

Exempted Limited Partnership Law, 2014

July 2014

Overview

The Exempted Limited Partnership Law, 2014 (the "**ELP Law**"), enacted on 2 July 2014 and now in full force and effect, repeals and replaces the Exempted Limited Partnership Law (2013 Revision). Whilst it revises and updates the old law it does not make significant changes to the way an exempted limited partnership (an "**ELP**") is established or operates. Necessarily so, as the ELP Law is of application to all ELPs registered to date. The fundamentals, a general partner, who will have unlimited liability, to act for and on behalf of the ELP (which although a legal entity has no separate personality) and limited partners each of whom will have limited liability remain unchanged. The ELP Law does nonetheless make changes, clarifications and improvements to the old law, and the purpose of this client memorandum is to summarize some of the more important aspects.

Changes

Fiduciary duties

Under the old law, the general partner had a statutory duty to act in good faith in the interests of the ELP. Most importantly and controversially, the ELP Law now makes part of that duty subject to the terms of the limited partnership agreement. Under the ELP Law, a general partner must act at all times in good faith, but only subject to any express provisions of the partnership agreement to the contrary, in the interests of the ELP. The precise ambit of the statutory authority is unclear. It purports to enable the partnership agreement to vary the fiduciary duties but it is by no means certain it achieves that effect, assuming that effect to be desirable. The provision may have particular relevance for the way in which general partners manage conflicts of interest but clearly whilst the requirement of the general partner to act at all times in good faith is unchanged, limited partners are now under an enhanced due diligence obligation to consider carefully the terms of the limited partnership agreement to establish the range and extent of the general partner's obligations.

The ELP Law also provides, at sections 19(2) and 24(2) respectively, that, again subject to the express provisions of the limited partnership agreement to the contrary, neither a limited partner nor member of any board or committee of an ELP owes any fiduciary duty in exercising any of their rights or authorities or otherwise in performing any of their obligations under the limited partnership agreement or as a member of the board or committee. The range and extent of fiduciary duties of a limited partner (in so far as they existed) and of a board or committee member (which clearly did exist) may therefore be modified by agreement of the partners. Note that duties may still be imposed by other contracts or through conduct, and we would advise that limited partners and members of boards and committees should always act in good faith.

Limited liability safe harbors

The limited liability safe harbors have been extended. Limited partners of an ELP may lose the protection of limited liability if they take part in the conduct or management of the business of the partnership, and the ELP Law sets out (at section 20(2)) a range of activities which, if undertaken by a limited partner, will not be deemed to be taking part in the conduct or management of the business. The safe harbors will now include (i) serving on any board or committee of the ELP, of a general partner or of the limited partners or appointing, electing or otherwise participating in the choice of a representative to serve on any board or committee, and (ii) serving on the board of directors or a committee of, consulting with or advising or being an officer, director, member, agent or employee of any person in which the ELP has an interest or any person providing management or other services to or otherwise having a business or other relationship with the ELP or its general partner.

Enforcement by third parties

Under section 24(1) of the ELP Law, where a limited partnership agreement contains provisions for the establishment and regulation of boards or committees of the ELP, its partners or any class or category of those partners, including the constitution of boards or committees and the manner and terms of appointment and removal of members, their powers, rights and obligations, the regulation of proceedings and rights to exculpation or indemnification, then subject to the express provisions of the limited partnership agreement any person appointed to the board or committee shall be deemed to have notice, and the benefit, of those provisions which will not be unenforceable by such person by reason only that the person is not a party to the partnership agreement. Representatives of limited partners sitting on advisory committees or advisory boards, for example, will therefore (unless otherwise provided by the partnership agreement) have the benefit of rights to exculpation and indemnification without being a party to the partnership agreement.

Registers and records

The register of partnership interests, which under the old law was open to inspection by all partners or other persons with general partner consent, is now open to inspection by all partners, subject to any express or implied term of the partnership agreement, and any other person with general partner consent. In addition, the register now need contain nothing more than the name and address of each limited partner, the date on which they became a limited partner and the date they ceased to be so. Details of contributions and returns of contributions may now be maintained on a separate "record" under section 30(1). This record is open to inspection by any person with the consent of the general partner. Consequently, a general partner may wish to expressly provide in the limited partnership agreement that inspection of the limited partnership register, containing no more than names, addresses and dates, remain subject to general partner consent, and further ensure that it does not consent, under the terms of the partnership agreement, to inspection of the "record" containing sensitive financial information.

Preservation of limited liability despite loss of last general partner

An ELP must have a qualifying general partner (as to which see immediately below). Section 4(6) of the ELP Law now provides that a limited partner shall not cease to have the benefit of limited liability by reason only of the ELP ceasing to have a qualifying general partner.

Extending general partner status to foreign limited partnerships

Foreign limited or limited liability partnerships may now apply to be registered as the general partner of an ELP, by following the procedures set out in section 42 of the ELP Law. Foreign partnerships therefore join the existing list of qualifying general partners, typically being Cayman or foreign companies or Cayman ELPs.

Clawback

Under the old law, a clawback obligation might arise if the ELP became insolvent within six months after a distribution of capital. Section 34(1) of the ELP Law now provides that if a limited partner receives a payment representing a return of any part of his contribution or is released from any outstanding obligation in respect of his commitment and, at the time that the payment was made or the release effected, the partnership is insolvent and the limited partner has actual knowledge of such insolvency, then for a period of six months commencing on the date of that payment or release, the limited partner shall be liable to the partnership for the amount of the payment or released obligation in respect of his commitment, to the extent necessary to discharge the relevant debt or obligation of the partnership.

Dissolution through strike-off

Section 37(1) of the ELP Law now provides that where the Registrar has reasonable cause to believe that an ELP is not carrying on business or is not in operation, the Registrar may strike the partnership off the register and the partnership shall thereupon be dissolved. Strike-off may be effected directly by the Registrar or pursuant to a request by the general partner. A partnership which has been struck off can be restored to the register within two years of the date of strike-off (or up to 10 years with the approval of the Cayman Islands government). Striking-off of an ELP shall not affect the liability, if any, of any general partner or limited partner.

Migration overseas

Section 43 of the ELP Law introduces provisions allowing an ELP to be de-registered in the Cayman Islands and to register by way of continuation as a partnership, body corporate or other form of entity under the laws of a jurisdiction outside the Cayman Islands, assuming among other things that the laws of that jurisdiction permit or do not prohibit the transfer, no outstanding petition or similar proceeding has been filed to wind up the partnership and it is not insolvent.

Definition of "majority of limited partners"

The defined term "majority of limited partners" has been amended to allow the partnership agreement to set out the class of persons who may be included for purposes of determining voting or consent thresholds of limited partners. Persons not party to the partnership agreement, most obviously limited partners in feeder, parallel, co-investment or other separate account vehicles, may therefore be included.

Agreement as to benefits

A person who has executed the partnership agreement (or who is named or otherwise identified, including as a class, in the partnership agreement) shall not, under section 26 of the ELP Law, be deemed to be a partner of the exempted limited partnership if (i) that person has executed the partnership agreement solely to take the benefit of a provision of, or assume an obligation under, the agreement otherwise than as a partner, or (ii) on a proper construction of the partnership agreement, the parties did not intend the person to be a partner. So a manager, for example, may

execute the partnership agreement to take the benefit of fee or indemnification provisions without being deemed a partner.

Dual foreign name

Under section 6(1) of the ELP Law, an ELP may now have a dual foreign name, which will allow them to obtain official recognition of that foreign name overseas.

Overrule of Mercury

Any uncertainty as to execution formalities created by the English case of *Mercury Tax Group Limited v. HMRC* has been removed by section 27 of the ELP Law. Any partnership agreement, any agreement pursuant to which any person makes any commitment or contribution as a partner and any agreement or instrument is validly executed by the parties thereto where it is executed in any manner contemplated by the parties, including where any signature or execution page to the agreement or instrument is executed, whether or not the agreement or instrument is at the time in its final form, and attached by the party to the relevant agreement or instrument.

Enforceability of penalty provisions

If a partnership agreement provides that a partner failing to perform its obligations under or otherwise breaching the partnership agreement may be subject to or suffer consequences of the failure or breach specified in the partnership agreement, then those remedies or consequences (including but not limited to reducing or forfeiting the defaulting partner's partnership interest, or effecting a forced sale or forfeiture of the partnership interest) shall not be unenforceable solely on the basis that they are penal in nature. This is useful since penalty provisions as a general matter of Cayman Islands law may be unenforceable. Section 25 of the ELP Law now provides for the enforceability of customary provisions in partnership agreements penalizing partners who fail to make timely capital contributions with the forfeiture of all or part of their interest.

Statutory novation on change of general partner

Section 17 of the ELP Law introduces a statutory novation of assets and liabilities on substitution of a general partner so that all rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof, held by the outgoing general partner will vest without the requirement for further formalities in the incoming general partner and any continuing existing general partner(s).

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