Globe Law
and Business

Private Equity

A Transactional Analysis, Third Edition

Consulting Editor **Chris Hale**

Private Equity

A Transactional Analysis, Third Edition

Consulting Editor **Chris Hale**

Consulting editor
Chris Hale

Managing director
Sian O'Neill

Editorial services director
Carolyn Boyle

Production manager
Neal Honney

Group publishing director
Tony Harriss

Private Equity: A Transactional Analysis, Third Edition
is published by
Globe Law and Business
Globe Business Publishing Ltd
New Hibernia House
Winchester Walk
London SE1 9AG
United Kingdom
Tel +44 20 7234 0606
Fax +44 20 7234 0808
www.globelawandbusiness.com

Print and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY

ISBN 9781909416215

Private Equity: A Transactional Analysis, Third Edition
© 2015 Globe Business Publishing Ltd

All rights reserved. No part of this publication may be reproduced in any material form (including photocopying, storing in any medium by electronic means or transmitting) without the written permission of the copyright owner, except in accordance with the provisions of the Copyright, Designs and Patents Act 1988 or under terms of a licence issued by the Copyright Licensing Agency Ltd, 6-10 Kirby Street, London EC1N 8TS, United Kingdom (www.cla.co.uk, email: licence@cla.co.uk). Applications for the copyright owner's written permission to reproduce any part of this publication should be addressed to the publisher.

DISCLAIMER
This publication is intended as a general guide only. The information and opinions which it contains are not intended to be a comprehensive study or to provide legal or financial advice, and should not be treated as a substitute for legal or financial advice concerning particular situations. Legal or financial advice should always be sought before taking any action based on the information provided. The publishers bear no responsibility for any errors or omissions contained herein.

Table of contents

Introduction 5
Chris Hale
Travers Smith

Private equity restructuring 11
Justin Bickle
Oaktree

The place of private equity in corporate finance and mergers and acquisitions 21
Justin Bickle
Oaktree

Private equity fund structures – the limited partnership 31
Jonathan Blake
Lorraine Robinson
King & Wood Mallesons LLP
(formerly SJ Berwin LLP)

Equity finance 53
Helen Croke
Travers Smith

Debt finance 73
Kirstie Hutchinson
Christopher Lawrence
Macfarlanes LLP

Acquisition documentation 107
Richard Lever
Lorraine Robinson
King & Wood Mallesons LLP
(formerly SJ Berwin LLP)

Due diligence 137
Tom Evans
Benedict Nwaeke
David Walker
Latham & Watkins

Performance of private equity 169
Barry Griffiths
Landmark Partners LLC
Rüdiger Stucke
Warburg Pincus LLC

Regulation 185
Amy Mahon
Clifford Chance LLP

Tax structuring and management 195
Kathleen Russ
Travers Smith

Public-to-privates 221
Graham Gibb
Charles Martin
Macfarlanes LLP

Benelux 259
Gaike Dalenoord
Elke Janssens
Margaretha Wilkenhuysen
NautaDutilh

France 287
Maud Manon
Xavier Norlain
Jeremy Scemama
Guillaume Valois
DLA Piper

Germany 309
Georg Schneider
Noerr LLP

Italy 335
Raimondo Premonte
Donato Romano
Gianni Origoni Grippo Cappelli
& Partners

Spain 351
Fernando de las Cuevas
Pío García-Escudero
Gomez-Acebo & Pombo

Sweden 363
Jens Bengtsson
Malin Leffler
Roschier

Private equity deals in the United States: separated from the United Kingdom by a common language? 375
Lilian Lardy
Howard Sobel
Huw Thomas
David Walker
Latham & Watkins

About the authors 393

试读结束：需要全本请在线购买： www.ertongbook.com

Private Equity

A Transactional Analysis, Third Edition

Consulting Editor **Chris Hale**

Consulting editor
Chris Hale

Managing director
Sian O'Neill

Editorial services director
Carolyn Boyle

Production manager
Neal Honney

Group publishing director
Tony Harriss

Private Equity: A Transactional Analysis, Third Edition
is published by
Globe Law and Business
Globe Business Publishing Ltd
New Hibernia House
Winchester Walk
London SE1 9AG
United Kingdom
Tel +44 20 7234 0606
Fax +44 20 7234 0808
www.globelawandbusiness.com

Print and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY

ISBN 9781909416215

Private Equity: A Transactional Analysis, Third Edition
© 2015 Globe Business Publishing Ltd

All rights reserved. No part of this publication may be reproduced in any material form (including photocopying, storing in any medium by electronic means or transmitting) without the written permission of the copyright owner, except in accordance with the provisions of the Copyright, Designs and Patents Act 1988 or under terms of a licence issued by the Copyright Licensing Agency Ltd, 6-10 Kirby Street, London EC1N 8TS, United Kingdom (www.cla.co.uk, email: licence@cla.co.uk). Applications for the copyright owner's written permission to reproduce any part of this publication should be addressed to the publisher.

DISCLAIMER
This publication is intended as a general guide only. The information and opinions which it contains are not intended to be a comprehensive study or to provide legal or financial advice, and should not be treated as a substitute for legal or financial advice concerning particular situations. Legal or financial advice should always be sought before taking any action based on the information provided. The publishers bear no responsibility for any errors or omissions contained herein.

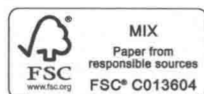

Table of contents

Introduction — 5
Chris Hale
Travers Smith

Private equity restructuring — 11
Justin Bickle
Oaktree

The place of private equity in corporate finance and mergers and acquisitions — 21
Justin Bickle
Oaktree

Private equity fund structures – the limited partnership — 31
Jonathan Blake
Lorraine Robinson
King & Wood Mallesons LLP
(formerly SJ Berwin LLP)

Equity finance — 53
Helen Croke
Travers Smith

Debt finance — 73
Kirstie Hutchinson
Christopher Lawrence
Macfarlanes LLP

Acquisition documentation — 107
Richard Lever
Lorraine Robinson
King & Wood Mallesons LLP
(formerly SJ Berwin LLP)

Due diligence — 137
Tom Evans
Benedict Nwaeke
David Walker
Latham & Watkins

Performance of private equity — 169
Barry Griffiths
Landmark Partners LLC
Rüdiger Stucke
Warburg Pincus LLC

Regulation — 185
Amy Mahon
Clifford Chance LLP

Tax structuring and management — 195
Kathleen Russ
Travers Smith

Public-to-privates — 221
Graham Gibb
Charles Martin
Macfarlanes LLP

Benelux — 259
Gaike Dalenoord
Elke Janssens
Margaretha Wilkenhuysen
NautaDutilh

France 287
Maud Manon
Xavier Norlain
Jeremy Scemama
Guillaume Valois
DLA Piper

Germany 309
Georg Schneider
Noerr LLP

Italy 335
Raimondo Premonte
Donato Romano
Gianni Origoni Grippo Cappelli & Partners

Spain 351
Fernando de las Cuevas
Pío García-Escudero
Gomez-Acebo & Pombo

Sweden 363
Jens Bengtsson
Malin Leffler
Roschier

Private equity deals in the United States: separated from the United Kingdom by a common language? 375
Lilian Lardy
Howard Sobel
Huw Thomas
David Walker
Latham & Watkins

About the authors 393

Introduction

Chris Hale
Travers Smith LLP

1. Background

Fifteen years ago, private equity was known as venture capital and operated at the fringes of corporate finance and corporate activity. By 2007 it had taken centre stage, with many household names and some large companies becoming private equity-owned. The post-Lehman financial crisis posed tough challenges for private equity but it emerged from that crisis in much better shape than many had predicted. So what is private equity, and why did it become so successful that it was viewed in some western economies as central to corporate finance and mergers and acquisitions activity?

In the United Kingdom, continental Europe and much of the rest of the world, 'private equity' means the equity financing of unquoted companies at many stages in their lifecycle, from start-up to expansion to management buyouts and buy-ins of established companies. 'Venture capital' is seen, in the United Kingdom at least, as a subset of private equity, covering the seed to expansion stages of investments.

The key elements of private equity are:

- investments in unquoted companies;
- equity capital by nature;
- medium- to long-term investments; and
- targeted at companies with growth potential.

Private equity is invested in exchange for a stake in a company; as shareholders, the investors' returns are dependent on the cash flows, growth and profitability of the business. Private equity emerged on the UK landscape in the post-war period, and saw its key period of growth from the late 1980s and in particular from the late 1990s. In 1981 there were just 44 private equity firms active in the United Kingdom, according to the British Private Equity & Venture Capital Association (BVCA). The BVCA now has some 200 private equity house members.

The Centre for Management Buyout Research (CMBOR) reported that in 1986 there were 370 buyouts in the United Kingdom, in which £1.4 billion was invested. By 1996 the number had risen to 647 and the amount invested to £7.7 billion. In 2007 – the high-water year in terms of value – there were 630 buyouts, in which £46.5 billion was invested. The consequences of the recent financial crisis can be seen in the statistics for 2009: only 370 deals were recorded by CMBOR, and just £5.5 billion was invested in these transactions. By 2013 the value of buyouts had shown considerably recovery, to £15.8 billion for that year according to CMBOR. Volumes, though, had not, 367 being recorded for 2013.[1]

2. How important is private equity?

Each year, for nine years up to February 2008, the BVCA commissioned research from IE Consulting on the economic impact of private equity. The February 2008 report indicated as follows:

- Companies that have received private equity backing account for the employment of around 3 million people in the United Kingdom, equivalent to 21% of the UK private sector workforce. Approximately 1.1 million people were employed at the time of the report by companies then backed by private equity, equivalent to 8% of UK private sector employees;
- Private equity-backed companies generated total sales of £310 billion and contributed more than £35 billion in taxes; and
- Over the five years to 2006/2007, employment rates and sales all grew faster in private equity-backed companies than in FTSE 100 and FTSE Mid-250 companies.

This research also showed that during the five-year period to 2006/2007, UK private equity-backed companies increased their worldwide staff levels by an average of 8% per annum. This was significantly faster than the rate of growth of FTSE 100 and FTSE Mid-250 companies, at 0.4% and 3% respectively.

The effect of private equity on employment has in recent years been a particularly contentious issue. Research conducted by CMBOR on the employment effects of buyouts since 1985 broadly supports the IE Consulting findings, although there does seem to be a difference between management buyouts and management buy-ins, with the latter experiencing slower employment growth.

Private equity is even more important to those working in the mergers and acquisitions market. According to research published by CMBOR, buyouts accounted for 47% by number and 49% by value of total UK mergers and acquisitions in 2005, percentages sustained in the years leading up to the onset of the financial crisis. Reflecting the low level of UK mergers and acquisitions activity since 2008, these proportions have risen in recent years with buyouts accounting for 60% of UK mergers and acquisitions volume in 2013 and 67% of value.

In each of the three years up to 2008, record amounts were raised by private equity fund managers; $10 billion-plus funds became almost common. It is in part a result of this sheer weight of money that private equity pushed into ever-larger deal territory, in 2007 in particular. That year saw the first, and so far only, take-private of a FTSE 100 company: Alliance Boots.

The financial crisis caused private equity fund raising to slump but by 2013, according to research group Preqin, it had recovered to levels approaching those seen before the financial crisis. Indeed Preqin reported that at the end of September 2014 a record high of $1.19 trillion was available to private equity fund managers for investment globally. Funds of $10 billion or more disappeared from the landscape for

---

1 The CMBOR statistics cover both private equity-backed and other buyouts. Recently CMBOR has started recording separate figures for private equity. In 2007 CMBOR reports there were 324 private equity backed buyouts with a value of £44.1 billion. In 2009 it was 118 buyouts with a value of £4.9 billion, and in 2013 193 buyouts with a value of £15.1 billion.

试读结束：需要全本请在线购买： www.ertongbook.com

a few years but in 2013 and 2014 began to return with, for example, Carlyle and Hellman & Freidman raising funds of this scale. Multi-billion dollar buyouts have also returned in the United States: the $24.9 billion Dell buyout of 2013 showing that in spectacular fashion. Such huge buyouts have yet, though, to return to the United Kingdom.

3. The geography of private equity

As Justin Bickle reveals in his chapter "The place of private equity in corporate finance and mergers and acquisitions", the United States has been the main driving force of the growth of private equity. Indeed, private equity is still heavily concentrated there and in the United Kingdom. According to a report published by Apax Partners in 2006, entitled *Unlocking global value – future trends in private equity Investment worldwide*, in the first 10 months of 2005 North America (including Canada) accounted for 50% of all new private equity funds raised globally. In the same period, 75% of all private equity investment (including venture capital) was made in the United States. Europe was then responsible for the vast bulk of the world's remaining private equity transactions, with the United Kingdom being by some way the largest European market. This Apax report attempted to rank 33 countries by how congenial their private equity environment was, measured by various criteria. The bottom two countries in this table were those carrying the greatest expectation of private equity development for the future: India and China. Since 2006, private equity investment has picked up considerably in Asia in particular, but there is a long way to go before private equity activity even in China, let alone parts of the world such as South America and Africa, comes to rival activity in the United States, the United Kingdom and other parts of western Europe.

4. What about private equity performance?

A study published by CMBOR in 2005 revealed that, for institutional investors, "[t]he most important reasons for investing in private equity are to achieve a greater return relative to other asset classes, to diversify the portfolio and to obtain a positive annual return". Is it right that private equity fund managers have indeed produced superior returns in this way? Regrettably, this has been one of the most difficult issues on which to obtain reliable information. Those with such information – investors in private equity funds and the fund managers – tended to keep it to themselves. Data sets of information are now appearing though. Perhaps the most complete are the Burgiss statistics, which have been used by Barry Griffiths and Rudiger Stucke who have written a new chapter for this edition on "The performance of private equity". They articulate some of the difficulties in assessing private equity returns, and look at the most common measures being used now to analyse those returns. As they point out, while classes of private equity have often, perhaps usually, beaten the Standard & Poor's 500 Total Return Index, on a risk-adjusted basis, they should do so materially.

What can be said is that it is highly likely that top quartile funds probably do beat public company indices materially. It is also the case, as Preqin surveys regularly show, that investors in private equity funds are overwhelmingly happy with the returns they obtain and are keen to continue investing in the asset class.

5. Why have at least upper-quartile private equity funds outperformed listed investments?

The reasons for upper-quartile funds at least materially outperforming listed assets are no doubt complex. It has been said that private equity made its money by leverage in the 1980s, by price/earnings multiple arbitrage in the 1990s and since then by genuinely changing companies. In fact, all three components have always played their part. Perhaps, though, one of the key reasons is the unique corporate governance structure of private equity, involving as it does active monitoring by private equity investors, high leverage and the concentration of equity under management control. This last element in particular creates a much more complete alignment of interest between a private equity fund manager and the senior executives that fund manager is backing to run a business than is the case in the listed company environment. As Paul Myners – who was a minister in the last Labour government, and who held senior positions at Gartmore and wrote a report at the request of Her Majesty's Treasury published in 2001 on institutional investment in the United Kingdom – said in a lecture given in Cambridge in May 2003:

> *Overly diversified portfolios with a significant number of underweight holdings mean there is little economic incentive for the fund manager (individually or organisationally) to adopt the mind-set of an owner and behave accordingly. If there is any sense of 'ownership' it applies to a portfolio as a whole and how individual securities interact to affect risk relative to benchmark – there is little focus on ownership responsibility towards individual companies. We thus have a critical vacuum in governance – no-one actually takes on the responsibility of ownership ...*
>
> *For the past year I have been chairing an unlisted company financed by private equity. I have been struck by the extent to which this ownership model leads to strong and effective governance focused on the aligned interest of owners and management. All are working to a common agenda, with shareholders fully engaged on strategic issues and in receipt of timely and complete management information going well beyond financial reporting. Contrast this with the situation for a public limited company where shareholder engagement on strategy is almost non-existent (reactive at best) and reporting is formulaic and limited in its inter-activity.*

6. Private equity scrutiny and emergence from financial crisis

As private equity moved in the first decade of this century to centre stage in some of the largest western economies, the authorities in those countries took a much greater interest in private equity and the way it operated. In November 2006 the Financial Services Authority (FSA), as it then was, published a paper entitled *Private equity: a discussion of risk and regulatory engagement*. While this, and the subsequent feedback paper which appeared in June 2007, gave private equity a qualified bill of health, the industry has had to become accustomed to much greater attention from regulators.

At the time the FSA was publishing these papers, private equity was the subject of a sustained attack by the GMB trades union and others. They charged that the industry made its money by loading acquisitions with debt, stripping assets, cutting jobs and using the extra cash flow from investee companies to pay itself huge

dividends and then dodging tax on the wealth it generated. Very little of this criticism stood up to serious scrutiny.

This type of regulatory and union attention was not assisted by the understandable desire of private equity fund managers to keep their activities private. When private equity is analysed from a government perspective, it by and large comes out well. All surveys indicate that limited partners and fund investors are satisfied with the level of detail and information they receive from the private equity fund managers they back. The governance model between the private equity fund managers and the companies in which they work could be said to be superior to that of other comparators. The difficulty was that private equity fund managers in the years leading up to the financial crisis invested in very large companies in which a substantial wider community felt it had a stake. The stakeholders took the view that they were entitled to information about the companies in which their stake existed. The private equity world was slow to respond, not least because it had never had to grapple with these types of comments and criticisms before.

The response in the United Kingdom was the Walker Guidelines on disclosure and transparency. Because these guidelines apply only to larger companies, and even then only to companies that generate 50% of their revenues in the United Kingdom, their effects are relatively limited. They are designed to ensure greater disclosure on the part of companies that satisfy the criteria and greater disclosure on the part of private equity firms investing in those companies. The portfolio companies that are required to comply with the guidelines amounted to just 71 in total as of December 2014. A Guidelines Monitoring Group was established to monitor conformity with the guidelines and each December it publishes an annual report. The benchmark against which the group measures compliance is the FTSE 350, and on the whole the December 2014 report gives those companies subject to the guidelines and their private equity backers good marks.

Voluntary measures such as these turned out not to be enough, however. The private equity and hedge fund industries came under heavy attack in late 2008 from certain European Parliament members. This criticism gathered momentum and resulted in the publication by the European Commission in April 2009 of a draft directive, the Alternative Investment Fund Managers Directive (AIFMD). After intense debate and lobbying the directive was passed and is now in force in the European Union. It covers both hedge and private equity fund managers, and covers an enormous range, including the marketing of alternative investment funds, their authorisation, conflicts of interest and risk management, the need for independent valuers and independent depositories, and sweeping disclosure requirements. Amy Mahon in another chapter new to this edition, on regulation, discusses the asset stripping provisions of the AIFMD. The AIFMD has and will add substantially to the compliance burdens of private equity. Whether the costs associated with these burdens will produce benefits that justify them remains to be seen. The private equity industry is sceptical, but it will cope and adjust to the AIFMD as it will to the tide of other regulations which will continue to flow as a reaction to the financial crisis.

In the dark days following the collapse of Lehman, pessimistic commentators

predicted that as many as a third of private equity fund managers then operating would go out of business and that many investee companies overburdened by debt would go bust or end up in the hands of banks. There was much talk of an approaching tsunami of debt maturity. These worst fears have not been realised. While a few private equity fund managers have not been able to raise new funds and may disappear (it takes a long time to kill off a private equity house because of the need to manage out investments already made), the vast majority have raised, or are likely to raise, new money. There have indeed been a number of new entrants to the private equity world since 2008.

Nor did the tsunami of debt defaults emerge. While conventional banks have to a greater or lesser degree retreated from leveraged buyouts, private debt funds, unitranche providers, a revived high-yield market and other sources of debt including new collateralised loan obligation funds have more than filled the gap. All this has provided enough liquidity to refinance much of the debt raised before 2008. 2014 has also been an exceptionally strong year for private equity exits – which has also helped cope with the pre-2008 debt issue.

Indeed 2014 saw debt pricing fall, covenant-light terms reappear and debt multiples increase. The challenge for private equity fund managers has not been either debt or equity availability – both are now plentiful – but the availability of good quality assets in which to invest.

The private equity industry has been through difficult periods before and will do so again. It has developed in waves. It has now emerged in good health from what appears to be (although this is still a tentative judgement) the worst of the financial crisis. Private equity is now an established part of institutional investors' portfolios and is likely to remain a significant part of corporate finance into the distant future.

7. This book

This book is intended to put private equity into context, to give some idea of its significance and, above all, to examine the nuts and bolts of private equity funds and the myriad issues associated with private equity deals. The principal focus – and indeed the assumption underlying much of what is in it – is that private equity equates to buyouts. While this is not the case in the United Kingdom, much of what is said here is of relevance to venture capital. The chapters in this book have been written by some of the leading practitioners in Europe. This third edition has not just been updated but substantially expanded, with new chapters on private equity performance and regulation, most western European jurisdictions and on the key differences between the terms of private equity deals in the United States and those in the United Kingdom. The book attempts to provide an introduction to those familiar with the mergers and acquisitions landscape, but not particularly with private equity, while also highlighting points of interest and guidance to more seasoned private equity practitioners.

Private equity restructuring

Justin Bickle
Oaktree

The onset of the summer 2007 financial crisis caused immediate and far-reaching shocks for the European private equity industry. This chapter explores private equity's approach to restructuring portfolio businesses and considers the tools that are available to financial sponsors when their underlying investments get into trouble.

1. Why was private equity so exposed when the market turned?

With the benefit of hindsight, before the onset of the financial crisis in August 2007, companies acquired by European private equity firms were much more highly levered and acquired at significantly higher acquisition multiples than equivalent buyouts undertaken by US private equity firms during 2006 and 2007. The glut of cheap debt financing, together with business plans that left room for little or no margin of error, meant that when the market correction came, coping with the downturn in Europe was destined to be prolonged and bloody for the majority of financial sponsors.

2. Reaction of private equity to the financial crisis

For the first 12 months of the credit crunch, most European mid-market private equity firms struggled to come to terms with the changed market and appeared not to know how to operate in such an alien environment. The market informally divided between:

- those with significant committed but unspent capital, which therefore fared relatively well;
- those whose problems were exacerbated by their reliance, in whole or part, on publicly listed funded vehicles; and
- those firms with no new funds, little operational know-how and limited experience in dealing with distressed portfolio businesses.

Therefore, 2008 was characterised, depending on the financial sponsor involved, as a time of either intense portfolio firefighting or of inactivity on the deal front as firms sought to hunker down, protect their existing investments and attempt to weather the economic storm.

By way of illustration, it has been suggested that during the 12 months up to August 2007, when the deal market changed, the top 10 private equity firms globally deployed around $120 billion in equity capital; in the 12 months following the collapse of Lehman Brothers in September 2008, those same top 10 firms deployed

less than one-tenth of that amount. The lack of third-party debt financing meant that many transactions reached only preliminary stages at best and were seldom consummated. Fear and inertia won out over greed and deal making.

For most, the financial restructuring of portfolio companies became the new focus. The tools available to and most commonly deployed by financial sponsors are the subject of this chapter.

3. Considerations prior to financial restructuring

Each financial sponsor considered different factors when determining how and when to support its troubled portfolio companies. The most relevant factors fall into two broad categories: those relating to the portfolio as a whole and its reputation, and those relating to individual companies within the portfolio.

The questions arising with regard to portfolio/reputational issues included the following:

- How many portfolio companies were actually troubled in terms of being likely to default on their third-party debt facilities or requiring the injection of new money?
- For those companies that would default, what amount of equity would be required to avoid further defaults and/or cure the problem, either for the next 12 months or for the lifetime of the debt facilities?
- Did the financial sponsor have the funds available to make the necessary equity injection(s)?
- How would its limited partners react to multiple equity injections across its portfolios?
- Would injecting equity cause any issues between either different vintages of private equity funds or different limited partners across numerous fund vehicles?
- What would be the consequences for the sponsor if it did not financially restructure the portfolio company, aside from the loss of all or part of its original equity investment?
- Could the sponsor simply afford to walk away from its investment and would it be economically rational to do so?
- Had the sponsor already taken its equity out of the investment (known as a 'dividend recapitalisation') or made a return on its original investment during the bull market?
- Did the syndicate comprise financial institutions – whether banks, credit funds or collateralised loan obligations (CLOs)[1] – that had cross-exposure to a number of different portfolio companies of the financial sponsor, and therefore were important for relationship purposes in terms of these current investments or future investments by the sponsor when primary credit markets returned?

---

1 CLOs are structured investment vehicles which exist to make a return on an underlying pool of around 70 leveraged loans in different portfolio companies. Many of these specialist credit investors had significant exposure to the same troubled credits during the downturn and often found themselves opposite the same financial sponsors and their advisers in restructuring negotiations.

试读结束：需要全本请在线购买： www.ertongbook.com