AMERICAN BANKRUPTCY INSTITUTE

International Caribbean Insolvency Symposium

Continuation Funds to Zombie Funds: Insights on Distressed Alternative Assets

Ronan Guilfoyle
Calderwood | George Town, Grand Cayman, Cayman Islands

Ioannis Michopoulos
Stout | New York

Richard Mottershead
Varcay Ltd. | Camana Bay, Grand Cayman, Cayman Islands

Leslie Anne Pinney
Foley & Lardner LLP | Ann Arbor, Mich.

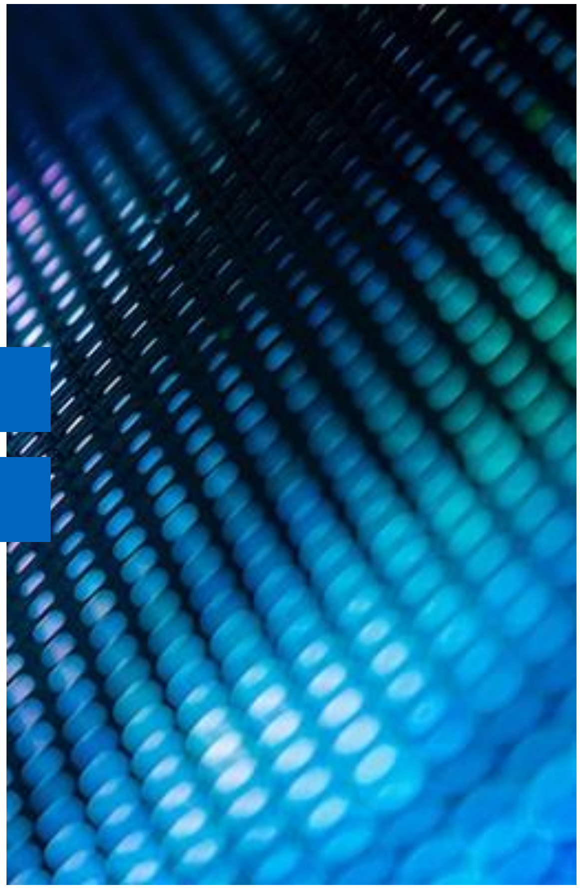
Harriet Ter-Berg
Appleby | Camana Bay, Grand Cayman, Cayman Islands

2026

ABI INTERNATIONAL CARIBBEAN INSOLVENCY SYMPOSIUM

Continuation Funds to Zombie Funds: Insights on Distressed Alternative Assets

January 15, 2026



Agenda

- Introductions
- What is a Private Fund
- Life Cycle of a Fund
- Continuation Fund
- Valuation
- Distress Assets and Deferred Consideration
- Contentious Elements (GP / LP Disputes)
- Distressed Assets Market Overview
- Director Duties of Distressed Fund
- SPCs Update
- Conclusion

Introductions

3

Introductions

Leslie Pinney (moderator)
Foley & Lardner
www.foley.com
lpinneu@foley.com
+1 313 234 7118

Richard Mottershead
Varcay Limited
www.varcay.com
richard@varcay.com
+1 345 925 9187

4 |

Introductions

Harriet Ter-Berg
Partner | Dispute Resolution
Appleby
www.applebyglobal.com
hter-berg@applebyflobal.com
+1 345 814 2704

Ronan Guilfoyle
Co-Founder & Director
Calderwood
www.calderwood.ky
rguilfoyle@calderwood.ky
+1 345 526 8545

Introductions

Ioannis Michopoulos
Managing Director – Valuation Advisory
Stout
www.stout.com
+1 646 807 4222
imichopoulos@stout.com

Quick Overview - What Is a Private Fund?

7

Definition and Distinguishing Features

- A private fund is a pooled investment vehicle that raises capital through private placements from a limited number of professional, institutional, or high net worth investors, and invests pursuant to a defined strategy, without offering interests to the public.
- Not publicly offered; interests are privately placed to qualified/professional investors, often with eligibility thresholds and transfer restrictions.
- Typically structured with a sponsor/manager and a fund vehicle (often with a general partner and limited partners), governed by a detailed offering document and constitutional/side letter framework.
- Economic model commonly features management fees and performance-based compensation; return distribution via waterfalls/hurdles tailored to strategy.
- Liquidity differs from public funds: closed ended funds use capital commitments and drawdowns with long-term horizons; open ended funds offer periodic subscriptions/redemptions subject to gates, lock-ups, and suspensions.
- Differentiated from public/retail funds by targeted investor base, lighter marketing to retail channels, bespoke terms, and greater flexibility in investment concentration, leverage, and valuation methodologies.

8

Common Types of Private Funds

- private equity and buyout;
- venture capital;
- growth and crossover;
- private credit (direct lending, special situations, distressed);
- real assets (infrastructure, energy, real estate);
- hedge funds;
- fund of funds;
- secondaries and continuation vehicles;
- co investment and managed accounts.

Life Cycle of a Fund

Life Cycle of a Fund

Phase 1 - Fund Raise, depends! Focus on first time manager

- First Things First:
  - Track record
  - Infrastructure ($100-250k)
  - Network
  - Pitch Deck
- Solo or Placement agents? Who Invests?
  - Seed & Strategic Investors
    - Commit eg $100m, favourable fee terms & 25% - 40% Revenue
    - Blackstone private equity seeded $150-200m Credit Fund
  - Pension funds - New York State Common Retirement nearly $300bn
  - Endowments - Harvard $52bn
  - Foundations - Bill Gates $80bn, invested into Abraaj p/e
  - Sovereign wealth funds - Norway $2tn, Saudi, Qatar, Abu Dhabi
    - Abu Dhabi invested $400m into Madoff / Fairfield Greenwich
  - High Net Worths - Jay Z, Ashton Kutcher (AirBnB, Uber, Spotify)
      - - Duff Guns n Roses Set up Meridan Rock Investments
      - - Oligarchs family offices - not so popular now.
- Investment Terms:
  - Depending on size and strategic importance 1:15 / 2:20
  - Side Letters (whole other presentation)

11

Life Cycle of a Fund

Phase 2 – Investment

- Investment Period: Often around 10 Years in total; typical to see investment structure broken down:
- Real Life Example

Close Date:	31 July 2014 (2014 Vintage)
Commitment Period:	5 Years
Fund Terms:	10 Years from Close Date
Extensions:	One year by Ordinary Vote
Investment Period:	4yrs from Close Date

- Find Things to Buy
  - Competition - lots of “dry powder” all chasing same criteria
  - Philosophy - Often make money or lose money day you sign the deal
  - Follow-on Investments - Growing companies need capital commitment

12

Life Cycle of a Fund

Phase 3 - Harvest

- Spent your committed capital - now investors want to see it back at a higher value than when it went in.
- Influence on the Exit will largely be dictated by position in the company Cap-Table:
  - Strategic Sales - Other Shareholders in the cap table, competition, new entrants to market.
  - IPO - Go public on exchange via a traditional route on NASDAQ, NYSE
  - SPAC - Special Purpose Acquisition Company
  - MBO - Management team raise fund to acquire exiting p/e shares
  - Secondary Buyout - Flip to next Private Equity firm
- Underpinning All of the above:
  - How do you value your investment that you made 5 years ago when there is no publicly traded share price to mark it against.... Ionnais hand off.

13

Continuation Funds

14

Continuation Funds

Continuation Funds have grown rapidly as exit markets slow, valuations become uncertain, and General Partners (GPs) seek liquidity solutions.

What Are Continuation Funds?

Definition:

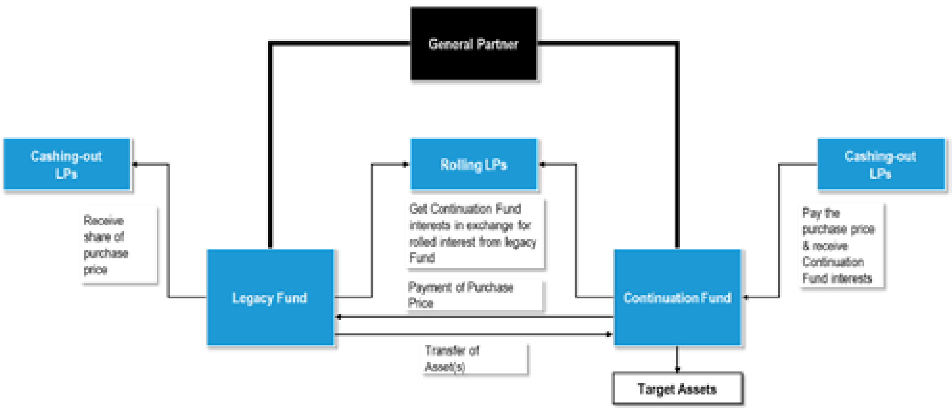
- Continuation Funds are specialized vehicles set up to acquire and manage assets from an existing fund that is nearing its end of life but still has unrealized value in its portfolio.
- These funds allow GPs to extend the holding period for certain portfolio companies, providing additional time for value creation or optimal exit opportunities.

Key Characteristics: (i) Structure (ii) Participants and (iii) Governance

- **Structure:**
  - *A new fund is created, often backed by existing Limited Partners ("LPs") and/or new investors.*
  - *The Continuation Fund is specifically designed to focus on a subset of assets from the original fund.*
  - *Typically involves a new fee and carry structure, with GPs negotiating lower fees to accommodate existing LPs and attract new investors.*
- **Participants:**
  - ***Existing LPs:** May roll-over their investments into the Continuation Fund or cash out.*
  - ***New LPs:** Often brought-in to provide additional capital.*
  - ***GPs:** Retain control of the assets and often reinvest into the Continuation Fund to align interests with LPs.*
- **Governance:** Typically involves a negotiation process, including transparency and fairness considerations, especially for existing LP.
  - *Transparent negotiation processes are critical, particularly for pricing and valuation.*
  - *In sensitive situations (e.g., bankruptcy or restructuring), third-party oversight may be necessary.*

Continuation Funds | Structure

A more illustrative view of the Continuation Fund Structure is presented below.



Continuation Funds | Motivation

Continuation Funds aim to maximize portfolio value, provide liquidity options for investors, avoid forced liquidation, and respond to market dynamics, ensuring better outcomes in distressed or restructuring scenarios.

Why Use Continuation Funds?

Maximizing Portfolio Value

- Some assets may need additional time to mature or recover from distressed situations, especially in industries requiring long-term development (e.g., real estate or infrastructure).
- Avoid selling portfolio companies at suboptimal prices during unfavorable market conditions.

Liquidity Options for Investors

- Provides flexibility to existing LPs:
  - **Roll-over Option**: LPs who believe in the long-term growth potential of the assets can roll-over their investment.
  - **Cash-out Option**: LPs seeking liquidity can exit and monetize their position.
- Attracts new LPs, creating fresh capital inflows for operational needs or restructuring

Avoiding Forced Liquidation

- Especially relevant in bankruptcy or restructuring contexts, where rushed asset sales often result in undervaluation or distressed pricing.
- Continuation funds allow more time for operational improvement or strategic exits.

Responding to Market Dynamics

- In volatile markets, IPOs or sales may not be feasible, requiring additional holding time to achieve desired exit prices.
- Continuation Funds are particularly useful for sectors where recovery cycles are longer or dependent on macroeconomic trends.

1) In distressed situations, Continuation Funds can play a pivotal role in preserving enterprise value.
2) They provide a structured way to manage assets without forcing liquidation, which can be critical in turnaround scenarios.

Continuation Funds | Fairness Opinion

Fairness opinions ensure transparency, mitigate conflicts of interest, and provide legal and fiduciary compliance, protecting all stakeholders in Continuation Fund transactions, especially in distressed or restructuring situations.

Ensuring Transparency and Trust

- A fairness opinion is an independent assessment evaluating whether the transaction terms (pricing, asset valuation, etc.) are fair to all parties involved.
- It reassures existing LPs, new investors, and other stakeholders that the transfer of assets into the Continuation Fund is being conducted equitably.

Mitigating Conflicts of Interest

- GPs often have a vested interest in the Continuation Fund and may face potential biases when valuing assets for transfer.
- A fairness opinion from a third-party valuation expert eliminates perceived or actual conflicts of interest.

Legal and Fiduciary Compliance

- Bankruptcy lawyers and restructuring professionals need to ensure that GPs and fund managers fulfill their fiduciary duties to LPs.
- A fairness opinion serves as documented evidence that the transaction was conducted in line with industry standards and legal requirements, minimizing risks of disputes or litigation.

Supporting LP Decision-Making

- Existing LPs depend on accurate, unbiased valuations to decide whether to roll-over their investments or cash out.
- A fairness opinion helps ensure all LPs are treated fairly in terms of pricing and investment options.

Critical in Bankruptcy and Restructuring Scenarios

- In distressed situations, Continuation Funds often involve complex negotiations with creditors, stakeholders, and LPs.
- A fairness opinion provides clarity and confidence in the valuation process, ensuring that all parties are aligned on the terms of the transaction.

From Continuation Funds to Zombie Funds

Zombie Funds refer to vehicles that have exceeded their intended duration but lack the ability to generate meaningful returns or execute exits. These funds persist in limbo, with assets that are either illiquid, underperforming, or distressed.

Key Characteristics

1. **Extended Lifecycles**: Zombie Funds often operate beyond their contractual term, with GPs requesting extensions or continuing management without clear exit strategies.
2. **Management Fee Persistence**: GPs continue to collect fees, even as performance stagnates, frustrating LPs.
3. **Weak Exit Opportunities**: Assets may be unattractive to buyers, leading to prolonged holding periods and limited liquidity.

Main Challenges

1. **Valuation Disputes**: Zombie funds often face disputes over Net Asset Values (NAVs), as GPs struggle to justify holding assets with limited upside potential.
2. **Liquidity Crunch**: LPs face prolonged capital lock-up, with few options to exit their positions. Secondary market sales often occur at steep discounts.
3. **Operational Neglect**: GPs may shift focus to newer funds, leaving zombie portfolios under-managed and operationally inefficient.

- *Continuation Funds: Represent an attempt by GPs to extend fund lifecycles and create opportunities for value recovery.*
- *Zombie Funds: Reflect the failure to exit investments or effectively manage distressed portfolios, leaving investors trapped.*

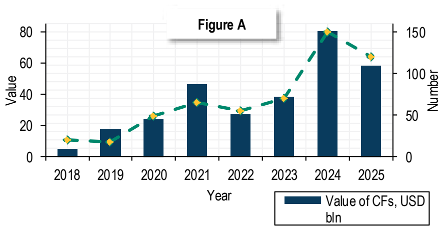
Market trends for Continuation Funds

Figure A shows the number and volume of continuation vehicles, while Figure B highlights the fraction of rolling investors.

Value and count of CFs[1]

Figure A: Continuation Fund Market Growth (2005–2025)

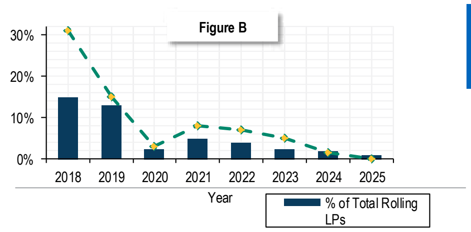
The chart illustrates the evolution of the continuation fund (CF) market, showing transaction values (USD billions, bar chart) and the number of CFs launched annually (dashed line). From **$5 billion in 2018 to nearly $50 billion in 2021**, the market saw significant growth. Activity peaked in 2024, with transaction values exceeding **$80 billion and ~150 CFs launched**. Early 2025 data indicates the market is on track to match 2024 levels, reflecting sustained momentum.



Trends in the % of rolling investors[1]

Figure B: Decline in Rolling Investors for Continuation Funds (2018–2025)

The chart shows a steady drop in rolling LP participation, from **14–15% in 2018–2019 to below 5% by 2025**, as fewer incumbent LPs roll commitments into CFs. Public LPs saw a sharper decline, with participation **falling from ~30% in 2018 to ~2% by 2024**, reflecting reduced involvement from public pension investors. A temporary uptick in 2021, likely due to pandemic-related liquidity constraints, was followed by flattening at low levels, signaling CFs increasingly attract new investors or secondary buyers over legacy LPs.

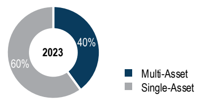


[1]**Source**: Selling to yourself: Continuation Funds in Private Equity, November 2025 | National Bureau of Economic Research

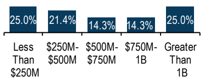
Continuation Funds | Statistics

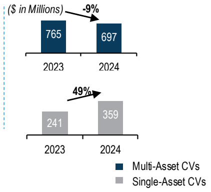
The continuation fund market has grown significantly in recent years, emerging as a widely adopted solution for GPs to unlock liquidity for LPs, optimize portfolios, and retain high-performing assets.

Single-Asset vs. Multi-Asset CVs (2023-2024)[1]



Median Transaction Size Trends[1]

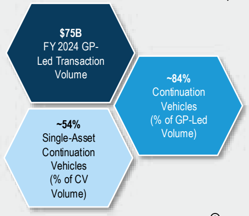




[1]**Source**: 2024 Continuation Fund Study, May 2025 | Houlihan Lokey
[2]**Source**: Global Secondary Market Review, January 2025 | Jefferies
[3]**Source**: FY 2024 Secondary Market Review, February 2025 | Evercore Private Capital Advisory

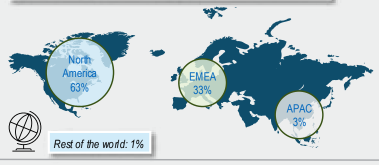
Global Secondary Markets Transactions[2]

__In 2024__, the global secondary market reached an annual record of __$162 billion__ in transaction volume, surpassing the previous high set in 2021. This reflects __growing activity__ in both GP-led and LP-led transactions.



North America remained the most dominant geography by GP-led volume[3]

Split by Underlying Companies Geography (% of Transaction Volume).



21 |

Valuation

Valuations of Assets in Private Equity or Private Credit Funds

Valuing private equity and private credit assets is inherently complex due to their illiquidity, limited disclosures and potential complicated structures. In distressed situations, those valuation challenges become even more pronounced, often triggering disputes, fairness opinions, and regulatory scrutiny.

Allocation Methods

Used to distribute equity value in complex capital structures:

Option Pricing Method (OPM): Uses option-pricing theory in complicated capital structures.

Probability Weighted Expected Return Method (PWERM): Allocates value across multiple scenarios with assigned probabilities.

Current Value Method (CVM): Current waterfall analysis assuming an imminent liquidity event.

Hybrid Method: Combines the aforementioned approaches.

- **Capital Structure Complexity**: Multiple equity classes with varying economic rights & privileges.
- **Investor Rights**: Liquidation preference, conversion rights, anti-dilution, IPO veto etc.
- **Liquidity Timing**: Uncertainty of timing or type of exit (e.g., IPO, Sale).

Private Equity Funds

- **Guideline Public Company Analysis (GPC)**: Evaluates the target company relative to similar companies based on multiples like EV/Revenue, EV/EBITDA, etc.
- **Discounted Cash Flow (DCF)**: Projects future cash flows and discounts them to present value using an appropriate discount rate.
- **Precedent Transactions**: Compares the target company to similar businesses that have been sold recently.
- **Adjusted Net Asset Value**: For companies with significant tangible assets, this method adjusts the book value of assets and liabilities.

Private Credit Funds

- **Amortized Cost**: For loans held to maturity, valuations may reflect the principal and interest expected to be received.
- **Fair Value Approach**: Incorporates factors like credit risk, market interest rates, and expected cash flows to determine the current value.
- **Discounted Cash Flow (DCF)**: Projects the future cash flows from interest and principal repayments and discounts them using a risk-adjusted rate.
- **Market Comparable Transactions**: When available, similar debt instruments traded in the market can provide a benchmark for valuation.

Key Differences

Private Equity Funds

- Enterprise value focused.
- Heavy reliance on EBITDA adjustments.
- Volatile exit markets impact valuation significantly.
- More strategic value in operations and growth assumptions.

VS

Private Credit Funds

- Cash flow stability and collateral value drive marks.
- Sponsor behavior (e.g., amend-and-extend) influences valuation.
- Defaults and restructurings trigger immediate markdowns.
- More sensitive to macro credit spreads..

23

Valuation Challenges & Lifecycle Insights | Private Equity Funds

Closed-End Structure	Valuation Considerations	Lifecycle Challenges	Empirical Observations	Additional Key Insight
• Private Equity Funds typically follow a closed-end structure (fixed lifespan). • Capital committed upfront and drawn over time. • Near the end-of-life, GP-led continuation funds emerge to extend fund duration, often leading to NAV disputes with LPs.	• **Enterprise Value Focus**: Valuations are driven by EBITDA multiples, exit market conditions, and sponsor-driven operational improvements. • **NAV Disputes**: Inflated NAVs in continuation fund setups can trigger LP objections, especially in tech portfolios or underperforming assets. • **Allocation Methods**: Used to distribute equity value in complex capital structures, including OPM, PWERM, CVM, and hybrid approaches.	• **Early Stage**: Legal setup, compliance, and onboarding of administrators. • **End-of-Life**: Liquidity crunches, dissenting LPs, and restructuring complexities (e.g., continuation funds or secondary sales).	• Continuation funds commonly arise in **10–12** years. • Valuation disputes often stem from misaligned GP-LP incentives and a lack of clear exit opportunities	• **Impact of Macroeconomic Shifts**: Changes in interest rates, inflation, and geopolitical events can significantly alter valuation assumptions (e.g., cost of capital, growth projections). • **Example**: Rising interest rates can reduce the attractiveness of leveraged buyouts, impacting valuations and exit opportunities for PE portfolios.

New Developments

“*The **democratization of private equity**[1] refers to the process of making private equity investments **more accessible to a broader range of investors**, including retail investors, smaller institutions, and individuals who traditionally have been excluded due to high barriers to entry. Historically, private equity **has been dominated by institutional investors** like pension funds, sovereign wealth funds, and ultra-high-net-worth individuals. **Democratization is reshaping the industry by lowering these barriers and expanding access**.*”

[1]**Source**: Private Equity, Public Capital, and Litigation Risk by Ludovic Philippou & William J. Magnuson | 20 Nov. 2025.

24

Valuation Challenges & Lifecycle Insights | Private Credit Funds

Open-End vs Closed-End Structures	Valuation Considerations	Lifecycle Challenges	Empirical Observations	Additional Key Insight
• **Closed-End**: Fixed term loans, often illiquid, with valuations tied to credit health and loan performance. • **Open-End**: Periodic liquidity windows; valuation issues (e.g., overvalued loans) can lead to redemption queues and gating.	• **Loan-Level Focus**: Valuations are based on borrower health, loan covenants, and expected recoveries. • **Amend-and-Extend Cycles**: Loans marked at par despite borrower stress or deteriorating fundamentals may misrepresent portfolio risk. • **Illiquidity Premiums**: Reflect the private nature of credit deals.	• **Early Stage**: Legal setup and compliance onboarding. • **Mid-Life**: Borrower stress often triggers portfolio restructuring or early continuation decisions. • **End-of-Life**: Loan defaults, NAV disputes, and liquidity crunches.	• Restructurings or continuation decisions in private credit typically happen earlier (due to borrower stress) compared to private equity. • Valuations are more sensitive to interest rate changes and market spreads than in private equity.	• **Sector-Specific Risks**: Certain industries (e.g., real estate, retail, energy) are more prone to borrower stress during downturns, creating unique valuation challenges for private credit portfolios. • **Example**: Energy sector loans may face significant valuation volatility due to fluctuating commodity prices or regulatory changes.

Market Outlook

***Valuation is a critical cornerstone in managing distressed alternative assets**, particularly in today's challenging economic and market environment. Across both private equity and private credit, accurate and consistent valuations are essential for decision-making, investor reporting, and navigating complex fund dynamics. However, the current landscape - characterized by **slower exits, high interest rates, liquidity challenges, and heightened scrutiny of GP-led deals** - has intensified valuation disputes and added significant pressures to fund managers. Fund managers must navigate these pressures carefully, balancing transparency, accuracy, and investor trust to mitigate risks and maintain portfolio integrity.*

25

Distress Assets (too good to write off) / deferred consideration

26

Distressed Assets - Too Good To Write Off?

- Not every investment is going to work out:
- So long as more succeed than fail, and money is made not lost, there's an expectation that at some point investments won't work out. So what to do with the remaining investments that can't be sold or still have potential at the end of the fund's life cycle?
- Get Creative
  - Sell for a nominal sum; pass on all right title and interest to a specialist manager, let them monitor and monetize at a future date. Defer consideration. Goal Alignment.
- The Alternative
  - Dumping Ground; for a fee you can clear up the portfolio by transferring the bad-assets to a low-cost holding structure (eg. SPC). Pass the problem on. Not all investments are simple equity.
  - Surrender Shares; Gift them back to the Company - may not be able to accept, may not want to incur the costs to receive them.
  - Transfer to a charitable trust; tax efficient method
- Problem with the Alternative
  - What happens if shares become valuable? Investors not going to be happy.

27

Contentious Elements (GP / LP Disputes)

- Various disputes coming through the Cayman Islands courts relating to ELP distress and/or GP/LP disputes.

- Continued uncertainty arising from complex legal matrix: relationship between:
  - Exempted Limited Partnership Act (**ELP Act);**
  - Partnership Act (**PA**);
  - Companies Act (**CA);**
  - Companies Winding Up Rules (**CWR**);
  - common law and equitable partnership principles; and
  - the terms of the limited partnership agreement (**LPA**)..

- Some potential clarity recently provided by Privy Council in *Aquapoint LP v Xiaohu Fan* [2025] UKPC 56 (***Aquapoint***). Statutory reform/clarification also anticipated.

- Some key issues of relevance in context of distress:
  - Information rights: *Neoma Private Equity Fund IV L.P. v Abraaj ABOF IV SPV Limited* CICA (Civ) 8 (***Abraaj***)
  - Forced removal of GP *qua* GP? Only usually possible where provided for by LPA. This has led to workarounds:
  - removal of GP as liquidator in voluntary liquidation under s 36(13): *One Thousand and One Voices* (***1001 Voices***) and *ECM Straits Fund* (Parker J, December 2022) **(*ECM Straits*);**
  - just and equitable winding up with appointment of independent liquidators under s 36(3)(g): *Aquapoint*
  - Insolvent liquidation? *Padma Fund Limited L.P.* (**Padma**); *Formation Group (Cayman) Fund I L.P.* (**Formation**), **1001 Voices**

29

ELP key characteristics

- LPs are not allowed to participate in the business of the ELP and loses limited liability status if it does: ss 14(1) and 20(1) ELP Act.
- GP liable for all the debts and liabilities of the ELP and conduct the business: s 4 ELP Act.
- Legal proceedings by or against an ELP may be instituted by or against any one or more of the GPs only, and a LP shall not be a party to or named in the proceedings save that an LP may bring a derivative action on behalf of the ELP where the GP has failed to act: s 33 ELP Act.
- LPs do not (generally) owe fiduciary duties. Liability only to the extent provided in LPA: s 4 ELP Act.
- GP's duty to act in interests of ELP is subject to any express provisions in the LPA to the contrary: s 19 ELP Act.
- As ELP is not a legal entity, property and rights of ELP are held on trust, LPs have a proprietary interest in the partnership assets.
- Terms of LPA are important, but subject to: terms of legislative regime and equitable principles.
- Wind-down usually provided for in ELP Act LPA and GP acts as voluntary liquidator. Certain provisions of the Companies Act apply to VLs (e.g. voidable preference claims and fraudulent trading).
- Current lack of certainty regarding circumstances when an ELP can be compulsorily wound-up outside just and equitable context

30

Information Rights - Overview

"It is a notorious fact that when a business entity of any description enters choppy financial waters, the free flow of information about its true financial status is often interrupted."

Kawaley J, *Re Green Asia Restructure Fund SPC* at [15]

- LPs are not entitled to have involvement with day to day affairs of fund. Statutory protection in the form of information rights.
- S 21 ELP Act:

  > "*Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner <u>true and full information</u> regarding the <u>state of the business and financial condition</u> of the exempted limited partnership"*

- Historically considered very broad obligation. In the *Abraaj* at first instance, the judge held:
  - An LP's application would fail "*only… in cases where it is clear that the information sought did not relate to the business and financial affairs of the partnership, which is very wide target to aim at."* [88]
  - LPs were entitled to the same information held by the general partner so that the LPs can be put on "*a level playing field*" [51];
  - the obligation was broader than a party's discovery obligations in litigation; and
  - the GP could be required to obtain information from third parties
- The correct approach and the scope of s 22 was then re-considered and re-cast by the CICA – see next slide

CICA decision in Abraaj

- The CICA acknowledged limitations to the statutory right and outline the following key principles (derived from the English decision of *Inversiones*):
  - S 22 is a fundamental safeguard for LPs intended to enable a comprehensive understanding of the business decisions of the ELP. "Full information" should be interpreted in this light.
  - In the ordinary circumstances, Court may be required to accede to widely expressed application, particularly where uncertainty as to what information may exist
  - Where proper accounts have been maintained with comprehensive underlying documents, those will often provide a substantial part of the information that LPs could require
  - If the GP provides information about what documents exist, the onus will shift to the LP to indicate (i) in what respects the available documentation is insufficient; and (ii) the existence of other documents which would be just as material as those which have been provided. It will not be sufficient to simply identify the existence of a particular document and demand all documents falling within that category
  - Thereafter, the exercise will require a fact specific investigation of what is required to comply with section 22. Relevant factors will include: the nature of the business, its mode of conduct and the terms of the governing documents
  - The focus will be on the function of the documents sought and whether it is properly required to enable the LP to understand the business
  - Once satisfied in principle that relief should be granted, the court should also be satisfied that any disclosure order made is appropriate to address "real and substantial" issues.
  - In an appropriate case, the court does have power to require the general partner to obtain information within its power from third parties, provided this can be done without incurring unreasonable expense – the latter being a fact sensitive question.
- On the facts, the CICA concluded that the judge was wrong to find that the LPs were entitled to everything that the GP had or could obtain.

Removal of GP as liquidator in VL

- Typical for LPA to provide for GP to act as liquidator in VL. However, wind-down is often when LPs want outside scrutiny if things have gone wrong.
- Particularly given uncertainty re availability of other liquidation options, important for Court supervision
- S 36(13) ELP Act:

  Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).
- S 36(3)(g):

  "on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.

1001 Voices

- Fund in wind-down. 97% of LPs wanted to replace GP as voluntary liquidator. Petitioner under ss 36(13) and 36(3)(g).
- GP opposed, arguing that Court did not have jurisdiction to override terms of LPA in a V and that s 36 did not provide a route to appoint a new liquidator in a VL.
- Both Grand Court and CICA concluded that s 36 enabled the Court to replace the GP as liquidator.
- "*In its application to voluntary liquidations of exempted limited partnerships, the* [CA] *has limited application; but tools which would otherwise be available to the court in the case of voluntary liquidations, such as removal of the liquidator and the exercise of overall supervision, are replaced by the general powers contained in section 36(3)(g) and section 36(13)* [of the ELPA]."

Just and Equitable Winding Up

- Shortly after the CICA decision in 1001 Voices in November 2025, the JCPC handed down judgment in Aquapoint confirming Court's power to wind up on the just and equitable basis under s 36(3)(g)
- In *Aquapoint*, the petitioner, Dr Fan, had been persuaded to become an LP in reliance upon representations that he would be entitled to withdraw his interest following an IPO of company held by the ELP.
- The terms of the LPA purported to grant the GP the complete discretion as to whether to consent to a withdrawal. The LPA, which was 'tailor made', also included comprehensive 'entire agreement' provisions confirming that Dr Fan did not rely on any earlier representations.
- The GP blocked the withdrawal and Dr Fan petitioned to wind up under s 36(3)(g). The JCPC upheld the decisions of the Grand Court and the CICA that the petition should be granted.
- The JCPC's reasoning included the following:
  - Equity may trump strict contractual terms in certain (limited) situations.
  - Focus should be on the personal character of relationships. However, the jurisdiction is a wide and flexible one and the relationships in question do not necessarily need to fit into rigid categories such as quasi-partnerships.
- As the JCPC emphasized, this case turned on unusual facts. Nonetheless, it is an interesting decision in the ELP context because:
- GPs will often seek to fall back on the strict contractual terms to resist LP action. The just and equitable route could be a way for LPs to exert pressure notwithstanding those terms (in the right case)
- ELPs will not normally 'qualify' as 'quasi-partnerships' because LPs do not participate in the business. The acknowledgment by the JCPC that equitable considerations can arise in other contexts may increase the use of these arguments
- The JCPC was influenced by the s 19 ELP Act duty of GPs to act in good faith. GPs should take care to ensure their conduct complies with this duty (to the extent not varied by the LPA).

Alternative Routes to Liquidation?

- Despite a number of important appellate decisions in the context of ELP liquidation, there is still significant uncertainty as to what, if any, other routes are available for creditors or LPs to place an ELP into official liquidation.
- There are potentially two further routes under the ELP Act to wind up an ELP:
  - Section 36(3) of the ELP Act applies the provisions of Part V of the CA, and the CWR, to the winding up of ELPs, except to the extent that those provisions are inconsistent.
  - The ELP Act also adopts the provisions of the Partnership Act. S 35 specifies 5 grounds for dissolution, including “*when the business of the partnership can only be carried on at a loss*” (35(d)).
- In ***Padma***, a decision from 2021, Parker J dismissed a creditor’s petition to wind up under s 92(d) of the CA (as applied via s 36 of the ELP Act). The judge relied upon (i) the possibility of dissolution under the PA, and (ii) an analysis that pursuant to s 33(1) of the ELP Act, as the ELP is not a legal entity, legal proceedings can only be commenced against the GP not the ELP (thereby ruling out a petition under the CA).
- In the subsequent decision of ***Formation*** in 2022, Kawaley J concluded that s 33(1) did not have such a wide effect and did not prevent the presentation of a winding up petition against an ELP under the CA provisions given that it was expressly contemplated by s 36(3) of the ELP Act.
- In ***Aquapoint,*** the JCPC has confirmed that an ELP can be liquidated on the just and equitable ground under the ELP Act (without reference to the equivalent provision in the PA).
- In ***1001 Voices***, in addition to confirming the existence of the jurisdiction to remove a badly-behaving GP from the role of voluntary liquidator, the CICA specifically contemplated the possibility of a creditor’s winding up petition against an ELP under s 92(d) of the CA. However, this was strictly *obiter*.
- In *ATP Life Science* [2025] CIGC (FSD) 106, Asif J noted further issues with seeking to apply the CWR to a just and equitable petition against an ELP given its lack of legal personality.
- It is hoped that this area will be the subject of reform in the near future to provide essential clarity.

35

Market Overview - Distressed Funds

36

Market Overview - Distressed Funds

- Creditors are more commonly looking to consensual, out of court solutions to debt enforcement which offers opportunities for independent directors specialising in distressed situations to assist by creditors seeking to put those directors on the board;
- Equally, company side, there appear to be more opportunities for independent directors specialising in distressed situations to be appointed to a board alongside existing management to help guide them through restructurings or to “hand hold” during choppy waters

Director Duties of Distressed Fund

- Where solvency is an issue, directors’ duties switch from what is in the best interests of the company/shareholders to creditors;
- In these situations, when making decisions the impact on creditors needs to be at the forefront of your thinking and actions taken need to be focused on preserving the current position for creditors and not deteriorating the position further, to the extent possible;
- Directors need to act prudently, being conservative in their risk assessments and taking expert advice when it is apparent potential issues are on the horizon (these steps should be taken earlier rather than later in order to mitigate risk as much as possible);
- When in distress, the financial position of the company needs to be assessed constantly for a number of reasons (1) you can monitor if the actions being taken to remedy the position are actually working, (2) monitors the rate of deterioration, (3) real time assessment of when the company is insolvent, or forecast the future point at which this may happen to enable preventative steps to be taken and (4) understand if, or when, trading should cease (less relevant in Cayman as do not tend to deal with trading businesses);
- Consideration as to when an entity needs to consider protection of the court (i.e. through liquidation or Restructuring Officer etc.);
- In these situations, directors should be meticulous about documenting decision making process (i.e. advice obtained, rationale for decisions (both decisions taken and not taken)) through board minutes and/or memorandums – these steps will help evidence that the directors discharged their duties and responsibilities properly, which will ultimately help protect the directors in the event of litigation
- I would always tend to want to communicate with key stakeholders, particularly creditors, in the interests of transparency which should help obtain support from stakeholders and make navigation of the distressed period less problematic

SPCs Update

39

SPCs Update

- SPCs are a popular vehicle for use by investment funds. Assets and liabilities are segregated within one entity. In principle, this enables multiple pools of investors in different portfolios to share fees and reduce costs, whilst ensuring protection in the event of the insolvency of another portfolio in the SPC. As identified above, they can be useful in a distressed scenario to manage underperforming investments.
- The current legislative regime in the CA provides for the appointment of statutory receivers to non-performing portfolios, the idea being that those portfolios can be wound-down and the healthy portfolios can continue without disruption.
- However, some recent case law has given rise to concerns that, in practice, portfolio investors may still be impacted by the misfortune of other portfolios:
  - *Oakwise* [CICA] confirmed that the test for the appointment of the statutory receiver under s 224 of the CA is a ‘flexible balance sheet’ test. This is typically a harder threshold for a creditor or shareholder to satisfy than cash-flow insolvency, which is the threshold for liquidation of a company under the CA.
  - *Re Holt Fund* expressly confirmed that an entire SPC may be wound up if one portfolio has insufficient assets to meet its liabilities (on the basis that the company then, as a whole, cannot meet its debts as they fall due under s 92(d) of the CA).
  - Taken together, these decisions are likely to incentivize creditors/shareholders to petition to wind-up the SPC as a whole when faced with an insolvent portfolio where ‘flexible balance sheet’ insolvency is or could be challenging to prove.
  - Given market concerns, the entire insolvency regime for SPCs is currently the subject of review for statutory reform to provide suitable comfort to investors in the vehicles.

40

Questions?

Faculty

Ronan Guilfoyle is a co-founder and director of Calderwood in George Town, Grand Cayman, Cayman Islands. He serves as an independent director on the boards of a wide range of investment funds and related structures, advising on fund governance and regulatory compliance. Mr. Guilfoyle is an industry leader and the current chairman of the Cayman Islands Chapter of AIMA. He has been a director on investment funds in the Cayman Islands for more than 18 years and has worked with many of the world's most successful managers. Mr. Guilfoyle is an active participant in industry regulatory consultations and a frequent speaker at hedge fund events and forums. Before founding Calderwood, he was a managing director at DMS Governance, with responsibility for the strategic development of the firm. Prior to that, he was a group manager at Admiral Administration, an independent fund administration firm in the Cayman Islands. Mr. Guilfoyle began his career with Ernst & Young, Ireland, where he was responsible for supervising audit teams on large global audits. He is a Chartered Accountant, a Registered Professional Director with the Cayman Islands Monetary Authority, and a member of the Cayman Islands Directors Association and the Cayman Islands Society of Professional Accountants. Mr. Guilfoyle received his B.S. in accounting from University College Cork, Ireland.

Ioannis Michopoulos is a managing director at Stout in New York, where he advises public and private companies, boards of directors and other fiduciaries on complex securities and derivatives valuations, advanced financial analytics, risk management, and portfolio valuation of venture capital and private-equity assets. He provides valuation advisory services in connection with complex business transactions and financial instruments, portfolio valuations, strategic planning, bankruptcy and reorganization, shareholder disputes and other corporate, tax and litigation-related matters, and has experience across equity-related instruments, embedded derivatives and exotic options, fixed-income securities, structured products and share-based awards. He also has experience in the valuation of venture capital and private equity-backed companies for financial reporting, tax and estate-planning purposes. While a graduate student in the MIT Sloan Master of Finance program, Mr. Michopoulos worked with Lazard Asset Management on quantitative analyses and predictive models for emerging stock markets and performed equity research for Fidelity Management & Research Co.. Prior to that, he led the student research group in the Accounting and Finance department at the University of Macedonia, where he earned his B.S. in accounting and finance, graduating first among his peers and attaining the second-highest grade in the department's history.

Richard Mottershead is the founder and investment advisor of Varcay Ltd. in Camana Bay, Grand Cayman, Cayman Islands, specializing in the management and monetization of illiquid investments, with a particular focus on offshore entities and special situations. He provides strategic advice on the sale and financing options available to holders of illiquid assets, leveraging his experience in both the insolvency profession and the secondary market. Mr. Mottershead began his career with PricewaterhouseCoopers and qualified as an accountant in 2004. He is a Fellow Chartered Certified Accountant (UK), a member of the Cayman Islands Society of Professional Accountants, and a member of RISA, the Cayman chapter of INSOL International, which promotes best practices in insolvency, restructuring, and litigation. Mr. Mottershead received his undergraduate degree from Sheffield Hallam University.

Leslie Anne Pinney is senior counsel with Foley & Lardner LLP in Ann Arbor, Mich., and a member of the firm's Fund Formation & Investment Management Practice. She helps helps private investment sponsors with all aspects of fund formation, including capital-raising, marketing, preparing offering documents, and drafting organizational documents. She also counsels clients on regulatory, compliance and operational issues during both an active fund raise and the operational stage, including concerning sponsor-carried interest and management company arrangements. Ms. Pinney's sponsor clients include established and emerging private-equity, venture capital, growth equity, credit and fund-of-funds sponsors. Her experience includes advising institutional investors, including endowments, family offices, governmental plans, fund-of-funds and corporations on their private capital investment activity. She also advises private fund sponsors, buyers and sellers in secondary transactions, and works with clients in connection with mergers and acquisitions, capital markets transactions, corporate governance, and public company reporting and compliance. Ms. Pinney received her B.A. in 2002 from Princeton University and her J.D. in 2017 from the University of Michigan Law School.

Harriet Ter-Berg is a partner in Appleby's Dispute Resolution team in Camana Bay, Grand Cayman, Cayman Islands. She joined the firm in November 2024 from another Cayman law firm. Prior to moving to the Cayman Islands, Ms. Ter-Berg practiced for a number of years as a commercial chancery barrister in London at 11 Stone Buildings and Gatehouse Chambers, and as an attorney in the London office of Sidley Austin LLP. She is a specialist advocate and has appeared extensively in the courts of both England and the Cayman Islands (including at appellate level) and before a number of arbitral tribunals. Ms. Ter-Berg's international commercial litigation and arbitration experience includes a particular focus on corporate insolvency (cross-border and domestic), contractual disputes, civil fraud, asset-tracing and enforcement, shareholder and partnership disputes, banking and finance litigation and fund disputes. She frequently carries out specialist advisory work for some of the world's largest corporations and investment firms. Ms. Ter-Berg regularly works with the major insolvency practitioners in the Cayman Islands and has acted in some of the most significant litigation in the jurisdiction, including *Re China Shanshui Cement Group*, *Jafar v. Abraaj Holdings*, *Re Oakwise Value Fund SPC*, *Re Global Cord Blood Corp.*, *Re Jian Ying Ourgame High Growth Investment Fund*, *Re Midway Resources International*, *BAF Latam Credit Fund*, *Re Uphold Ltd.* and *RPI v S&P Global, Inc.* She receiver her law degree from Magdalen College at Oxford.