Cayman Islands: The Exempted Limited Partnership Law, 2014

The Exempted Limited Partnership Law, 2014 (the “ELP Law”) came into force on 2 July 2014. The ELP Law is a major re-working of the now repealed Exempted Limited Partnership Law (2013 Revision) following extensive public and private sector consultation. The ELP Law gives partners greater contractual flexibility to determine their affairs and will enhance the overall attractiveness of the Cayman Islands as a domicile for partnership formation.

The amendments brought about by the ELP Law fall into three broad categories:

(i) changes which are market and investor driven and which seek to maintain the Cayman Islands as the leading jurisdiction for the formation of private equity and other investment funds;
(ii) changes which convey greater flexibility for partners to determine their business; and
(iii) changes which broadly adopt concepts used in the Cayman Islands Companies Law, as far as applicable.

Commercial changes which are market and investor driven

Qualifying general partners and admission or substitution of general partners
The list of persons who qualify as a general partner has been extended to include a limited partnership or limited liability partnership established in a recognized jurisdiction upon registration as a foreign limited partnership in the Cayman Islands (a “foreign limited partnership”).

The ELP Law seeks to provide for automatic novation of partnership property upon a change of general partner. As a matter of Cayman Islands law, where a new general partner is being admitted or substituted in accordance with the provisions of
the partnership agreement, all rights or property of every description vest without
the requirement for further formalities in the incoming general partner.

Execution and delivery of partnership agreements simplified
A number of the requirements under Cayman Islands law relating to the execution
and delivery of partnership documents have been revised with a view to making it
more manageable for investors to accede to the partnership and/or to execute
partnership documents. In particular, a partnership agreement or subscription
agreement will be executed validly where it is executed in any manner contemplated
by the parties, including (a) execution of the complete agreement or (b) where any
signature or execution page to the document is executed, whether or not the
agreement is in its final form. Further, where the agreement conveys a power of
attorney, the agreement will be deemed to satisfy the general requirements under
Cayman Islands law for a power of attorney to be executed as a deed. These
provisions of the ELP Law also have retroactive effect.

Extension of safe harbour provisions for a limited partner acting on boards and
committees
The ELP Law extends the list of “safe harbour” activities which a limited partner can
carry out without losing its limited liability status. A limited partner will not be
taking part in the conduct of the business of the exempted limited partnership if the
limited partner, or a representative of the limited partner, participates in a board or
committee of the exempted limited partnership.

Establishment of boards and conveying the benefit of exculpation and indemnity
provisions on board members
Unless specified in the partnership agreement to the contrary, members of boards
and/or committees of an exempted limited partnership shall be deemed to have
notice of, and shall have the benefit of, indemnity and exculpation clauses expressly
given in favour of such members in the partnership agreement even if they are not
party to the partnership agreement.

Limited partner may bring proceedings in certain circumstances
Where a general partner, without cause, fails or refuses to bring an action on behalf
of the exempted limited partnership, a limited partner may bring an action on behalf
of the exempted limited partnership. Where the limited partner brings a successful
action in the courts of the Cayman Islands, in whole or part, the court may award
that limited partner reasonable expenses (to include attorney’s fees) from any
recovery or from the assets of the exempted limited partnership.
**Return of contributions**
The exempted limited partnership’s right to claw back funds from a limited partner have been modified and restricted to apply only if the exempted limited partnership is (a) insolvent at the time of the repayment of the contribution to the limited partner or release of obligation (including where the payment or release causes the insolvency); and (b) the limited partner has actual knowledge of the insolvency of the exempted limited partnership.

**Security**
The ELP Law clarifies that choses in action (rights to procure the payment of a sum of money, including the right to make capital calls), are an asset of the exempted limited partnership. The ELP Law also gives statutory confirmation that the assets of an exempted limited partnership may be the subject of a floating charge whether or not the partners of the exempted limited partnership are companies, overseas companies or bodies corporate.

Further, the ELP Law gives statutory confirmation that a creditor who has security over the whole or part of the assets of the exempted limited partnership is entitled to enforce the security without leave of the court and without reference to the general partner and/or any liquidator.

**Changes which convey greater flexibility for partners to determine their business**

**Power to determine partner approval thresholds**
Partners can agree contractually to set different permission approval thresholds for different matters. In the event that no permission threshold is set out in the partnership agreement, the required majority shall be a simple majority of the limited partners calculated by reference to the value of the contributions of each of the limited partners.

**Consent where multiple general partners**
Where the exempted limited partnership has more than one general partner, the ELP Law provides that the partners can specify in the partnership agreement that a certain general partner is entitled to exercise certain authority, consents or powers to the exclusion of the other general partners.

**Duty of good faith**
The ELP Law provides that a general partner shall at all times act in good faith. The general partner is required to act in the interests of the exempted limited partnership.
unless there is an express provision in the partnership agreement to the contrary. By contrast, the ELP Law provides that a limited partner does not owe any fiduciary duties to the exempted limited partnership or to any other partner when exercising any of its rights or authorities or otherwise in performing any of its obligations under the partnership agreement. This standard is analogous to the standard applicable to a shareholder of a company. Further, subject to any express provisions of the partnership agreement to the contrary, membership of any board or committee of an exempted limited partnership does not of itself impose any fiduciary duties to the exempted limited partnership or any other partner.

**Provision of information and keeping of registers**

The ELP Law sets out certain information that must be disclosed to partners unless there is an express or implied term of the partnership agreement to the contrary. For example, subject to the terms of the partnership agreement, each limited partner has the right to demand true and full information regarding the state of the business and financial condition of the exempted limited partnership.

The general partner is required to maintain or cause to be maintained (a) a register of limited partners (including the name and address of the limited partner and the date on which the person became a limited partner and ceased to be a limited partner) and (b) a register of limited partner contributions (including a record of the amount and date of the contribution of the limited partner and the amount and date of any payment representing a return of the whole or any part of the contribution). These registers are not required to be maintained at the registered office or in the Cayman Islands, however, there should be kept at the registered office a record of the address at which the registers are maintained. Where a general partner is in default of keeping these registers or causing the registers to be maintained, it commits an offence and is liable on summary conviction to a fine and is required to indemnify any person who thereby suffers a loss.

The register of limited partners is open to inspection by all partners unless specified to the contrary in the partnership agreement and is also open to inspection by any person with the consent of the general partner. The register of limited partner contributions is open to inspection by any person with the consent of the general partner.

**Remedies and consequences for breach not unenforceable on the basis they are penal in nature**

Partners are at liberty to determine what consequences or remedies apply in the event that a partner fails to perform any of its obligations under the partnership agreement.
agreement or otherwise breaches the provisions of the partnership agreement. The ELP Law makes it clear that a remedy or consequence which is penal in nature will not be unenforceable solely on that basis.

Changes which broadly apply concepts used in the Cayman Islands Companies Law, so far as applicable to a partnership

Dual foreign name
Following the broad principles in the Cayman Islands Companies Law, it is now permissible for a Cayman Islands exempted limited partnership to have an additional dual foreign name. The name can be in any language not utilizing the Roman alphabet and may utilise any letters, characters and other diacritical marks and does not have to be an exact translation or transliteration of the name in the Roman alphabet.

Strike off
Where the Registrar has reasonable cause to believe that an exempted limited partnership is not carrying on business or is not in operation, the Registrar may strike the exempted limited partnership off the register and de-register the exempted limited partnership. The provisions for strike off are broadly similar to those applicable to a company under the Companies Law, except that when an exempted limited partnership is de-registered by strike off, any assets remaining in the exempted limited partnership at the time of strike off vest in the applicable general partner.

Express filings and registration
The ELP Law sets out a statutory procedure for express registration of the exempted limited partnership. Subject to an additional filing fee, it is possible to register the section 9(1) statement on the same day as filing or on an overnight basis.

Foreign limited partnership registration
A foreign limited partnership must first register under the ELP Law in order to act as the general partner of an exempted limited partnership. The foreign registered limited partnership may be registered by the Registrar upon payment of a registration fee and by filing (a) its certificate of formation in its jurisdiction of establishment; (b) a certificate of good standing; and (c) a prescribed statement of information signed by or on behalf of the foreign limited partnership.
De-registration for continuation in another jurisdiction

The ELP Law allows an exempted limited partnership to be de-registered in the Cayman Islands where the exempted limited partnership proposes to register by way of continuation in another jurisdiction. In order to de-register, the exempted limited partnership must deliver the prescribed fee to the Registrar and confirm, by way of voluntary declaration or affidavit, that a prescribed list of requirements has been satisfied.

Conclusion

The Cayman Islands’ new ELP Law is expected to make private equity and investment fund formation in the Cayman Islands even more attractive. Many of the changes will also facilitate the establishment of parallel fund structures with other jurisdictions. The government’s attitude towards and open communication with the private sector continues to encourage the promotion and maintenance of the Cayman Islands’ offshore business. The ELP Law is an example of this proactive, cooperative process, helping the Cayman Islands to maintain its status as a leading offshore jurisdiction.
This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

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