

Client Memorandum

New Flexible Offshore Vehicle: The Cayman Islands Limited Liability Company

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The Cayman Islands has taken steps to introduce a new vehicle in 2016. The Limited Liability Companies Bill, 2015 (the "**Law**") was published in December 2015, and is expected to become law in the first half of 2016. A Cayman Islands limited liability company ("**LLC**") will be a body corporate with separate legal personality, which confers limited liability upon its members. It has many flexible features, while retaining legal and equitable concepts familiar to users of Cayman Islands exempted companies and exempted limited partnerships.

The LLC was in-part modeled on Delaware limited liability companies. For that reason, LLCs will be of interest to clients who wish to establish offshore fund vehicles that are a close parallel to their onshore counterparts. But their appeal goes beyond their similarity to other vehicles – LLCs will be attractive for a range of applications, including joint ventures, holding companies, and serving as the general partner to an exempted limited partnership.

The key benefits of the LLC are:

- Management of an LLC is generally determined by the terms of the LLC agreement. The LLC agreement does not need to be filed with the Registrar (unlike the memorandum and articles of association of an exempted company). Unless otherwise provided in the LLC agreement, management of an LLC is vested in its members acting by majority in number; or an LLC can be managed by one or more managers.
- Unless otherwise provided in the LLC Agreement, a manager of an LLC does not owe any duty (fiduciary or otherwise) to the LLC or any member, other than a duty to act in good faith. But note that this duty of good faith can be expanded or restricted by the terms of the LLC agreement. This construct seeks to follow Delaware law but considerable care needs to be taken on this point as firstly the Cayman Islands fiduciary duties and duties of care and skill owed by a director to a company are not identical to a duty of good faith and secondly the duty of good faith owed by a manager may be thus modified in the LLC Agreement. One effect of this is that directors of an exempted company are not entitled to consider the interests of another company, or a specific group of shareholders or creditors, in making a decision, and may not act in a position of conflict of interest which can be a limitation in some commercial structures. However to the extent these points may operate as a protection to investors in the company context investors in an LLC need to consider this distinction carefully.
- Further, the Law expressly provides that the members do not owe fiduciary duties to the LLC or to other members in exercising their rights or performing their obligations under the LLC agreement, unless the LLC agreement says otherwise. The position here is not dissimilar from the duties owed by shareholders in a typical company but is quite distinct from the duties owed by directors in a company.

- An LLC interest is not unitized like a share in an exempted company. The profits and losses of an LLC can be allocated among the members and classes of interests in any manner as provided in the LLC agreement. This feature is similar to the flexibility offered by exempted limited partnerships.
- It is possible to be admitted as a member and receive an LLC interest without making a contribution or being obligated to make a contribution to the LLC.
- Member or manager default remedies in an LLC agreement will not be unenforceable solely on the basis that they are in the nature of a penalty or forfeiture. The relevant provisions of the Law, similar to certain 2014 amendments to the Exempted Limited Partnership Law, support freedom of contract among the parties and will enable the inclusion of default remedies that are common market practice, such as forfeiture of a member's LLC interest and payment of default interest in the event of failure to meet a call.
- The Law specifically provides for an optional "negative consent" procedure for member approvals.
- An LLC can be registered quickly with a simple registration statement. A short-form LLC agreement can be used initially, and then amended and restated later.
- Key constitutional documentation can be simplified: a single LLC agreement can replace the memorandum and articles of association and conforming shareholders' agreement.

How an LLC is registered:

An LLC can be registered by filing with the Registrar a registration statement signed by any person forming the LLC, and payment of the registration fee. The registration statement must contain the name of the LLC (which may include a dual foreign name), the Cayman Islands registered office address, the term for which the LLC has been formed (if not formed for an unlimited duration), and a declaration that the LLC will not undertake business with the public in the Cayman Islands (other than so far as may be necessary for the carrying on of the business of the LLC outside the Cayman Islands). The LLC will be deemed registered on the date that the registration statement is filed. An LLC agreement may be entered into at any time before, after or at the time of filing the registration statement.

Other features of the LLC:

- An LLC can apply for a tax undertaking certificate with 50-year duration.
- A member's rights to receive payments or distributions from the LLC can be assigned (unless the LLC agreement provides otherwise).
- An LLC can acquire an LLC interest from a member, for consideration or no consideration, provided that the LLC is able to pay its debts as they fall due in the ordinary course of business.
- Written resolutions of members need not be unanimous and may be passed by a majority.
- An LLC can merge with another LLC, an exempted company or a foreign company, and any foreign entity may be registered by way of continuation as an LLC (provided that it has separate legal personality).
- Concepts of common law and equity applicable to companies also apply to LLCs, except to the extent inconsistent with the nature of an LLC and the Law.
- An LLC can be formed by just one person, and the LLC agreement can be a single-party agreement.

- An LLC must maintain a register of members, a register of managers and a register of mortgages and charges, although only the latter two registers need to be filed with the Registrar (similar to the position for exempted companies).
- The Law provides for the claw back of distributions made to members who had actual knowledge that the LLC was unable to pay its debts as they fell due in the ordinary course of business.
- An LLC agreement can provide for classes or groups of managers with different rights, powers and duties.

Travers Thorp Alberga will issue a new update when the Law becomes effective.

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