

GETTING THE
DEAL THROUGH 

Private Equity 2019

Contributing editor

Bill Curbow

Simpson Thacher & Bartlett LLP

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For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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Preface

Private Equity 2019

Fifteenth edition

Getting the Deal Through is delighted to publish the fifteenth edition of *Private Equity*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the British Virgin Islands, Canada, Colombia, Egypt and Thailand. The report is divided into two sections: the first deals with fund formation in 22 jurisdictions and the second deals with transactions in 23 jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Bill Curbow of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume

GETTING THE 
DEAL THROUGH

London
February 2019

Canada

Andrae J Marrocco, Bruce Chapple and TE (Ted) Scott

McMillan LLP

Formation

1 Forms of vehicle

What legal form of vehicle is typically used for private equity funds formed in your jurisdiction? Does such a vehicle have a separate legal personality or existence under the law of your jurisdiction? In either case, what are the legal consequences for investors and the manager?

A limited partnership is typically used for private equity funds in Canada. This allows ‘flow-through’ treatment for investors (ie, income tax is not paid at the partnership level). Limited partnerships are formed provincially and, to be created, a declaration must be filed in the applicable province. However, they do not have a separate legal personality. A Canadian limited partnership is, similar to most other jurisdictions, a partnership with passive investors (limited partners) and a general partner who is charged with the management and operation of the business for the partnership and has unlimited liability for all of the obligations of the limited partnership. Limited partner investors do not take part in the management of the fund and are only liable to the extent of the amount they contribute or agree to contribute.

2 Forming a private equity fund vehicle

What is the process for forming a private equity fund vehicle in your jurisdiction?

The formation of a vehicle for a private equity fund can be done quickly by a general partner and an initial limited partner. If the general partner and initial limited partner are formed, the formation of the limited partnership can be accomplished on the same day by the general partner filing a declaration in the applicable province. There are no minimum capital requirements. That being said, the commercial realities and process of fundraising and negotiating a limited partnership agreement with investors can take much longer and would be similar to other jurisdictions (typically several months or longer). The government fees for forming and maintaining a limited partnership are nominal, while professional advisory fees (legal, accounting, potentially placement agents, etc) are more significant.

3 Requirements

Is a private equity fund vehicle formed in your jurisdiction required to maintain locally a custodian or administrator, a registered office, books and records, or a corporate secretary, and how is that requirement typically satisfied?

A private equity fund is typically a limited partnership. This includes two elements: the partnership and the general partner. A declaration for the limited partnership must be filed by the general partner in the province where the limited partnership is formed and in each province where the limited partnership carries on business. The general partner must also either be formed in such provinces or be registered as an extra-provincial corporation to carry on business in such provinces. The partnership and general partner typically must maintain a registered office and attorney for service in each province in which they carry on business. This can be the fund’s business address or law firm’s office.

4 Access to information

What access to information about a private equity fund formed in your jurisdiction is the public granted by law? How is it accessed? If applicable, what are the consequences of failing to make such information available?

Typically, the general partner of a limited partnership must maintain a current record of the limited partners (including the full name and address and amount of capital contributed or total contributions) at its principal place of business in the province in which it is formed. Upon request and without charge the general partner must permit any person to inspect the record of limited partners during business hours and to make copies. In the province of Manitoba, however, the Partnership Act requires public identification of the limited partners and their capital contributions on the registration of the limited partnership. This information is not generally published and is accessed by request.

5 Limited liability for third-party investors

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

Third-party investors are limited partners and enjoy liability limited to the extent of the amount contributed or agreed to be contributed to the limited partnership. This is meant to be a passive investment and this limited liability can be lost, however, if an investor takes part in the control of the business.

In this regard, Manitoba (as opposed to the other provinces) has a slightly more favourable regime for protecting the limited liability of limited partners: a limited partner in a Manitoba limited partnership who takes an active part in the business of the partnership is liable as a general partner to third parties dealing with the partnership, but only if they do not know that he or she is a limited partner.

6 Fund manager’s fiduciary duties

What are the fiduciary duties owed to a private equity fund formed in your jurisdiction and its third-party investors by that fund’s manager (or other similar control party or fiduciary) under the laws of your jurisdiction, and to what extent can those fiduciary duties be modified by agreement of the parties?

In Canada, partners of a partnership owe each other a fiduciary duty. This is especially true of a general partner to its limited partners. While this fiduciary duty can be amended, limited or elaborated on by the terms of the limited partnership agreement, it is common for the limited partnership agreement to provide that the general partner will carry out its duties honestly, in good faith and in the best interests of the partnership and will exercise the care, diligence and skill of a prudent and qualified administrator. Fiduciary duties are not typically expressly limited. However, there may be limitations on the decision-making authority (eg, review by a limited partners’ advisory committee) or limitations and review process based on conflict of interest (eg, special approvals for transactions with related persons, etc).

7 Gross negligence

Does your jurisdiction recognise a ‘gross negligence’ (as opposed to ‘ordinary negligence’) standard of liability applicable to the management of a private equity fund?

Gross negligence is often negotiated to or from ordinary negligence in Canadian commercial agreements. The precise meaning of gross negligence is not well settled but it is generally thought to be a flagrant or intentional disregard of a need to use reasonable care, whereas ordinary negligence is a mere failure to exercise reasonable care.

8 Other special issues or requirements

Are there any other special issues or requirements particular to private equity fund vehicles formed in your jurisdiction? Is conversion or redomiciling to vehicles in your jurisdiction permitted? If so, in converting or redomiciling limited partnerships formed in other jurisdictions into limited partnerships in your jurisdiction, what are the most material terms that typically must be modified?

Commercial terms of private equity funds in Canada are typically negotiated by the sponsor with a lead investor or counsel on behalf of the investors at the first closing. They follow US practice and are deferential to the Private Equity Principles published by the Institutional Limited Partners Association.

It is not difficult to convert or redomicile a limited partnership into a Canadian province from a mechanical perspective. The commercial terms would not need significant amendment except, however, there would be material tax considerations that may make this impractical.

A limited partnership in Canada typically comprises only resident Canadians. For international investors, this can be accomplished by forming a Canadian investor corporation to hold the limited partnership interest in the private equity fund. Alternatively, private equity funds with international investors are often structured as two separate limited partnerships that invest in parallel: one formed for resident Canadian investors and one formed for international investors.

9 Fund sponsor bankruptcy or change of control

With respect to institutional sponsors of private equity funds organised in your jurisdiction, what are some of the primary legal and regulatory consequences and other key issues for the private equity fund and its general partner and investment adviser arising out of a bankruptcy, insolvency, change of control, restructuring or similar transaction of the private equity fund’s sponsor?

The bankruptcy, insolvency, liquidation, dissolution or winding-up of the general partner typically triggers a dissolution of the limited partnership unless the general partner is replaced by the limited partners in accordance with the limited partnership agreement. This is typically a special majority vote of limited partners (exclusive of any interest held by the sponsor or its affiliates). The agreement also typically includes a right for the limited partners to replace the general partner in negotiated circumstances such as material breach of the partnership agreement or fraud.

Regulation, licensing and registration

10 Principal regulatory bodies

What are the principal regulatory bodies that would have authority over a private equity fund and its manager in your jurisdiction, and what are the regulators’ audit and inspection rights and managers’ regulatory reporting requirements to investors or regulators?

There is no regulatory body directly focused on private equity funds and their managers in Canada. However, compliance with the statutory filing requirements under provincial limited partnership laws is required and the registrar or administrator under such legislation has a right to review certain limited partnership records. Also, tax authorities have audit rights and the issuance and trading of interests in a private equity fund are subject to securities laws and the jurisdiction of the various

provincial (and territorial) securities commissions to enforce such laws. There are 10 provinces and three territories in Canada.

11 Governmental requirements

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

Except for the administrative registration described above to form a limited partnership, there are no approval, licensing or registration requirements applicable to a private equity fund in Canada.

12 Registration of investment adviser

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

A typical private equity fund and its manager, officers, directors or control persons are exempt from registration under National Instrument 31-103 as dealers, advisers or investment fund managers to the extent that they and the fund do not engage in activities that require registration and, in this regard:

- adviser registration is not required provided that the advice given in connection with the purchase and sale of portfolio investments is incidental to its active management of the portfolio companies;
- dealer registration is not required provided that the raising of money from investors and its subsequent investment is occasional and uncompensated; and
- investment fund registration is not required provided that the private equity fund is actively involved in the management of the companies it invests in, or the private equity fund otherwise invests in the underlying portfolio company for the purpose of achieving control.

13 Fund manager requirements

Are there any specific qualifications or other requirements imposed on a private equity fund’s manager, or any of its officers, directors or control persons, in your jurisdiction?

There are no specific qualifications or other requirements imposed on a private equity fund’s manager in Canada. However, the commercial realities and process of raising money mean that investors want to see a track record of investment success from the principals of the general partner as well as a minimum investment by the management team.

14 Political contributions

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure of, political contributions by a private equity fund’s manager or investment adviser or their employees.

Canadian pension funds are deferential to the Private Equity Principles published by the Institutional Limited Partners Association, which require reporting on such contributions.

15 Use of intermediaries and lobbyist registration

Describe any rules – or policies of public pension plans or other governmental entities – in your jurisdiction that restrict, or require disclosure by a private equity fund’s manager or investment adviser of, the engagement of placement agents, lobbyists or other intermediaries in the marketing of the fund to public pension plans and other governmental entities. Describe any rules that require a fund’s investment adviser or its employees and agents to register as lobbyists in the marketing of the fund to public pension plans and governmental entities.

All levels of Canadian government have broadly similar rules concerning the lobbying of public officials. The rules are primarily aimed at capturing communication with public office holders intended to influence

their decision-making, subject to certain exceptions. Marketing a fund to a public office holder could fall within the definition of lobbying applicable in various Canadian jurisdictions, which may require registration by employees (ie, in-house lobbyists) or consultant/external lobbyists.

The core of all lobbying legislation in Canada is the requirement to register. The relevant federal, provincial or municipal rules will outline when registration is required, what information must be disclosed and who must register. In most Canadian jurisdictions, lobbyists must meet a threshold minimum of lobbying activity before registration requirements apply to them. When registration and reporting is required, the information that must be disclosed and who must register varies according to the type of lobbyist (ie, in-house or consultant/external lobbyist). Fund managers and investment advisers are not required to disclose the engagement of consultant/external lobbyists. However, consultant/external lobbyists must register on behalf of an organisation once they are retained.

16 Bank participation

Describe any legal or regulatory developments emerging from the recent global financial crisis that specifically affect banks with respect to investing in or sponsoring private equity funds.

There is no industry-wide phenomenon that limits banks' participation in private equity funds in Canada. Banks are not, however, typically sponsors of private equity funds. There was some historic activity in this regard, but it eroded (eg, EdgeStone Capital Partners was created from NB Capital (National Bank), Birch Hill Equity Partners evolved from TD Capital and more recently Fulcrum Capital Partners separated and rebranded from HSBC Capital).

Taxation

17 Tax obligations

Would a private equity fund vehicle formed in your jurisdiction be subject to taxation there with respect to its income or gains? Would the fund be required to withhold taxes with respect to distributions to investors? Please describe what conditions, if any, apply to a private equity fund to qualify for applicable tax exemptions.

Limited partnerships are generally disregarded for Canadian income tax purposes, such that funds are generally not liable for income tax on income and gains earned by the fund. Instead, the income and gains of a partnership are allocated to its partners or investors and taxed in the hands of such partners or investors. There is no obligation on a fund constituted as a partnership to withhold taxes on account of distributions to its partners or investors.

A partnership with even a single non-resident partner or investor could be deemed to be a non-resident entity for purposes of assessing Canadian withholding tax from Canadian-source income (including most interest, dividends and royalties paid by Canadian-resident payers). Accordingly, it is customary to include a requirement in partnership agreements requiring all partners to maintain tax residency in Canada for the duration of their investment.

18 Local taxation of non-resident investors

Would non-resident investors in a private equity fund be subject to taxation or return-filing requirements in your jurisdiction?

Private equity funds constituted as limited partnerships typically require all investors in the fund to maintain tax residency in Canada to avoid having Canadian-source income earned by the fund being subject to Canadian withholding tax. Non-resident investors seeking to invest in a Canadian fund will occasionally incorporate Canadian corporations to hold their partnership interest. Such a corporation would be a Canadian-resident taxpayer that was liable for Canadian income tax on its worldwide income (including income allocated to it by the fund) and would be liable to file an annual Canadian federal income tax return and, in certain circumstances, tax returns in selected provinces. US investors frequently constitute such a holding corporation as an 'unlimited liability company' in order to capitalise on the flow-through

character accorded to such entities for US income tax purposes. Alternatively, private equity funds with international investors are often structured as two or more separate limited partnerships that act in parallel: one formed for Canadian investors and the other or others formed for non-Canadian investors.

19 Local tax authority ruling

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

It is uncommon to obtain a tax ruling from the Canadian tax authorities in connection with the formation of a private equity fund in Canada. Occasionally tax rulings will be sought to confirm the expected tax treatment of innovative financing or investment structures in which the fund is a participant.

20 Organisational taxes

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

There are no significant organisational taxes that are paid with respect to private equity funds formed in Canada.

21 Special tax considerations

Please describe briefly what special tax considerations, if any, apply with respect to a private equity fund's sponsor.

Sponsors of private equity funds in Canada are customarily compensated, directly or indirectly, with:

- a monthly investment management fee (typically calculated as a percentage of assets under management); and
- a participation in the profits of the fund through a special class of partnership units (ie, carried interest).

Investment management fees are customarily taxed in the hands of the sponsor and subject to value-added taxes that can range from a low of 5 per cent to a high of 15 per cent, depending on the applicable provincial rates that apply. The tax character of the payments allocated to the sponsor as carried interest will generally depend on the underlying nature of the partnership income.

Recent amendments to the federal excise tax regime now subject, in certain circumstances, a sponsor's carried interest to value-added tax.

22 Tax treaties

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

Canada has a robust network of income tax treaties and tax information exchange agreements with countries around the world. Depending on the nature and geographic scope of a fund's investments, such treaties and information exchange agreements may entitle the fund to materially reduced taxes payable in respect of its investment activities. Of particular note, given both the geographic proximity and economic scale of the United States, the Canada-United States Income Tax Convention (1980), as amended, is a common feature of international investment by Canadian investment funds.

23 Other significant tax issues

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

A limited partnership in Canada typically comprises solely Canadian-resident investors. International investors can obtain economic exposure to Canadian funds by forming a Canadian corporation to hold the limited partnership interest in the private equity fund. US investors frequently constitute such a holding corporation as an 'unlimited liability company' in order to capitalise on the flow-through character accorded to such entities for US income tax purposes. Alternatively, private equity funds with international investors are often structured

Update and trends

Canada is a relatively small market on the world scale and its private equity landscape is dominated by large pension funds that have determined to co-invest or invest directly rather than relying on outside managers to gain exposure to this asset class: for example, Canada Pension Plan Investment Board, Caisse de dépôt et placement du Québec, Ontario Teachers' Pension Plan and OMERS Private Equity. In addition, its proximity and history, which are closely intertwined with the United States, mean that many private equity investors who want exposure to Canada get it through North American or US private equity funds. Balanced against this, the relatively neutral and calm political environment in Canada can make it a politically attractive location to form private equity funds with international political considerations.

Franchise mergers and acquisitions

Private equity's interest in franchise systems continues to grow. Use of the franchise business model as an expansion strategy has been on the

rise across the globe for many years, and its contributions to national gross domestic product and job creation have outperformed other sectors. Franchise systems have progressed well beyond traditional quick-service restaurants and now encompass businesses across numerous industries and sectors across international jurisdictions. As a result, franchise businesses have increasingly become a focus for private equity and have been the subject of notable transactions such as the C\$12.64 billion tax inversion deal involving Burger King Worldwide and Tim Hortons engineered by Brazilian private equity firm 3G Capital.

Understanding the franchise business model framework and mechanics has become paramount for advising on franchise-related M&A transactions, particularly as the arrangements and relationships within franchise systems are now more complex, multifaceted and international. It is also important to note that the franchise sector has been subject to an increasing amount of direct and indirect regulation across numerous jurisdictions, and is increasingly a highly litigious area.

as two or more separate limited partnerships that act in parallel: one formed for Canadian investors and the other or others formed for non-Canadian investors.

Selling restrictions and investors generally

24 Legal and regulatory restrictions

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

Canada has a closed system. No person or company shall trade in a security unless a preliminary prospectus and a prospectus have been filed and receipts have been issued therefor or a prospectus exemption is available.

For a private equity fund, the most common prospectus exemptions used to complete a private placement are: issuing to 'accredited investors' (which include investors with financial means or sophistication, for example, pension funds, individuals with over C\$1 million net financial assets, individuals with over C\$5 million net assets or individuals with over C\$200,000 net income a year (before taxes) for the most recent two calendar years and who reasonably expect to exceed that net income level in the current calendar year); investments with a minimum amount per investor (C\$150,000 cash, but this is not available to entities set up for the sole purpose of purchasing or holding securities as an 'accredited investor'); or delivering to the purchaser of securities an 'offering memorandum' meeting applicable form requirements.

25 Types of investor

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

Investors are not prohibited from participation in private equity funds, provided the purchase of securities in the private equity fund was conducted in compliance with Canadian securities laws and subject to their internal authority to do so.

26 Identity of investors

Does your jurisdiction require any ongoing filings with, or notifications to, regulators regarding the identity of investors in private equity funds (including by virtue of transfers of fund interests) or regarding the change in the composition of ownership, management or control of the fund or the manager?

There are two types of filings with regulators that may lead to the disclosure of the identity of investors in private equity funds: under securities laws and under partnership laws.

With regard to securities laws, depending on the securities exemption used to raise funds from investors, a post-closing filing disclosing details of prospectus exemptions relied upon and the identity of purchasers may need to be made with the securities commissions. If any materials were delivered to investors, including offering memorandums, in connection with the fundraising, such materials are required to be delivered to the securities commissions following closing.

With regard to partnership laws, most provinces and territories do not require public disclosure of investors. However, in Manitoba, the Partnership Act requires public identification of the limited partners and their capital contributions on the public register.

A manager (general partner) is generally closely held and private and not subject to the same disclosures.

27 Licences and registrations

Does your jurisdiction require that the person offering interests in a private equity fund have any licences or registrations?

A manager does not require a licence or registration. However, depending on its activity, a placement agent probably would.

28 Money laundering

Describe any money laundering rules or other regulations applicable in your jurisdiction requiring due diligence, record keeping or disclosure of the identities of (or other related information about) the investors in a private equity fund or the individual members of the sponsor.

The federal Department of Justice in Canada administers the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and its Regulations. Private equity fund management is enumerated by the government as a relationship that requires compliance with the Act, which involves keeping a record of the purpose and intended nature of the business relationship; conducting ongoing monitoring of such business relationship; detecting any transactions that need to be reported as suspicious; keeping client identification and beneficial ownership information up to date; assessing risk level based on transactions and activities; determining if the transactions and activities are consistent with the fund's knowledge of the business relationship; and keeping a record of monitoring.

Exchange listing

29 Listing

Are private equity funds able to list on a securities exchange in your jurisdiction and, if so, is this customary? What are the principal initial and ongoing requirements for listing? What are the advantages and disadvantages of a listing?

Private equity funds are able to list their securities on the principal securities exchanges in Canada, namely the Toronto Stock Exchange, the TSX Venture Exchange and the Canadian Securities Exchange, provided they meet the initial listing requirements of the applicable

securities exchange; however, such listings are not customarily sought in Canada.

The initial and ongoing requirements for listed issuers are primarily related to the financial condition and the capital structure of the listed company on an initial and continuing basis. In terms of financial condition, the principal Canadian securities exchanges require their listed issuers who are investment issuers to meet minimum requirements relating to net tangible assets, working capital and financial resources to achieve the objectives of a publicly disclosed investment policy. In terms of capital structure, the principal Canadian securities exchanges will require confirmation that the listed issuer's securities meet public float tests and that the listed securities have not been issued for minimal or nominal consideration.

Some advantages of a listing include increased liquidity for existing security holders, improved opportunity for access to future capital and a higher profile for the listed issuer. Some disadvantages include the potential loss of control of the listed securities, increased costs associated with initial and continuous disclosure obligations and a loss of flexibility owing to legal requirements for public companies and securities exchange rules.

30 Restriction on transfers of interests

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

Generally speaking, securities that are listed on a securities exchange in Canada may not be subject to restrictions on transfer.

Participation in private equity transactions

31 Legal and regulatory restrictions

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

Private equity funds formed in Canada are not subject to any legal or regulatory restrictions relative to private equity transactions inside or outside Canada, other than laws of general application, tax planning and the terms of their limited partnership agreement.

32 Compensation and profit-sharing

Describe any legal or regulatory issues that would affect the structuring of the sponsor's compensation and profit-sharing arrangements with respect to the fund and, specifically, anything that could affect the sponsor's ability to take management fees, transaction fees and a carried interest (or other form of profit share) from the fund.

Canadian pension funds are deferential to the Private Equity Principles published by the Institutional Limited Partners Association, including in relation to management fees, transaction fees and carried interest (or other form of profit share) from the fund. The sponsor's compensation and profit-sharing arrangements are otherwise not subject to specific legal or regulatory issues, aside from their own tax planning.

mcmillan

Andrae J Marrocco
Bruce Chapple
TE (Ted) Scott

andrae.marrocco@mcmillan.ca
bruce.chapple@mcmillan.ca
ted.scott@mcmillan.ca

Brookfield Place, Suite 4400
181 Bay Street
Toronto
Ontario M5J 2T3
Canada

Tel: +1 416 865 7000
Fax: +1 416 865 7048
info@mcmillan.ca
www.mcmillan.ca

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Mediation
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Mining
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Patents
Pensions & Retirement Plans
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Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
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Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
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