ability to offer world class and competitive legal, tax, accounting and administrative services, which are provided within close proximity to its European neighbours. The Jersey funds sector continues to adapt to the legislative changes quickly and efficiently; and in concert with the Jersey government and the industry regulator, positive steps are being taken to ensure that Jersey's fund industry has the relevant policies in place to ensure compliance with the ever changing financial services landscape.

Moreover, investors and fund managers alike are becoming more proactive in their search for the preferred jurisdiction to domicile property funds, with the favoured solution being those jurisdictions that can deal not only with the economic challenges, but also the increased legislative requirements. In Jersey's favour are reports such as the Global Financial Centres Index (most recent report dated September 2011), which show that Jersey is the highest rated offshore international finance centre. As reflected in the quarterly league table, Jersey sits 10 points ahead of its closest offshore rival, Guernsey and even 8 points ahead of one of its closest European competitors, Luxembourg.

In light of the current market conditions, I believe one of the key risks that property funds face in 2012 is access to funding, given the significant impact that the sovereign debt crisis is having on European economies. It has recently become apparent that banks are taking steps to de-leverage their balance sheets and reduce exposure to new property lending and the potential risk involved. This could lead to a shortage of available finance, which will ultimately have a prejudicial impact upon property values.

The commercial lending arm of Commerzbank (Eurohypo AG) has suspended all new property lending until June 2012, similarly, Société Générale has suspended new UK and European property lending indefinitely. With other lenders sure to follow, it is likely that only the most liquid of property structures will survive during this difficult period. This does, however, mean that there is potential scope for funds that are cash rich with an appetite for long term investment, to acquire good quality commercial properties at relatively low prices. It is expected that the space left by the retracting banks would be taken up by Insurance Companies and private lenders but this is yet to be confirmed.

The prevailing market conditions also appear to have impacted on investment decisions made by fund managers. In the context of investment selection, throughout 2012 it is expected that commercial property investors will focus on high-quality buildings in prime locations, situated in liquid and transparent markets: See: the CBRE Global Research report 'The Global ViewPoint for 2012'. These trends correlate with what we're currently seeing at Whitmill, with various funds administered by Whitmill purchasing four office buildings and a shopping centre during the previous two quarters, all of which are predominantly situated in prime city centre locations in both the UK and other European countries.

However, having a prime city centre located asset will not guarantee success. Whilst the London commercial property sector continues to thrive with vacancy levels in London's West End at 4.4% at the close of Q3 in 2011, other UK regions such as Birmingham (20.1%) and Liverpool (19.1%) are not faring as well: Jones Lang LaSalle – UK Corporate Occupier Conditions 2011. Notwithstanding, it is a positive sign that commercial property investment throughout Europe totalled €31.4 billion (2011, Q4), which is a 17% increase from €28.6 billion (2011, Q3): DTZ Research – Investment Market Update, Quarter 4, 2011.

Essentially, the success of any type of commercial property investment, particularly those operating in difficult market conditions, requires excellent asset management to ensure positive asset performance. This is particularly prevalent in the retail property sector, with footfall numbers reducing at the same time that the popularity of online shopping is on the increase. Whilst it is correct that retail sales experienced a 6.2% growth in December 2011 and the volume of sales increased by 2.6% during the same period (www.ons.gov.uk), such statistics do not differentiate between shop and online purchases. Online shopping has never been more popular, so it is vital for an investment manager to consider such factors to ensure maximum rental returns and occupancy rates in retail outlets.

It is paramount that a prudent property manager can ensure its business model is suitably flexible so that any retail letting defaults are minimised. This is only possible if the entire investment model is similarly flexible to adapt to changing circumstances.

> *"This growth in legislative measures is substantially increasing the compliance, legal and administrative fee base attributable to the fund structures."*

Ending on an optimistic note, there is still scope for investment potential in commercial property deals outside of the capital cities.

There are more regional satellite airports and cheap airlines than ever before, which open gateways and develop transport hubs that naturally lend themselves to attractive retail investment opportunities. Similarly, the pull of free parking and late night shopping in out-of-town shopping centres continues to challenge the traditional high street retail trading.

Even the BBC's decision to relocate operations countrywide has benefits – for instance, boosts to the retail, commercial and private sectors have been witnessed in Greater Manchester with the 'Media-city' development in Salford. Similarly, urban redevelopment plans for cities like Preston, albeit temporarily halted, are indicative of potential investment opportunities outside of the usual sphere.

Whitmill
TRUST

About Whitmill: Whitmill Trust Company Limited ("Whitmill") was established in 1992 when Don Wijsmuller (Managing Director) made the strategic decision to develop the business independently of any financial institution or banking organisation. This independence ensures flexibility, quick decision making and a highly personal approach to its clients, which sets it apart from its competition.

Whitmill is regulated by the Jersey Financial Services Commission.

Claire Keeney is a Senior Manager within the Funds Department. She joined Whitmill in April 2009 to establish and head-up the funds team. Claire has considerable technical expertise and experience of both day-to-day administration and the launching of new funds, which has been gained whilst working for the Jersey office of a major international fiduciary group.

Claire is able to draw upon skills and knowledge gained from her academic qualifications, combined with her considerable experience in the funds and alternative investments area. Claire is also experienced in the listing of a wide range of structures on the Channel Islands Stock Exchange ("CISX"). Following her arrival, Whitmill applied for and has been accepted as an authorised Listings Sponsor with the CISX.

Claire can be contacted on +44 (0) 1534 886129 or by email at Claire@whitmill.com.

Snapshot - Venture Capital in 2011

Europe

Venture capital trusts (VCTs) were among the best performing closed-end funds during 2011, according to research by the Association of Investment Companies (AIC).

The research revealed that half of the top 10 performing funds were VCTs in the 12 months to end of December 2011.

However, the general VCT sector was down by 3% at the end of 2011 compared with an 11% drop for the average closed-end fund.

The best performing fund was the Foresight VCT up 51% during 2011, and has risen by 81% over three years.

The second best performing fund was Maven Income & Growth VCT 4, which increased by 46% in the year to December 31, 2011.

USA

Entrepreneurs raised $30.6 billion in venture capital funding– the largest amount since 2001. Investors funded 3051 deals, a 9.3% increase from 2010.

Venture capitalists weren't bashful in Q4 2011 showering 755 companies with $7.6 billion in venture funding.

Q4's performance brought 2011's total to $30.6B invested in 3051 deals which marked a 10-year high for the VC asset class on both deals and dollars.

California and New York account for 59% of internet VC deals and 66% of funding. Internet investments took over 1/3 of venture dollars in 2011.

Choosing the Right Acquisition Vehicle: Delaware Limited Liability Companies as the Vehicle of Choice

By Steven Daniels & Faiz Ahmad

Skadden

The choice of acquisition vehicle, and more broadly speaking the choice of investment structure, can profoundly impact a fund's experience with an investment in a variety of significant, and often economically relevant, ways. Historically, most businesses were organized as corporations. Over time, however, the trend has been increasingly in favor of using limited liability companies, or LLCs, and other "alternative entities." These alternative entities, in particular the LLC, can help an acquiring fund to avoid many of the pitfalls of corporate jurisprudence, enhance the sponsor's flexibility across a range of equity and debt financing strategies and may provide substantial tax advantages not otherwise available to entities organized in corporate form. Moreover, the use of an LLC creates opportunities – at least for the time being – to structure management equity compensation arrangements in a tax-advantaged manner, potentially enabling the sponsor to differentiate itself from other bidders.

In the State of Delaware, which continues to be the domicile of choice for entities used by sophisticated parties in complex business transactions, LLCs have swelled in popularity over the past ten years. In 2010, of all entities formed in the State of Delaware, 70% were LLCs, 24% were corporations and approximately 5% were limited partnerships. Since 2001, Delaware has experienced a 171% increase in the number of LLCs formed. As described below, we believe there are good reasons for this boom in LLC formation.

In structuring an investment, parties will often gravitate toward LLCs and other alternative entities because of their ability to provide "pass-through" tax treatment. That is, rather than being taxed as a separate entity, the profits, losses and other tax attributes of the business conducted by the LLC will pass through to the members of the LLC. However, an LLC has the flexibility to elect to be taxed as either a partnership or a corporation under the Internal Revenue Code. Therefore, even in situations where pass-through treatment is not desired or the acquired business is already in corporate form (thereby limiting some of the benefits of using a pass-through acquisition vehicle), the use of an LLC can nevertheless afford a number of significant benefits. In these instances, the LLC can still be used as a holding company for the acquired company where any co-investment interest and management equity compensation arrangements also reside.

The real hallmark of the LLC is the virtually limitless flexibility it affords from a governance perspective. Freedom of contract is the central tenet of the Delaware Limited Liability Company Act, or DLLCA, which governs all LLCs formed in Delaware. As embodied in the DLLCA and applied by the Delaware courts, this freedom of contract means that the parties will have extraordinary freedom and flexibility under Delaware law to establish the rights and obligations of the LLC, its members and its managers.

The statutory framework of the DLLCA provides certain "default" rules. In most instances, however, the parties can opt out of these default rules or customize them in the LLC's operating agreement. Delaware courts have consistently upheld clear, unambiguous provisions in operating agreements that override the statutory default requirements. The DLLCA therefore affords the members of an LLC the ability to: structure complex protocols for the distribution of profits and the allocation of tax attributes; design securities with flexible voting rights and powers; develop internal rules and standards for the interaction of the members (including to impose restrictive covenants or to permit related party or interested transactions); structure transfer restrictions, redemption rights, limits, gates and clawbacks; and restrict information rights of the LLC's members. The DLLCA also provides the members of an LLC with broad discretion to limit or eliminate traditional fiduciary duties of managers and members, as well as the ability to eliminate personal liability for breaches of fiduciary duty.

Of further note are the private nature of an LLC's governance arrangements and the relative ease of its operation. The LLC's operating agreement is a private contract protecting both the identities of the parties and the contents of the agreement. LLCs also provide considerable flexibility in defining the scope of information rights available to members. Although the DLLCA contains a statutory default right of members to access the books and records of the LLC, this right can be limited or be made subject to reasonable restrictions in the LLC's operating agreement. As such, the LLC affords its owners a greater ability to protect confidential information, including trade secrets and proprietary information, as well as financial information, capitalization tables and member information. Further, there are no minimum capital investments required for LLCs and there are no obligations to maintain records, hold meetings or conduct business activities within the State of Delaware. Investors and managers need not be natural persons or U.S. citizens, thereby enabling the use of offshore feeder entities.

Like other limited liability vehicles, a properly formed LLC that observes appropriate formalities will insulate the LLC's members and managers from personal liability for the debts and obligations of the LLC. Creditors of the LLC generally may not attack the interests of the members or managers in the LLC. Moreover, under a recent Delaware Supreme Court decision, creditors of an LLC have no standing to assert derivative claims on behalf of the LLC, even if the LLC is insolvent. As such, the sponsor, its employees and managers on the board of the LLC are all protected with respect to the LLC's debts and obligations. Similarly, creditors of individual members or managers generally may not attack the assets of the LLC in order to satisfy the debts and obligations of the members or managers.

The Delaware LLC also provides significant advantages in the design of equity securities, allowing the creation of traditional common and preferred units, as well as a variety of profits interests for compensatory and non-compensatory uses. This flexibility can provide a valuable tool when seeking to incentivize and reward a portfolio company's management team. While stock options are the customary approach to equity compensation in the corporate setting, options are less ideal in the LLC context because of the associated tax consequences. An LLC profits interest provides the recipient with a right to participate in the post-grant appreciation of the LLC through an allocable sharing in the LLC's net profits. LLC profits interests can be designed to replicate the economics of a stock option or a restricted stock grant, but can also provide considerable flexibility in designing tiered incentives for higher levels of performance. As with other terms of the LLC's operating agreement, the terms of the profits interests issued by the LLC may be structured in virtually any manner the parties' desire. For example, profits interests may be structured to generate value for the recipient only after the sponsor has realized a preferred return, or the profits interests can be separated into multiple classes or tranches which share in appreciation of the LLC at successively higher thresholds. Moreover, under the current state of the law, LLC profits interests can provide the recipient with capital gains treatment in an exit transaction, providing a considerable benefit relative to corporate equity grants.

Given the tremendous flexibility afforded to the members of a Delaware LLC in structuring their arrangements, the deference given to these contractual arrangements by reviewing Delaware courts and the potential advantages afforded by the LLC's flexible capital structure, private equity sponsors and other investors should carefully consider the use of a Delaware LLC in structuring their investments.

Skadden

Steven J. Daniels has a broad-ranging corporate practice, focused primarily on mergers and acquisitions, private equity transactions and securities law matters. He also advises clients on issues of Delaware law, has significant experience representing private equity sponsors, and has represented public and private companies in connection with negotiated acquisitions and dispositions in both distressed and traditional settings. Mr. Daniels works extensively with the structuring and formation of limited liability companies and other alternative entities for use in private equity transactions, joint ventures and other complex business arrangements. He has repeatedly been included in Chambers USA: America's Leading Lawyers for Business.

Steven can be contacted on +1 302 651 3240 or by email at steven.daniels@skadden.com.

Faiz Ahmad is an associate in Skadden's mergers and acquisitions practice. He has advised public and private companies, private equity funds and hedge funds in a variety of transactions, including negotiated and contested acquisitions, dispositions, mergers, auctions, tender offers, going-private transactions, and minority investments. Mr. Ahmad previously served as counsel to a global social venture capital fund investing in the delivery of critical goods and services to the impoverished in India, Pakistan, and East Africa. He also advises local and regional non-profits on corporate governance and has served in various leadership positions with the North American South Asian Bar Association.

Faiz can be contacted on +1 302 651 3045 or by email at faiz.ahmad@skadden.com.

Shadow Banking by Investment Funds

By Steven T. Kolyer

CLIFFORD CHANCE

The scope and volume of credit and credit intermediation services being provided by banks and banking institutions has been going through a period of stress and contraction while the need for such services continues to exist and, in many markets, grow. Opportunities exist, and will continue to expand, for non-banks – particularly private, unregulated funds and fund like entities – to achieve favourable returns by providing credit and credit intermediation services to borrowers and issuers of various types across many product and regional markets in the world financial community.

Growing Need

Non-bank banking activity, referred to as "shadow banking", may be described generally as credit intermediation involving entities and activities outside the regular banking system. While shadow banking has existed for many years, the volume of "shadow banking" globally grew in the early 2000's and appears to be poised to grow again. Aggregate global volume grew from approximately $27 trillion in 2002 to more than double that volume in 2007, dropped in 2008 and then re-grew in 2010 to 2007 levels, of which the US portion was approximately $24 trillion. In 2010, the largest proportions of the total were by investment funds (29%) and securitization vehicles (9%).*

Banks currently face a combination of obstacles that will impede or prevent the making of many types of loans that had been made by banks in the past. Compliance with risk-based capital rules is becoming more burdensome and expensive. Banks have been going through high general levels of de-risking, deteriorated asset quality, greater market concerns with bank counterparty risk, new restrictions on permissible banking business, and departure of experienced human resources. Further, large banking institutions are increasingly challenged by a plethora of new or expected regulations, legal uncertainties and increased regulatory scrutiny generally, together with the fact that certain funding mechanisms like the securitization markets have been reduced or closed.

Meanwhile, the need for credit and liquidity has increased across credit-stressed and liquidity-challenged borrowers. This is most apparent in the need for commercial real estate financing and refinancing, but extends to corporate lending needed for strategic transactions, infrastructure and other illiquid asset financings. Sovereign and bank credit stresses in Europe exacerbate these pressures.

The Response

The role of non-banks in "shadow banking" has the potential to grow significantly through investment funds. Capital and liquidity are in abundant supply at large, well-established investment funds. Investment funds have expertise in many relevant sectors. Private equity funds (and, to an extent, hedge funds) may avoid certain of the liquidity (and related mark-tomarket) pressures faced by deposit-taking banking institutions or by broker-dealers supported by repos and other short-term funding sources. An investment fund can use its familiarity with a business as an equity investor to facilitate underwriting credit risk to that business. Funds, moreover, boast relationships with potential borrowers, may provide favourable financing terms, and can be quick to react.

Financing tools exist to support the lending activity of private equity funds, hedge funds, money-market funds and other types of private investment vehicles. Funds are capable of bank style lending, capital markets financings, securitization term financing takeouts, short-term funding through repos, CP conduits and derivatives, as well as innovations in structuring permanent capital with efficient term financing. Developmental challenges exist that private funds engaging in shadow banking will need to address, such as direct or indirect systemic risks, potential for increased regulation, credit underwriting and surveillance systems development and fund investor acceptance. Nevertheless, credit intermediation activities for funds may potentially include new loan originations, both commercial and consumer, distressed loan acquisitions/restructurings, warehouse financings and sponsoring of securitizations, as well as generally advising on, arranging, syndicating and servicing loan assets.

Key Issues for Funds

An investment fund seeking to engage in shadow banking will need to address various issues and considerations. An existing fund undertaking a lending business must consider and reconcile its business plan with its structural limitations while a new fund will seek to have a structure that accommodates a lending business. Depending upon whether the fund is open-ended or closed-ended and its overall structure, the fund's capital may be locked in over a fixed term or drawn down as needed and returned upon realization or the fund may need to provide ongoing liquidity for investors, possibly subject to lock-ups. Incentive fee structures for the fund manager may influence the fund's planning as well. In origination of consumer loans, the existence of direct lender/borrower relationships typically necessitates regulatory licensing requirements. Loan origination activity generally poses U.S. taxable "trade or business" activity considerations and necessitates information barriers/walls to separate securities trading activities from borrower lending activities. Investment funds are challenged to develop the kinds of market access and broad reach historically enjoyed by large banks.

From a funding perspective, funds have to consider that, in the absence of deposit-taking, there are fund-raising needs and issues of timing – capital call notice periods, hedging, match funding, maturity mismatch risks (e.g. short-term funding for long-term assets); and counterparty risk for borrowers. In a number of areas, such as in real estate finance, investment funds must consider the availability and ease of securitization. Transaction-specific lending structures may vary widely and can include revolving credit facilities, repurchase agreements, term loans, securitizations and other kinds of structured and asset-based financings.

From a portfolio management perspective, an investment fund must consider investment advisor registration questions and potential statutory investment advisor duties, as well as conflicts of interest issues that may stem from multi-tranche investing or different channels of access to borrower information. Business relationship conflicts could arise as well. An investment fund's obligation to its equity investors must be evaluated on a number of levels, such as return of capital timing, needs for liquidity, avoiding mark-to-market risks, and accommodating excuse needs/requests. Special measures may be necessary to enable pledging of capital commitments. Obligations to provide ongoing disclosure to investors must be considered in light of obligations of confidentiality.

Regulatory changes, actual and pending, must be considered across many areas and in different jurisdictions. A very large fund could become subject to certain requirements due to being deemed systemically important. The new U.S. rules that will curtail or limit equity investments by banks in funds may lead to market shifts in how funds themselves are capitalized.

U.S. tax law requirements scheduled to take effect under FATCA will affect structures as well. Operational systems will need to enable a fund to perform borrower AML and suitability reviews, have reliable cash management systems, and carry out ongoing reporting. Additional considerations arise in managing credit-impaired and distressed loan assets.Private investment funds are well-positioned to fill an existing and growing funding gap borne of changes in the traditional banking industry occurring around the world. Adapting to meet this opportunity is bringing structural and operational changes to funds and giving rise to new fund structures designed to meet the needs of borrowers and other customers while addressing the needs of fund investors. Broadly-focused planning and structuring will best position an existing or contemplated investment fund to explore new opportunities in shadow banking.

Steven T. Kolyer is a partner of Clifford Chance US at the firm's New York City office. Mr. Kolyer has extensive experience in structured financings and other credit transactions through the securities and finance markets and in investment fund formations and investments. Over the years Mr. Kolyer's experience has been highlighted by transactions involving innovation and structured solutions in the capital markets.

In this regard, he played a lead role in the development of a number of securitization products dating back to the origins of that market, in the U.S. and off-shore, including first-time structures with real estate loan and other financial assets in various types of actively-managed fund and specialty finance products. He has headed the Firm's U.S. Structured Capital Markets Group and is recognized as a leading lawyer by Chambers, Legal 500 and NY Super Lawyers.

Mr. Kolyer may be contacted on +1 212 878 8473 or by email at steven.kolyer@cliffordchance.com.

Adding Insult to Injury: Investors in Madoff Feeder Funds Are Targets For Claw Back Suits

By Timothy W. Mungovan,
Stephen LaRose & Joel Cavanaugh

Investors in Madoff feeder funds who redeemed capital prior to the disclosure of the fraud in December 2008 ("Redeeming Investors") face increasing litigation risk. While almost three years have passed since the Ponzi scheme was exposed, Redeeming Investors should not assume that the passage of time has reduced their litigation risk. Redeeming Investors also should not take refuge in the fact that they did not invest directly in Madoff, that they are domiciled in a jurisdiction outside the United States, or that they invested in a fund that was domiciled outside the United States.

The hard reality is that Redeeming Investors are litigation targets of both Irving H. Picard, as the Trustee for the liquidation of Madoff's investment firm, Bernard L. Madoff Investment Securities, LLC ("BLMIS") and the feeder funds themselves.

Recently, Picard has filed several dozen lawsuits in the United States directly against Redeeming Investors in the largest feeder fund, Fairfield Sentry Limited ("Sentry"), to recover redemptions. Meanwhile, acting separately from Picard, the liquidators of Sentry have filed more than two hundred lawsuits in the United States seeking to recover redemptions (together, the "Sentry Claw Back Suits").

The Sentry Claw Back Suits appear to be the first in a wave of claw back suits that will be filed against Redeeming Investors in the coming months and years. Any Redeeming Investor, regardless of where they are located and how much money they lost, is at risk of being sued in the United States.

While the risk of a lawsuit is high, there are several procedural and substantive defenses available to Redeeming Investors. Rather than burying their heads in the sand, hoping to "wish away" the risk of a suit, Redeeming Investors would be wise to pay close attention to the Sentry Claw Back Suits and develop their own defense strategy.

Picard's "Subsequent Transferee" Actions Against Redeeming Investors

Picard has broad powers under the Securities Investor Protection Act of 1970 ("SIPA") and U.S. bankruptcy law to recover property for the benefit of the BLMIS Estate, including the power to seek recovery from both "initial transferees" (who redeemed directly from BLMIS) and "subsequent transferees" (who redeemed from an initial transferee, not directly from BLMIS).

Picard has followed a carefully orchestrated litigation strategy. The large feeder funds were among his first targets, in part because obtaining a judgment against these feeder funds as initial transferees is a condition precedent to pursuing the Redeeming Investors as subsequent transferees. Recently, Picard has started to settle some of his lawsuits against several large feeder funds, including Sentry, the Tremont-sponsored funds and Mount Capital Fund Limited.

Shortly after the Bankruptcy Court approved Picard's settlement with Sentry, Picard launched more than twenty claw back suits against Redeeming Investors. Each of these suits was commenced in the United States Bankruptcy Court for the Southern District of New York, against investors who redeemed capital from Sentry. Many of these Redeeming Investors appear to be domiciled outside the United States.

In each complaint, Picard alleges that after money was transferred from BLMIS to Sentry, it was subsequently transferred "directly, or indirectly to, or for the benefit of" the defendant/Redeeming Investor, rendering the money recoverable under the U.S. law (according to Picard). Notably, it is unclear from the complaints whether the Redeeming Investors were net winners or losers.

The Feeder Funds' Claw Back Suits Against Their Investors

Redeeming Investors also face the risk of a claw back suits by the feeder funds themselves. The Redeeming Investors in Sentry who have been named as defendants in Sentry Claw Back Suits are located around the world - including Switzerland, Germany, Singapore, Kuwait, Brazil, and many other countries. The Sentry liquidators' Claw Back Suits generally assert a variety of state common law theories, including Unjust Enrichment, Money Had and Received, Constructive Trust, as well as several theories under the liquidation laws of BVI.

Redeeming Investors Have Substantial Defenses to Claw Back Suits

Redeeming Investors have several potential defenses to claw back suits by both Picard and the feeder funds. First, Redeeming Investors should consider whether the U.S. Bankruptcy Court in New York can exercise personal jurisdiction over them. This inquiry focuses on whether the Redeeming Investor has sufficient contacts with the state of New York, or the forum in which the litigation is pending, to justify forcing the investor to defend the suit there. Redeeming Investors who are domiciled outside the United States and who invested in offshore feeder funds should have the strongest defense on personal jurisdiction..

Redeeming Investors also have a defense to these claw back suits if they can show that they gave "value" when they received their redemptions and acted in good faith. For Redeeming Investors who redeemed principal only, redemptions of principal are generally, but not always, accepted as giving "value." Redeemers of principal only will still have to make some showing that they acted in good faith and then the burden will likely shift to Picard or the feeder funds to prove that the Redeeming Investor did not act in good faith. For Redeeming Investors who redeemed principal and profits, they will have a more difficult time showing that they gave value and acted in good faith, particularly as to the profit portion of their redemptions.

As to suits by the feeder funds, there is some question whether the U.S. Bankruptcy Courts have subject matter jurisdiction over these direct claw back suits. In Sentry, Judge Loretta Preska, Chief Judge for the United States District Court for the Southern District of New York, recently decided that the Bankruptcy Court did not have subject matter jurisdiction over a subset of approximately forty cases that Sentry's liquidators had originally filed in New York State courts. It remains an open question whether the Bankruptcy Court has jurisdiction to hear the other two hundred or so Sentry Claw Back Suits filed by the Sentry Liquidators.

The Pressure Is Building On Redeeming Investors

The true risks to Redeeming Investors in feeder funds are difficult to quantify. While there is a high risk of being sued in the U.S., the risk of adverse judgment is difficult to quantify with precision. There are a large number of cases that have been filed concerning the Madoff fraud and different judges have been assigned to different cases. Important decisions and developments are occurring almost weekly.

Meanwhile, the law in the U.S. is still developing in several critical areas, including Chapter 15 of the Bankruptcy Code, the intersection of SIPA and the U.S. securities laws, and the good faith/fair value defense, particularly as to investors who redeemed principal and profits. Some of the decisions from different judges appear somewhat contradictory, which adds to the uncertainty.

Redeeming Investors should carefully monitor these on-going developments, so that they can develop their defensive strategize to minimize the risk of an adverse judgment against them.

NIXON PEABODY LLP
ATTORNEYS AT LAW

Tim Mungovan has an international practice in complex Commercial Litigation representing public and private corporations and businesses in a wide variety of areas, including securities, corporate governance, fiduciary obligations, investment management and financial services, fraud and trade secrets. As the founder and leader of the firm's Private Fund Disputes team, he specializes in disputes involving private investment funds including hedge funds, private equity funds, venture funds, and limited partnerships.

He has represented funds, investment advisers, managers, principals, feeder funds, institutional investors, and individual investors in various disputes, including control contests, partnership disputes, restructurings, removal of the general partner, and claims of fraud.

Tim has a national reputation for litigating hedge fund frauds, and representing investors in connection with redemption disputes.

Tim can be contacted on +1 617-345-1334 or by email at tmungovan@nixonpeabody.com.

Stephen LaRose focuses his practice on a wide range of commercial business litigation matters, particularly in the area of financial services, private fund disputes, securities and tax.

He regularly advises clients in disputes arising from private investment partnerships including affordable housing tax credit partnerships, hedge funds, and other private investment partnerships.

Mr. LaRose also represents clients in general disputes over contractual provisions between business entities, competition over trademarks and trade secrets, employment matters, and tax controversies. In each of these areas, Mr. LaRose has extensive experience representing his clients in motion hearings and trials before the state and federal courts of Massachusetts, as well as other jurisdictions.

Stephen can be contacted on +1 617-345-1119 or by email at slarose@nixonpeabody.com.

Joel Cavanaugh's practice focuses on complex commercial litigation.

He has experience working on a variety of matters, including private fund disputes, copyright infringement, patent infringement, legal malpractice, trade secret misappropriation, and government investigations.

Joel can be contacted on +1 617-345-1176 or by email at jcavanaugh@nixonpeabody.com.

Snapshot – Private Equity in 2011
Four Quarters, Four Groundbreaking Deals

Q1

92 private equity funds worldwide reached a final close in Q1 2011 raising an aggregate $42.3bn. This represents a small decrease from the $47.1bn collected in Q4 2010.

Stand-out Deal

Ares Management LLC's acquisition of Global Defense and Technology Solutions, which was renamed Sotera Defense Solutions. Global Defense was a public company and was taken private.

Matt Cwiertnia, Senior Partner of Ares Management commented "We anticipate that this long-term investment will enable the existing management team to expand its cutting edge and established franchise—one that is intrinsically involved with the growing markets for IT and national security."

Since the acquisition Sotera has made two other acquisitions to build a larger intelligence business and shift more of its business from products to services and solutions.

Q2

201 funds reached a final close in Q2, raising a combined $66.9bn, a further 115 funds held interim closes, having secured $24.1bn so far.

Stand-out Deal

Dynamics Research Corp acquires High Performance Technologies Inc. HPTi was acquired for $143 million, Jim Regan, DRC's chairman and CEO commented, "Health care is a big part of our growth strategy and we had military health pretty well covered, but VA is what we were looking for,"

With the acquisition, two-thirds of DRC's business is now in growth markets such as health, cyber security, finance and regulatory, intelligence and homeland security.

Q3

97 funds closed in Q3, raising an aggregate $44.8bn. Q3 2011 saw the flow of both private equity-backed buyout deals and exits slow significantly, with Q3 deal volume falling by 23% and exits falling by 54% in comparison to Q2 2011.

Stand-out Deal

Providence Equity Partners acquires SRA International. SRA shareholders received $31.25 per share in cash. Dr. Ernst Volgenau, SRA Founder and Chairman, said, "We believe that Providence Equity will be an excellent partner. Their values and culture are consistent with our longstanding ethic of honesty and service. SRA has a bright future."

Julie Richardson, a Managing Director at Providence, said, "We look forward to partnering with Ernst and the entire SRA team to help SRA achieve its tremendous potential as a leading innovator in the national security, civil government, health and intelligence sectors."

Q4

There were 624 private equity-backed buyout deals in Q4 2011, valued at a total of $56.7bn – an 8% decrease from Q3 2011.

Stand-out Deal

US-based BlackRock and First Reserve backed the $69.4 million (R900million) private equity investment in South Africa-based coal miner Umcebo Mining.

The duo invested alongside Glencore International and the Government of Singapore Investment Corporation. The deal saw Glencore pick up a 43.66% equity stake in Umcebo.

The funding will finance production at South Africa's principal coal field in Mpumalanga, which has established infrastructure to transport thermal coal.

The History of Private Equity & Venture Capital

Investors have been acquiring businesses and making minority investments in privately held companies since the dawn of the industrial revolution. However with a few exceptions, private equity in the first half of the 20th century was the domain of wealthy individuals and families.

Early History: 1946 – 1981

In 1946 the first two venture capital firms American Research and Development Corporation (ARDR) and J.H. Whitney & Company were founded. ARDC is credited with the first major venture capital success story when its 1957 investment of $70,000 in Digital Equipment Corporation (DEC) would be valued at over $355 million after the company's initial public offering in 1968 (representing a return of over 500 times on its investment and an annualized rate of return of 101%).

One of the first steps toward a professionally-managed venture capital industry was the passage of the Small Business Investment Act of 1958. The 1958 Act officially allowed the U.S. Small Business Administration (SBA) to license private "Small Business Investment Companies" (SBICs) to help the financing and management of the small entrepreneurial businesses in the United States.

During the 1960s and 1970s, venture capital firms focused their investment activity primarily on starting and expanding companies. More often than not, these companies were exploiting breakthroughs in electronic, medical or data-processing technology. As a result, venture capital came to be almost synonymous with technology finance.

It was also in the 1960s that the common form of private equity fund, still in use today, emerged. Private equity firms organized limited partnerships to hold investments in which the investment professionals served as general partner and the investors, who were passive limited partners, put up the capital.

Throughout the 1970s, a group of private equity firms, focused primarily on venture capital investments, would be founded that would become the model for later leveraged buyout and venture capital investment firms.

Venture capital played an instrumental role in developing many of the major technology companies of the 1980s. Some of the most notable venture capital investments were made in firms that include: Tandem Computers, Genentech, Apple Inc., Electronic Arts, Compaq, Federal Express and LSI Corporation.

Notable deals:

- Arguably the first leveraged buyout may have been the purchase by Malcolm McLean's McLean Industries, Inc. of Pan-Atlantic Steamship Company in January 1955 and Waterman Steamship Corporation in May 1955

- The first major venture capital success story occurred in 1957, when an investment of $70,000 into Digital Equipment Corporation would end up being valued at over $355 million after the company's IPO in 1968, providing a return of over 500 times the initial investment)

- Florida Foods Corporation was a developer of an innovative method for delivering nutrition to American soldiers which later came to be known as Minute Maid orange juice and was sold to The Coca-Cola Company in 1960.

The first Private Equity Boom: 1982 – 1993

The 80's are perhaps more closely associated with the leveraged buyout than any decade before or since. For the first time, the public became aware of the ability of private equity to affect mainstream companies and "corporate raiders" and "hostile takeovers" entered the public consciousness. The decade would see one of the largest booms in private equity culminating in the 1989 leveraged buyout of RJR Nabisco.

In January 1982, former US Secretary of the Treasury William E. Simon, Ray Chambers and a group of investors, which would later come to be known as Wesray Capital Corporation, acquired Gibson Greetings, a producer of greeting cards. The purchase price for Gibson was $80 million, of which only $1 million was rumoured to have been contributed by the investors. By mid-1983, just sixteen months after the original deal, Gibson completed a $290 million IPO and Simon made approximately $66 million. The success of the Gibson Greetings investment attracted the attention of the wider media to the nascent boom in leveraged buyouts.

Because of the high leverage on many of the transactions of the 1980s, failed deals occurred regularly, however the promise of attractive returns on successful investments attracted more capital. With the increased leveraged buyout activity and investor interest, the mid-1980s saw a major proliferation of private equity firms. Among the major firms founded in this period were: Bain Capital, Chemical Venture Partners, Hellman & Friedman, Hicks & Haas, The Blackstone Group, Doughty Hanson, BC Partners, and The Carlyle Group.

Venture Capital in the 80's

The public successes of the venture capital industry in the 1970s and early 1980s (e.g., DEC, Apple, Genentech) gave rise to a major proliferation of venture capital investment firms. From just a few dozen firms at the start of the decade, there were over 650 firms by the end of the 1980s, each searching for the next major "home run". While the number of firms multiplied, the capital managed by these firms increased only 11% from $28 billion to $31 billion over the course of the decade.

The growth the industry enjoyed was hampered by sharply declining returns and certain venture firms began posting losses for the first time. The market for initial public offerings cooled in the mid-1980s before collapsing after the stock market crash in 1987 and foreign corporations, particularly from Japan and Korea, flooded early stage companies with capital. Many of the venture capital firms attempted to stay close to their areas of expertise in the technology industry by acquiring companies in the industry that had reached certain levels of maturity.

In 1989, Prime Computer was acquired in a $1.3 billion leveraged buyout by J.H. Whitney & Company in what would prove to be a disastrous transaction. Whitney's investment in Prime proved to be nearly a total loss with the bulk of the proceeds from the company's liquidation paid to the company's creditors.

Corporate raiders and hostile takeovers

Although buyout firms generally had different aims and methods, they were often lumped in with the "corporate raiders" who came on the scene in the 1980s. The raiders were best known for hostile bids—takeover attempts that were opposed by management. By contrast, private equity firms generally attempted to strike deals with boards and CEOs, though in many cases in the 1980s they allied with managements that were already under pressure from raiders. But both groups bought companies through leveraged buyouts; both relied heavily on junk bond financing; and under both types of owners in many cases major assets were sold, costs were slashed and employees were laid off. Hence, in the public mind, they were grouped together.

Management of many large publicly traded corporations reacted negatively to the threat of potential hostile takeover or corporate raid and pursued drastic defensive measures including poison pills, golden parachutes and increasing debt levels on the company's balance sheet.

RJR Nabisco

One of the final major buyouts of the 1980s proved to be its most ambitious and marked both a high water mark and a sign of the beginning of the end of the boom that had begun nearly a decade earlier. In 1989, KKR closed on a $31.1 billion dollar takeover of RJR Nabisco. It was, at that time and for over 17 years, the largest leverage buyout in history. The event was chronicled in the book, Barbarians at the Gate: The Fall of RJR Nabisco.

LBO bust

By the end of the 1980s the excesses of the buyout market were beginning to show, with the bankruptcy of several large buyouts. Additionally, in response to the threat of unwelcome LBOs, certain companies adopted a number of techniques, such as the poison pill, to protect them against hostile takeovers by effectively self-destructing the company if it were to be taken over.

Notable deals

- A $31.1 billion dollar takeover of RJR Nabisco. It was, at that time and for over 17 years, the largest leverage buyout in history.

- Wesray Capital Corporation, acquisition of Gibson Greetings, a producer of greeting cards. The purchase price for Gibson was $80 million and by mid-1983, just sixteen months after the original deal, Gibson completed a $290 million IPO.

- In 1989, Prime Computer was acquired in a $1.3 billion leveraged buyout by J.H. Whitney & Company in what would prove to be a disastrous transaction. Whitney's investment in Prime proved to be nearly a total loss with the bulk of the proceeds from the company's liquidation paid to the company's creditors.

- In 1985 Revlon was acquired for $2.7 billion. The buyout would prove troubling, burdened by a heavy debt load. Revlon ended up selling four divisions: two were sold for $1 billion, its vision care division was sold for $574 million and its National Health Laboratories division was spun out to the public market in 1988.

The second Private Equity Boom: 1993-2003

Beginning roughly in 1992, three years after the RJR Nabisco buyout, and continuing through the end of the decade the private equity industry once again experienced a tremendous boom. After declining from 1990 through 1992, the private equity industry began to increase in size raising approximately $20.8 billion of investor commitments in 1992 and reaching a high water mark in 2000 of $305.7 billion, outpacing the growth of almost every other asset class.

As private equity re-emerged in the 1990s it began to earn a new degree of legitimacy and respectability. Although in the 1980s, many of the acquisitions made were unsolicited and unwelcome, private equity firms in the 1990s focused on making buyouts attractive propositions for management and shareholders.

The venture capital boom and the Internet Bubble: 1995–2000

Unlike the leveraged buyout industry, after total capital raised increased to $3 billion in 1983, growth in the venture capital industry remained limited through the 1980s and the first half of the 1990s increasing to just over $4 billion more than a decade later in 1994.

The late 1990s were a boom time for the venture capital, as firms on Sand Hill Road in Menlo Park and Silicon Valley benefited from a huge surge of interest in the nascent Internet and other computer technologies. Initial public offerings of stock for technology and other growth companies were in abundance and venture firms were reaping large windfalls. Among the highest profile technology companies with venture capital backing were Amazon.com, America Online, E-bay, Intuit, Macromedia, Netscape, Sun Microsystems and Yahoo!

The bursting of the Internet Bubble and the private equity crash: 2000 – 2003

The Nasdaq crash and technology slump that started in March 2000 shook virtually the entire venture capital industry as valuations for start-up technology companies collapsed. Over the next two years, many venture firms had been forced to write-off large proportions of their investments and many funds were significantly "under water". By mid-2003, the venture capital industry had shrivelled to about half its 2001 capacity.

Although the post-boom years represent just a small fraction of the peak levels of venture investment reached in 2000, they still represent an increase over the levels of investment from 1980 through 1995.

Stagnation in the LBO market

Meanwhile, as the venture sector collapsed, the activity in the leveraged buyout market also declined significantly. Leveraged buyout firms had invested heavily in the telecommunications sector from 1996 to 2000 and profited from the boom which suddenly fizzled in 2001. In that year at least 27 major telecommunications companies, (i.e., with $100 million of liabilities or greater) filed for bankruptcy protection.

Deals completed during this period tended to be smaller and financed less with high yield debt than in other periods. Private equity firms had to cobble together financing made up of bank loans and mezzanine debt, often with higher equity contributions than had been seen. Private equity firms benefited from the lower valuation multiples. As a result, despite the relatively limited activity, those funds that invested during the adverse market conditions delivered attractive returns to investors.

Meanwhile, in Europe LBO activity began to increase as the market continued to mature. In 2001, for the first time, European buyout activity exceeded US activity with $44 billion of deals completed in Europe as compared with just $10.7 billion of deals completed in the US.

Notable Deals

- Thomas H. Lee Partners acquisition of Snapple Beverages, in 1992, is often described as the deal that marked the resurrection of the leveraged buyout after several dormant years. Only eight months after buying the company, Lee took Snapple Beverages public and in 1994, only two years after the original acquisition, Lee sold the company to Quaker Oats for $1.7 billion.

- In 1993 the Texas Pacific Group acquired Continental Airlines. The plan included bringing in a new management team, improving aircraft utilization and focusing on lucrative routes. By 1998, Texas Pacific Group had generated an annual internal rate of return of 55% on its investment.

- In 1998, after 38 years of ownership, Domino's Pizza founder Tom Monaghan announced his retirement and sold 93 percent of the company to Bain Capital, Inc. for about $1 billion and ceased being involved in day-to-day operations of the company.

The third private equity boom and the Golden Age of Private Equity: 2003 – 2007

As 2003 got underway, private equity began a five year resurgence that would ultimately result in the completion of 13 of the 15 largest leveraged buyout transactions in history, unprecedented levels of investment activity.

The combination of decreasing interest rates, loosening lending standards and regulatory changes for publicly traded companies would set the stage for the largest boom private equity had seen.

The Sarbanes Oxley legislation, officially the Public Company Accounting Reform and Investor Protection Act, passed in 2002, in the wake of corporate scandals such as Enron. In addition to the existing focus on short term earnings rather than long term value creation, many public company executives lamented the extra cost and bureaucracy associated with Sarbanes-Oxley compliance.

For the first time, many large corporations saw private equity ownership as potentially more attractive then remaining public. Sarbanes-Oxley would have the opposite effect on the venture capital industry. The increased compliance costs would make it nearly impossible for venture capitalists to bring young companies to the public markets and dramatically reduced the opportunities for exits via IPO.

Resurgence of the large buyout

By 2004 and 2005, major buyouts were once again becoming common and market observers were stunned by the leverage levels and financing terms obtained by financial sponsors in their buyouts. Some of the notable buyouts of this period include: Dollarama (2004), Toys "R" Us (2004),The Hertz Corporation (2005), Metro-Goldwyn-Mayer (2005) and SunGard (2005).

Age of the mega-buyout

As 2005 ended and 2006 began, new "largest buyout" records were set and surpassed several times with nine of the top ten buyouts at the end of 2007 having been announced in an 18-month window from the beginning of 2006 through the middle of 2007.

Publicly traded private equity

Although there had previously been certain instances of publicly traded private equity vehicles, the convergence of private equity and the public equity markets attracted significantly greater attention when several of the largest private equity firms pursued various options through the public markets.

In May 2006, Kohlberg Kravis Roberts raised $5 billion in an initial public offering for a new permanent investment vehicle. KKR raised more than three times what it had expected at the outset as many of the investors in KPE were hedge funds seeking exposure to private equity but could not make long term commitments to private equity funds.

On March 22, 2007, after nine months of secret preparations, the Blackstone Group filed with the SEC to raise $4 billion in an initial public offering. On June 21, Blackstone sold a 12.3% stake in its ownership to the public for $4.13 billion in the largest U.S. IPO since 2002.

Meanwhile, other private equity investors were seeking to realize a portion of the value locked into their firms. In September 2007, the Carlyle Group sold a 7.5% interest in its management company to Mubadala Development Company, for $1.35 billion, which valued Carlyle at approximately $20 billion. Similarly, in January 2008, Silver Lake Partners sold a 9.9% stake in its management company to the California Public Employees' Retirement System for $275 million.

Secondary market and the evolution of the private equity asset class

In the wake of the collapse of the equity markets in 2000, many investors in private equity sought an early exit from their outstanding commitments. Beginning in 2004 and extending through 2007, the secondary market transformed into a more efficient market in which assets for the first time traded at or above their estimated fair values and liquidity increased dramatically. During these years, the secondary market transitioned from a niche sub-category in which the majority of sellers were distressed to an active market with ample supply of assets and numerous market participants. By 2006 active portfolio management had become far more common in the increasingly developed secondary market and an increasing number of investors had begun to pursue secondary sales to rebalance their private equity portfolios.

Notable Deals

- The Carlyle Group, Welsh, Carson, Anderson & Stowe, along with other private investors, led a $7.5 billion buyout of QwestDex. The buyout was the third largest corporate buyout since 1989. QwestDex's purchase occurred in two stages: a $2.75 billion acquisition of assets known as Dex Media East in November 2002 and a $4.30 billion acquisition of assets known as Dex Media West in 2003. R. H. Donnelley Corporation then acquired Dex Media in 2006.

- Private equity firms KKR, TPG Capital, and Goldman Sachs Capital Partners purchased TXU in 2007. Energy Future Holdings (TXU) can boast the largest amount ever paid in a private equity deal, a staggering $44.37 billion.

- After the gaming conglomerate Harrah's Entertainment acquired the Caesar's Entertainment corporation in 2005, shares jumped, but that didn't deter Apollo and TPG from forming Hamlet Holdings and taking Harrah's private in 2008. The deal was valued at $27.4 billion.

The Credit Crunch and post-modern private equity: 2007-2008

In July 2007, turmoil that had been affecting the mortgage markets spilled over into the leveraged finance and high-yield debt markets. Uncertain market conditions led to a significant widening of yield spreads, which coupled with the typical summer slowdown led to many companies and investment banks to put their plans to issue debt on hold until the autumn.

By the end of September, the full extent of the credit situation became obvious as major lenders including Citigroup and UBS AG announced major writedowns due to credit losses. The leveraged finance markets came to a near standstill.

Additionally, the credit crunch has prompted buyout firms to pursue a new group of transactions in order to deploy their massive investment funds. These transactions have included Private Investment in Public Equity (or PIPE) transactions as well as purchases of debt in existing leveraged buyout transactions.

According to investors and fund managers, the consensus among industry members in late 2009 was that private equity firms will need to become more like asset managers, offering buyouts as just part of their portfolio, or else focus tightly on specific sectors in order to prosper. The industry must also become better in adding value by turning businesses around rather than pure financial engineering.

"By the end of September, the full extent of the credit situation became obvious as major lenders including Citigroup and UBS AG announced major writedowns due to credit losses. The leveraged finance markets came to a near standstill."

Private Equity in 2010

Private equity firms invested nearly 90% more capital in 2010 than they did in 2009. Overall, private equity firms invested around $225 billion in 3,380 transactions, compared to $119 billion in 2,818 deals for 2009. Nearly half of the 2010 dollars went to North and South American companies. Europe placed second with a 35.5% market share, followed by Asia-Pacific (excluding Japan) with a 12.5% stake. 2010 saw activity in the private equity backed buyout market recovering to reach the kind of levels not seen since the onset of the financial crisis.

Regulatory Developments in the marketing of securities and financial services within Bahrain, Kuwait and the UAE

By Zeeshan A. Ahmedani & Salim Azzam

WHITE & CASE

Foreign firms marketing securities to local investors in countries of the Gulf Cooperation Council (the "GCC") (in particular, Bahrain, Kuwait, Oman, Qatar and the United Arab Emirates) are subject to the their regulatory regimes, which, in most cases, restrict marketing to local investors without approval from the relevant regulatory bodies. Foreign firms have historically circumvented such requirements by taking advantage of certain "grey areas" of the laws by marketing discretely to local investors to avoid often onerous licensing requirements, or requirements to market through local agents. In most jurisdictions, other than Saudi Arabia, the regulators have turned a blind-eye to this type of activity.

However, mainly as a result of the global financial crisis, regulators in some GCC countries have recently taken measures to ratchet up enforcement of laws addressing marketing of foreign securities and financial services, laws developed to protect the local investors from predatory marketing activity. In so doing, they have replicated, to a large extent, the more restrictive rules in Saudi Arabia, where marketing onshore is permitted solely by coordinating with the Saudi Arabian Capital Markets Authority and through locally licensed persons authorized to carry out such activities (so-called "authorized persons").

This article addresses recent regulatory developments in Bahrain, Kuwait and the UAE in particular regarding marketing of securities and financial services.

Regulatory regimes of GCC countries; Summary

In each country, the offeror is subject to the restrictions applying to foreign firms marketing financial products and securities. The offeror will also be subject to overriding restrictions on foreign firms that "engage in business" without proper authorization.

As the laws have developed in each country, market practice has emerged, partly based on legislation, and partly resulting from the idiosyncrasies of each jurisdictions' regulatory bodies. For example, in Saudi Arabia, if a foreign firm intends to carry out activities, it must retain a local (licensed) firm, or failing that it must carry out all activities "outside the country". Carrying out activities "outside the country" is narrowly construed.

A foreign firm is advised to refrain from "cold calling" or negotiating with potential or existing investors while inside or outside the country. However, the foreign firm may, under certain circumstances, meet with potential investors in Saudi Arabia, provided this meeting is in response to a request from the investors, and the firms' acting representative remains passive during the meeting and is accompanied by a local agent.

These themes are found, to varying degrees, in all GCC countries. Up until now, however, the GCC countries other than Saudi Arabia haven't enforced these rules strictly, allowing the "grey area" marketing noted above.

Recent Developments; Bahrain and Kuwait

In Bahrain, the Central Bank of Bahrain and the Financial Institutions Law (the "CBB Law") regulates the financial services industry. Pursuant to the CBB Law, a foreign firm cannot market or sell securities or financial services (or any other "regulated" activity) unless licensed by the Central Bank of Bahrain (the "CBB").

Notwithstanding this general prohibition, foreign firms have historically approached investors without approval from the CBB, taking advantage of the CBB's relatively lenient approach to marketing activities of a discrete nature. For example, foreign firms have typically taken the following measures: (i) avoiding "cold calling", (ii) ensuring that personal visits where discrete in nature, (iii) ensuring that, in advance personal visits to Bahrain, the Bahraini investor provides written confirmation that such visit was a result of the Bahraini's investors request, (iv) ensuring that all documents are executed abroad and (v) avoiding public presentations or road shows.

Recently, the CBB's attitude towards "discrete" marketing, formerly a grey area of the CBB law, has taken a more restrictive tone. On 3 April 2011, the CBB proposed a regulation with respect of financial services/products offered to Bahraini investors. If adopted, the draft regulation will make it a criminal offense to market, promote or offer financial services in Bahrain without a license (or without an express exemption from the CBB). The draft regulation defines "markets, promote or offer" to mean any announcement, advertisement, broadcast or other communication made for the purpose of inducing recipients to purchase or otherwise acquire financial service in return for monetary payment or some other form of valuable consideration.

In Kuwait, the marketing of foreign securities and financial services was formerly governed by Decree law No. 31 of 1990 ("Law 31"), with the Ministry of Commerce and Industry (the "MOCI") responsible for enforcement of the Law 31. Under Law 31, the marketing, offer and sale of any foreign securities in Kuwait were only permissible upon the approval of the MOCI. Under Law 31, no foreign firm was able to sell, market or offer foreign securities or services in Kuwait, except through a licensed Kuwaiti agent.

The Kuwaiti government has recently passed Law No. 7 of 2010 and the Executive Bylaws for Law No. 7 of 2010 Concerning the Establishment of the Capital Markets Authority (the "CMA") and Organization of Securities Activity (collectively, the "Capital Markets Law"). Pursuant to the Capital Markets Law, the CMA is now the sole regulatory authority primarily responsible for regulating the marketing, offer and sale of securities and financial services in Kuwait (while the Central Bank may be involved if necessary).

The Capital Markets Law does not differ substantially from the regime under Law 31 in respect of the marketing of securities and financial services: if a foreign firm intends to market, offer or sell securities in Kuwait the foreign firm may either (i) apply to the CMA for a license to market, offer and sell securities in Kuwait or (ii) market, offer or sell securities in Kuwait through a licensed entity in Kuwait.

However, the establishment of a more formal regime under the Capital Markets Law may be seen as a reaction to the global financial crisis, and an attempt to formalize the Kuwait's regulation of foreign marketing activities.

In the UAE, the Securities and Commodities Authority and the Central Bank have entered into an MOU, which may, among other things, pave the way for the enactment of amendments to the Federal Securities and Commodities Law, providing more regulatory clarity in respect marketing of local and foreign securities. Although the MOU was adopted in 2009, the expectation is that laws adopted pursuant to the MOU will follow the approach taken by Kuwait and Bahrain.

Conclusion

The recent measures by many of the GCC countries to monitor and restrict marketing activities more closely represents a departure from prior practice and can be seen as a local effort to correspond to the more publicized and burdensome legislation enacted in the US and across the EU. Fund managers and sponsors should closely monitor their marketing activities in the GCC in the upcoming months to ensure compliance. In the end, the GCC remains a very liquid investor market. Local authorities recognize the interests of local investors in global funds. Therefore, a compliant manager should still be able to tap the local markets as has always been the case.

WHITE & CASE

Zeeshan Ahmedani is a partner in our Abu Dhabi office. Zeeshan is a member of the Firm's Investment Funds practice. He has substantive experience advising managers and sponsors on the organization and establishment of private investment funds both onshore and offshore (tax haven) jurisdictions, including hedge funds, private equity funds, real estate funds, distressed debt funds, hybrid funds and Shari'ah compliant funds. Zeeshan represents managers, placement agents and sponsors around the world, with equity diverse investment and distribution strategies.

He has also represented fund sponsors on the establishment of management companies and compensation arrangements, as well as on US regulatory issues, including investment advisory, investment company, ERISA, securities listing, distribution strategy, and commodities and futures trading matters.

Zeeshan also represents institutional investors on their alternative asset portfolios included negotiating investments in all classes of private investment funds, separately managed account and investment management agreements.

He has had articles published on topics such as securities issues related to private investment funds, hedge fund advisor performance compensation, and US broker-dealer issues.

Zeeshan has also spent time in the Firm's London, Palo Alto, Hong Kong and Tokyo offices, and continues to counsel Asia-based and Europe-based clients.

Zeeshan can be contacted on +971 2 495 0133 or by email at zahmedani@whitecase.com.

Salim is a corporate associate based in Abu Dhabi. His experience includes corporate transactions, international joint ventures, corporate offshore restructuring and international commercial matters.

Prior to joining White & Case, Salim represented a wide range of UAE and US companies related to international acquisitions and commercial matters. Examples of Salim's transactional experience include advising on and structuring share and asset acquisitions, and drafting, reviewing and negotiating various transaction documents.

In New York, Salim advised companies on corporate and commercial matters, and handled all aspects of business litigation.

Salim can be contacted on +971 2 4950 125 or by email at sazzam@whitecase.com.

Venture capital vital to our nation's hi-tech survival

Dr Katherine Woodthorpe

The vital role that innovation plays in our nation's development is, rightly, well recognised.

But what is not well understood is how management expertise and capital move ideas and concepts from laboratories, garages and backrooms into innovative, commercially viable products and services, adding to the economic well-being of Australia.

A major source of entrepreneurial expertise and funding comes from the venture capital (VC) and private equity (PE) industry.

Entrepreneurs and innovators seeking support and backing for their intellectual property have limited options to access capital and expertise. There are few advisors and consultants that cater to the early stage market. Early stage companies are high-risk investments often with little or no collateral. Consequently, the firms that are in the best position to invest and advise early stage companies are those that are run by former successful entrepreneurs, scientists, doctors and engineers themselves – a VC firm.

Fund managers running VC firms can bring with them a unique business mindset that seeks out and manages early-stage investment opportunities on behalf of investors (mainly superannuation funds, institutions and wealthy individuals). Their hands-on ability to work closely with the founders/management of innovative companies, on matters of strategic planning, recruitment, and access to international markets and technology, makes them a partner who brings more than just capital to the table.

There are around 200 seed, early and late stage companies backed by local VC managers.

In the 2011 financial year, 37% of the total VC dollars invested were in the information communication and technology sector (ICT). Life sciences received the majority of VC investments in FY2011; a statistic which has been steady over the last six years. The largest proportion of investments in ICT went into business related software, followed by communication and networking services. Other ICT sectors include semiconductors, consumer electronics and connectivity, networking and communication software.

Some well-known VC successes in the ICT sector include Seek, Looksmart, Hitwise and Wedgetail. Successes in life sciences include Cochlear, Resmed and Pharmaxis.

VC fund managers bring a "business focus" to new companies, helping them grow to the next stage of their life-cycle, before being sold to another investor or merging with a competitor to create a larger market share.

While I would like to say the amount and number of VC investments is growing, the reality is that the VC industry has been contracting in Australia and around the world, even in the US.

The VC sector has faced headwinds in recent years, with investors seeking increased liquidity and reluctant to back higher risk, longer term investments.

The Australian Government spends around $8 billion a year on research, much of it 'blue sky' adding to the knowledge base but also in the hope that something will come out of it to contribute to the nation's productivity.

Despite this government expenditure, little focus is given to commercialise the investment. VC fund managers take on the financial risk to help innovators commercialise their concepts. To help them continue this vital role in the nation's innovation system, there needs to be greater policy support to these "enablers".

One area of support in recent years has been the Government's Innovation Investment Fund (IIF) program, started in 1998 just before the tech crash. It co-invests with private sector investors in VC funds to assist early-stage companies to commercialise the outcomes of Australia's strong research capability.

However the IIF has only one more tranche of funds left before it ends later this year. Worryingly, there is no appetite from the Government to extend it in any form despite a very positive independent review and the Government's own praise for the programme, leaving the massive taxpayer funded expenditure into R&D without any adequate commercialisation mechanism.

Historically, Government intervention into a unique asset class such as VC has been crucial to its growth. Governments in the US and UK have backed their respective early stage sectors for decades and have especially increased their initiatives towards the innovation sector post-GFC.

Australia maintains a robust ecosystem that advocates innovation in technology: for example, the Government's zeal to establish a national broadband network is testament to its goal to better the Australian IT infrastructure. Australia is one of the easiest places to start a new business and is one of the best places for laws relating to ICT. Furthermore, Australia's proximity to emerging technology-based Asian powerhouses like China, India, Indonesia and the Philippines gives us access to an agile product testing environment.

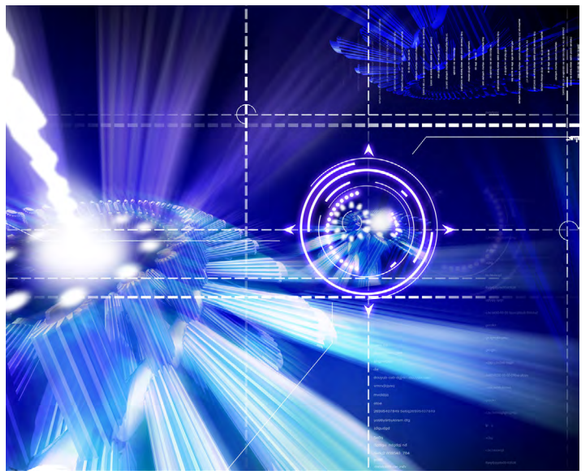
Dr Katherine Woodthorpe is the Chief Executive at AVCAL.

AVCAL, the Australian Private Equity and Venture Capital Association Limited, was established in 1992 as a forum and voice for participants in the private equity and venture capital industry.

Membership includes almost all the domestic and international PE and VC fund managers active in Australia. PE and VC are key sources of capital for companies of all sizes, to enable their growth and realise their potential. VC is one of the few sources of capital available to enable entrepreneurs to convert innovative ideas into sustainable enterprises.

Australian PE has $23.6b under management while VC has $2.9b under management.

To find out more information please visit www.avcal.com.au, www.twitter.com/avcal1 and www.linkedin.com/in/avcal.



Shenzhen and Xiamen Further Encourage Equity Investment

By Dezan Shira & Associates

Local governments of several Chinese coastal cities are offering further incentives to equity investment enterprises, as private equity (PE) investment has emerged as one of the most important capital-raising avenues for small and medium-sized enterprises in those areas.

Shenzhen: PE Development Fund

In order to offer various fiscal incentives to PE funds, Shenzhen established a PE Development Fund (PEDF) and recently clarified the operation procedures for PE funds that intend to apply for the financial support extracted from the PEDF.

According to the "Operation Procedures for PE Funds' Application for the Use of the PEDF (shenfujinfa [2011] No.5)" and the "Regulations on Promoting PE Funds Development (shenfu [2010] No.103)," all types of Shenzhen-registered equity investment enterprises – regardless of whether they are Chinese-invested, foreign-invested or jointly-invested – will be able to apply for the use of the PEDF if they meet the following criteria corresponding to their own corporate nature:

- **A PE fund** shall have a registered monetary capital of no less than RMB100 million and the initial funding in place shall not go under RMB50 million. Shareholders or partners shall all invest in their own names and the funding from each individual shareholder/partner shall be no less than RMB5 million. Where the PE fund is established in the form of a limited liability company or partnership, the number of its shareholders/partners shall be no more than 50; where the PE fund is established in the form of a limited corporation, the number of its shareholders shall not be more than 200.

- **A PE fund management enterprise** shall have a registered capital of no less than RMB10 million if it is established in the form of a limited corporation; it shall have an actual receipt capital of no less than RMB5 million if it is established in the form of a limited liability company or partnership.

- **A private securities investment fund management enterprise** shall have a registered capital of over RMB10 million and manageable assets of over RMB100 million.

Incentives offered to those PE funds include:

- **Reward for local financial contributions:** A reward amounting to 100 percent of a PE fund's local financial contributions – based on the enterprise's business turnover and corporate income – will be offered during the first two years, and a reward amounting to 50 percent of the PE fund's local financial contributions will be granted during the next three years. The application for the reward will only be accepted between May 20 and August 10 every year.

- **Office purchase subsidy:** A one-time subsidy amounting to 1.5 percent of the office purchase price will be offered to either the PE fund or the PE fund's management enterprise. The total amount of the subsidy shall not exceed RMB5 million and the subsidized office shall not be for sale within the next 10 years.

- **Office rent subsidy:** A three-year subsidy amounting to 30 percent of the market office rent will be granted to either the PE fund or the PE fund's management enterprise. The total amount of the subsidy shall not exceed RMB1 million and the application for the subsidy will only be accepted between January 1 and February 28 every year.

- **One-time settlement reward:** A reward amounting between RMB5 million and RMB15 million will be given to a PE fund settled in Shenzhen based on its registered capital size (if the fund is established in the form of a corporation) or the size of the fund that was actually collected upon establishment (if the fund is established in the form of a partnership). The rewarded PE fund shall remain settled in Shenzhen within the next five years.

- **One-time reward for investment withdrawal:** A one-time reward amounting to 30 percent of a PE fund's local financial contribution (or a PE partner's local financial contribution based on his/her income tax) will be offered upon the fund's withdrawal from an enterprise or a project. However, the total amount of the reward shall not exceed RMB3 million.

Xiamen: Government Guide Fund

In order to increase equity investment companies' participation into encouraged industries, the Xiamen local government established the Government Guide Fund, a fund that will join and follow up desired PE investments and provide risk allowance to better secure investments.

According to the "Regulations on Promoting the Development of Equity Investment Enterprises (xiafu [2011] No.443)," Xiamen's incentives offered to eligible equity investment enterprises include:

- **Office purchase and rent subsidies:** An equity investment enterprise with a registered capital of over RMB1 billion will receive an office purchase subsidy amounting to 5 percent of office purchase price or a three-year office rent subsidy amounting to 20 percent of office rent. The total amount of office purchase subsidy shall not exceed RMB4 million or RMB800 per square meter and will be spread into a five-year payment; the total amount of office rent subsidy shall not exceed RMB800,000.

- **Reward for local tax contributions:** An equity investment enterprise will be granted a reward amounting to 50 percent of the enterprise's local corporate/individual income tax (CIT/IIT) contribution during the first two years, and a reward amounting to 25 percent of the enterprise's local tax contribution during the next three years.

- **Reward for investment withdrawal:** A complete withdrawal of an equity investment from a Xiamen-based enterprise or project will obtain a one-time reward amounting to 5 percent of the equity investment enterprise's actual local tax contribution.

- **Reward for equity investment management enterprises:** A profitable equity investment management enterprise will receive a five-year reward:

1) Amounting to 20 percent of the its local CIT contribution if the enterprise's assets under management range between RMB200 million and RMB500 million

2) Amounting to 30 percent of the its local CIT contribution if the enterprise's assets under management range between RMB500 million and RMB1 billion

3) Amounting to 50 percent of the its local CIT contribution if the enterprise's assets under management exceed RMB1 billion

- **Incentives for talents in scarcity**: An executive employed over a year at an equity investment enterprise will be offered a three-year reward amounting to 40 percent of his/her local IIT contribution; a professional in the related field will enjoy distinct types of social benefits, such as faster visa issuance, better social insurance package and favorable housing policies.

Dezan Shira & Associates is a specialized foreign direct investment practice, providing business and legal advisory, tax, accounting, payroll and due diligence service to multinationals investing in the emerging markets of Asia.

Established in 1992, the firm is a leading regional practice in Asia with twenty offices in five jurisdictions, employing over 170 business advisory and tax professionals. For information or advice on establishing business operations in China.

Please contact Dezan Shira & Associates at **info@dezshira.com** *or visit* **www.dezshira.com**.

A New Avenue- a new beginning for QFIs

By Prachi Loona & Dhaval Vussonji

KANGA & CO. (Regd)
ADVOCATES & SOLICITORS
ESTABLISHED 1890
123rd YEAR
2012-2013

In a move to boost investments and increase investor base in times of significant foreign outflows and rupee volatility, in August 2011, Qualified Foreign Investors (QFIs) were allowed to invest in the units of mutual funds. This was taken a step further when the Finance Ministry vide its press release dated 1st January, 2012 has allowed QFIs to further invest on repatriation basis in the equity shares of companies listed on recognized stock exchanges. This is a huge step for Indian regulatory authorities towards liberalization and allowing capital account convertibility. Hitherto, only registered foreign institutional investors (FIIs) as also individuals and sub-accounts of the FII were permitted to deal in securities listed on a recognized stock exchange within India. FIIs were subject to registration and strict regulatory regime for investments. It is therefore pertinent to examine the new regulatory regime now proposed to be introduced (viz.investment by QFIs) vis-à-vis the existing FII investments.

A QFI is a person resident in a foreign country that is in compliance with the Financial Action Task Force (FATF) standards and is a signatory to the International Organizational of Securities Commission's (IOSCO) Multilateral Memorandum of Understanding (MMOU). Needless to add a QFI cannot be a FII and/or a sub-account of a FII in order to maintain distinction in the two available routes of investment. While an FII is directly regulated by Securities and Exchange Board of India (SEBI), a QFI's only point of contact is the SEBI registered depository participant (DP) though whom the investments are routed. The DP has been entrusted with supervisory powers over the QFIs.

QFIs are not completely unregulated. The DP is required to ensure that only QFIs which meet the requisite Know Your Customer (KYC) norms (i.e. as per FATF standards, Prevention of Money Laundering Act, etc.) are permitted to directly invest in the Indian equity market. In order to ensure transparency, it has been mandated that the ultimate/ end beneficial owners are known and placed on record. In the event the details of ultimate/ end beneficial owners are not accessible or ring fenced from each other, the DPs are required to disallow such entities from opening a demat account. Presumably therefore, listed corporate entities and funds would not be permitted to invest as a QFI.

In order to maintain further control, DP is required to ensure that the same set of ultimate/ end beneficial owners do not open more than one demat account as QFIs and the ultimate/end beneficial owners are not residents of India. Although this will allow the regulator to keep full and complete track of all the investments being made by the QFIs, it is not clear how this is proposed to be achieved. SEBI does not have extra territorial jurisdiction and an exercise of such jurisdiction appears to be doubtful in light of the recent judgement of the Supreme Court in the case of Vodafone. Therefore, any change in the organization of the QFI may not be brought to the notice of the DP frustrating the purpose of the regulations.

SEBI has also in its wisdom, disallowed QFIs from issuing any offshore derivative instruments (ODIs). This ensures that no back door entry is achieved by third parties through the ODI medium. However, the enforceability and practicability of these restrictions remains to be seen.

This check is also being maintained through the fiscal routes by not allowing the QFI to open any bank accounts within India. In order to facilitate investments, DPs have been permitted to open a rupee pool bank account which is to be used exclusively for the purposes of investments by QFIs in India. The DP is required to clearly segregate the funds of each QFI in the pool account and maintain proper audit trails. However, the retention of shares/funds in pool accounts has historically proved to be fraught with risks and portfolio schemes based on such pool accounts have been discontinued recently. Similarly, although multiple broking accounts have been permitted, order routing is mandatory via the DP only and no direct orders are permitted to be placed by the QFI. This mechanism appears to be intended to allow both the fiscal and the securities regulator to maintain adequate control over the activities of the QFI through the DP and the banker.

In order to fully appreciate the introduction of the QFI route, we would have to consider the nature and quantum of investments that maybe made by the QFIs. Presently, investments by QFIs are permissible in mutual fund units, certain non convertible debentures, sale and purchases on stock exchanges through recognized stock brokers, purchase of equity shares in public issues, rights issues, receipt of bonus shares, receipt on account of stock split/ consolidation, receipt due to amalgamation, demerger, receipt of dividends and tendering of equity shares under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 or SEBI (Delisting of Securities) Guidelines, 2009 or SEBI (Buyback) Regulations, 1998. All transactions in equity shares by an QFI is to be only on the basis of taking and giving delivery of equity shares purchased or sold and QFIs have not been permitted to deal in any exchange traded derivatives. Presumably, this is because short selling and speculative trading in derivatives allows QFIs to bring in volatility in the market without having any corresponding obligations or responsibility. Further, it appears (at for the time being) that QFIs will not be able to invest in convertible securities, warrants, security receipts, government securities, etc.

Further, the individual and aggregate shareholding of QFIs in any company has been limited to 5% and 10% of the paid up capital of the company, respectively. As in the case of FIIs, RBI has prescribed that the DPs publish a caution list when the aggregate ceilings are reaching in any company and all fresh purchases would require the prior approval of the depositories. However, intra QFI transactions have been permitted without the prior approval of the depositories. In line with the extant foreign exchange regulations, QFIs cannot take funding against the securities held by them whether within India or outside.

"Presumably, this is because short selling and speculative trading in derivatives allows QFIs to bring in volatility in the market without having any corresponding obligations or responsibility."

These guidelines have been issued by the Government amid pressing times and have given a new access route to investors from more than 70 countries to enter and invest in the Indian equity market. Although great responsibility has been placed on the DPs to ensure the success of this route, the approach does not impose any burdensome conditions or restrictions on the QFI and may provide the much required impetus and boost to foreign inflows.

Mr. Dhaval Vussonji is a practicing Advocate and Solicitor and a Partner of Messrs Kanga & Co., a leading firm of Advocates and Solicitors in Mumbai, India established in 1890. He is also qualified as a Bachelor of Commerce and a Chartered Accountant.

Mr. Vussonji is an expert in varied areas of practice including real estate, international ship building contracts and related international arbitrations, private equity investments, capital market transactions involving public issuances, delisting offers, buy-backs and takeover offers, banking and finance, commercial negotiations of hotel management contracts and litigations.

Prominent deals recently advised by him include an acquisition of real estate in Central Mumbai by the Ajay Piramal Group for a sum exceeding US$ 150 Million, commercial negotiations relating to construction and purchase of 3 ships for a sum exceeding US$ 45 million, a bitterly contested hostile takeover bid for Great Offshore Limited a structured investment by Ess Dee Aluminium in India Foils Limited and an amalgamation of the two listed entities, a structured real estate debt refinancing exceeding US$ 120 million and a reference before the Constitutional Bench of the Supreme Court of India relating to provisions of the Indian Arbitration Act.

Mr. Vussonji can be contacted on +91 22 6623 0000 or by email at dhaval.vussonji@kangacompany.com.

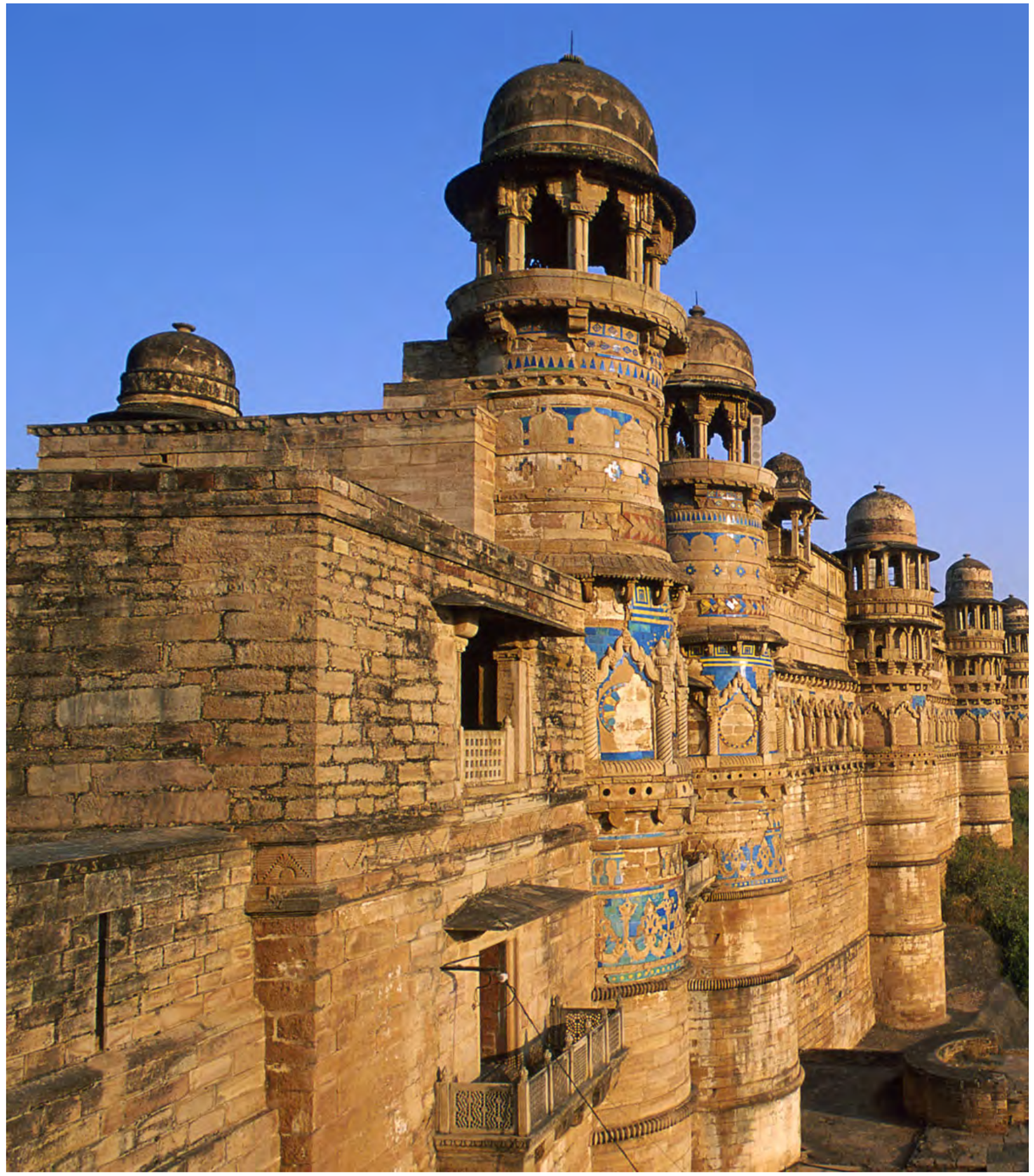
Ms Prachi Loona is qualified as an Advocate and Solicitor from Mumbai and is an Associate with Kanga & Co..

She has advised acquisitions of real estate in various parts of India including Maharashtra, Andhra Pradesh and Delhi and has provided opinions on title on those properties, which has been a unique experience given the diverse laws and customs applicable in different parts of India.

She also regularly advises matters relating to banking and finance, securitisation, joint ventures, investments by foreign institutional investors in the Indian securities markets, offshore derivatives contracts with the Indian securities as the underlying in compliance with the regulatory regime within India.

Her work experience with the National Stock Exchange of India Limited has given her an added perspective on functioning of financial markets. Ms Prachi Loona has advised various multinationals including offshore branches of investment banks in private banking, wealth management, investment advisory, cross border banking, syndicated lending and structured finance transactions both within India as well from overseas.

Ms. Loona can be contacted on +91 22 6623 0000 or by email at prachi.loona@kangacompany.com.



Expert Directory - Europe

UK
PwC
Malcolm Preston
+44 (0) 20 721 32502
Malcolm.H.Preston@Uk.Pwc.Com

Phil Case
+44 (0)20 7212 4166
Philip.V.Case@Uk.Pwc.Com
http://www.pwc.co.uk/

UK
SGH Martineau
Kavita Patel
0800 763 1645
kavita.patel@sghmartineau-uk.com

Andrew Stilton
0800 763 1556
Andrew.stilton@sghmartineau-uk.com
http://www.sghmartineau.com/

Isle of Man
The Fund Management Association (FMA)
Ita Mc Ardle
ita@itamcardle.com
http://www.fma.org.im/

Guernsey
Guernsey Finance
Fiona Le Poidevin
+44 (0) 1481 720071
info@guernseyfinance.com
www.guernseyfinance.com

Republic of Ireland
Dillon Eustace
Andrew Bates
+353 1 673 1704
andrew.bates@dilloneustace.ie
http://www.dilloneustace.ie/

Luxembourg
The Association of the Luxembourg Fund Industry (ALFI)
Marc Saluzzi/ Susanne Weismüller
+352 22 30 26 1
info@alfi.lu

Jersey
Whitmill Trust Company Limited
Claire Keeney
+44 (0) 1534 886129
Claire@whitmill.com

Gibraltar
Hassans International Law Firm
James Lasry
+350 200 79571
james.lasry@hassans.gi
http://www.gibraltarlaw.com/

Luxembourg
CACEIS Investor Services
Nicolas Palate
+352 4767 2356
Nicolas.palate@caceis.com
http://www.caceis.com

North America

USA
PwC
Lauren Koopan
+1 646 471 5328
Lauren.K.Koopman@Us.Pwc.Com
http://www.pwc.com/

USA
Clifford Chance
Steven T. Kolyer
+1 212 878 8473
steven.kolyer@cliffordchance.com
http://www.cliffordchance.com/home.html

USA
Nixon Peabody
Tim Mungovan
+1 617-345-1334
Tmungovan@Nixonpeabody.Com

Stephen LaRose
+1 617-345-1119
Slarose@Nixonpeabody.Com

Joel Cavanaugh
+1 617- 345-1176
Jcavanaugh@Nixonpeabody.Com
http://www.nixonpeabody.com/

USA
Skadden
Steven J. Daniels
+1 302.651.3240
steven.daniels@skadden.com

Faiz Ahmad
+1 302 651 3045
faiz.ahmad@skadden.com
http://www.skadden.com/

Middle East

UAE
White & Case
Zeeshan A. Ahmedani
+971 2 495 0133
Zahmedani@Whitecase.Com

Salim Azzam
+971 2 4950 125
Sazzam@Whitecase.Com
http://www.whitecase.com/

Asia/Australasia

China
Dezan Shira & Associates
info@dezshira.com
www.dezshira.com

India

Kanga & Co
Dhaval Vussonji
+91 22 6623 0000
Dhaval.Vussonji@Kangacompany.Com

Prachi Loona
+91 22 6623 0000
Prachi.Loona@Kangacompany.Com
www.Kangacompany.Com

Australia
The Australian Private Equity & Venture Capital Association Limited (AVCAL)
Dr. Katherine Woodthorpe
http://www.avcal.com.au/