

- Key changes
- Round up of additional changes

Cayman Revises the Exempted Limited Partnership Law

*On 2 July 2014 the Cayman Islands government passed into law substantial revisions to its exempted limited partnership legislation in the form of the Exempted Limited Partnership Law, 2014 (the **New ELP Law**).*

The exempted limited partnership (ELP) remains the favoured form of Cayman entity for the establishment of private equity, venture capital and real estate funds as well as continuing to be used for both hedge funds and joint venture transactions.

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The revisions made in the New ELP Law represent the most significant changes to this law since 2009/10 and have been the subject of an extensive period of consultation between the Cayman government and industry representatives resulting in significant enhancements to the flexibility and practicality of the ELP.

The revisions reflect the following key principles:

- Promoting freedom of contract between the partners whilst providing default provisions in key areas;
- Updating the existing ELP Law to accommodate and confirm, on a statutory basis, certain historic private equity industry practices and allowing for targeted retroactive effect to provide additional certainty to existing structures;
- Streamlining of the requirements for certain additional legal formalities which would otherwise apply; and
- Bringing the Cayman ELP regime closer to its onshore counterparts, particularly in the US (eg Delaware) to promote consistency where offshore and onshore structures run in parallel.

This update highlights the key changes in the New ELP Law and is intended as a general overview. Please refer to the key contacts below or usual Harneys contacts for further information.

Key changes

Enforcement of third party rights

- Limited Partner Advisory Committee (**LPAC**) members are extended third party rights including, specifically, with respect to exculpation and indemnification provisions in an exempted limited partnership agreement (**LPA**). This, together with the new Contracts (Rights of Third Parties) Law (**CRTPL**) (discussed below), addresses the Cayman historic issue of having no general legislation allowing for direct enforcement of third party rights. Previous work-arounds have included the general partner (**GP**) being specifically authorized in the LPA to execute separate non - Cayman law governed indemnity agreements (subject to a law which does allow for enforcement of third party rights) or Cayman 'deed polls'.
- Additional third parties typically intended to be caught by exculpation and indemnity provisions within, for example, definitions in the LPA such as 'Covered Persons' or 'Indemnified Parties' can now make use of the CRTPL which provides third party benefit and enforcement rights on an opt-in basis.
- Confirmation that a third party can be named in/execute a LPA to, for example, take the benefit or assume the liability of a provision under the LPA without being deemed to be a partner.

Limited partner limited liability

- Additional (non-exclusive) safe harbours for LPs including those specifically aimed at LPAC involvement which expressly do not constitute taking part in the 'conduct of the business' of the ELP and which might otherwise have led to potential LP liability (LPs being generally prohibited from taking part in the conduct of the business of the ELP).
- Incorporation of an 'actual knowledge' requirement relating to the LP statutory clawback on insolvency of the ELP – the test now requiring a LP to have had actual knowledge of the insolvency of the ELP at the time a return of a contribution/release of commitment was made to it for the statutory claw-back to take effect.
- Confirmation that the interest rate applicable on statutory LP clawback may be reduced to zero in an LPA and/or the basis of interest calculation also amended in the LPA (otherwise the statutory rate being 10 per cent simple interest per annum calculated on a daily basis).
- Confirmation that LP limited liability is not lost solely on the basis that an ELP does not (subsequent to its initial registration) have a qualifying general partner – ie where, for example, a GP withdraws and, for a period of time there is no qualifying GP in place.

LP fiduciary duties

Confirmation that (unless the LPA otherwise states):

- LPs do not owe fiduciary duties to other partners or the ELP; and
- LPAC members do not owe fiduciary duties to any partner or the ELP.

Defaulting partner provisions

- Statutory amendment to common law on penalty clauses in an ELP context with the New ELP Law providing that default remedies/provisions in the LPA are no longer unenforceable solely because they would constitute a 'penalty clause' for Cayman law purposes.
- Confirmation that a GP is not liable for its decision to impose/not impose remedies on any partner subject to its overriding duty of good faith (and, if not excluded in the LPA, its duty to act in the best interests of the ELP).

Admission of LPs/transfer of LP interests

- The New ELP law aims to facilitate transfers of LP interests and admission of LPs to ensure that, provided the LPA is complied with, there should be no privity of contract concerns including providing confirmation that, provided the relevant provisions in the LPA are complied with, the relevant person will:
 - be deemed to have adhered to/agreed to be bound by the LPA; and
 - have the right and obligations contained in the LPA,

in each case as if the relevant person and all existing partners had together duly executed and delivered the LPA.

This provision also has retroactive effect.

- Clarification that, subject to the LPA, no LP may transfer/grant a security over its interest without prior/simultaneous GP consent.

GP duty

Previous requirement of the GP's duty being to 'act at all times in good faith in the interests of the ELP' now amended to retain the good faith element but allow the 'in the interests of the ELP' section to be modified/disapplied by the LPA. This brings the duty more in line with the Delaware equivalent legislation and provides greater contractual certainty to all partners as to the GP duty and the ability of the LPA to regulate it by appropriate disclosure and informed consent.

Transfers of GP interests / withdrawal of GP – ELP property

- Confirmation that on transfer of a GP interest in accordance with the LPA and the New ELP Law, all rights/property of the ELP which are held/deemed held by the existing GP vest in the incoming GP without further formalities. (Where non-Cayman assets/rights are held, local law advice should be taken confirming this approach will be respected).
- Confirmation that on a GP withdrawal in accordance with the LPA and the New ELP Law, all rights/property of the ELP vest in any remaining GP(s) without further formalities. (Where non-Cayman assets/rights are held, local law advice should be taken confirming this approach will be respected).

Security enhancements

- *GP grant of security over capital calls:* Clarification that contractual rights including the right to make capital calls and receive the proceeds thereof are rights/property of the ELP meaning that historic concerns over the authority/capacity of a GP to grant such security where the GP was not specifically authorised in the LPA are alleviated.

- *Floating Charges*: Confirmation that an ELP can grant floating charges over its assets.
- *Continuing security on withdrawal of GP*: Confirmation that on a withdrawal of a GP, ELP property vests in remaining GP(s) and remains subject to any mortgages/charges/security interests.
- *Enforcement of security*: confirmation that in an ELP specific context a secured creditor is entitled to enforce its security without the leave of the court and without reference to the general partner or liquidator appointed to wind-up the ELP.
- *Introduction of a 'Register of Security Interests'*: essentially the same as the prior requirement for a register of mortgages of limited partnership interests and having to show all security interests over LP interests for which notice has been given to the ELP. In terms of the notice requirements there is however no longer a requirement to provide an executed copy of the charge agreement, just the prescribed particulars.

Round up of additional changes

- Allowing for the registration of foreign limited partnerships in Cayman to act as qualifying GPs of Cayman ELPs.
- Allowing dual foreign names (eg with Chinese characters) to be used (and not having to be translations).
- Additional provisions expressly allowing GP agents and delegates to enter into documents on behalf of the ELP.
- Confirmation that the registered office (**RO**) of an ELP must be at the address of a person licensed with the Cayman Islands Monetary Authority (ie not just an address in Cayman) – subject to provisions allowing existing ROs not satisfying this condition to continue unless the RO of an ELP is moved.
- Clarification with respect to certain dissolution provisions:
 - previous discrepancies as to the consequential Cayman requirements under 'Events of Dissolution' set out in the LPA compared to where dissolution was effected by a resolution of the partners have been addressed with there now being equivalent requirements;
 - automatic dissolution provisions on GP withdrawal events such as insolvency proceedings have been improved so the GP now has an absolute duty to provide notice of relevant events to LPs;
 - certain provisions which previously applied by reference to the Companies Law have now been specifically incorporated into the New ELP Law including, for example, the provision confirming that a secured creditor is entitled to enforce its security without the leave of court and without reference to the GP or liquidator appointed to wind-up the ELP.
- Clarification that changes to the make-up of the partners do not cause the LPA to terminate (previously the ELP Law just confirmed that this did not cause a dissolution of the partnership).
- Clarification that where there are multiple GPs in a partnership, the LPA can delegate authority to one GP where the ELP Law provides for certain GP authorities/powers as the previous law was unclear as to whether all GPs had to perform the relevant matters.

- Introduction of a short form strike-off process for ELPs (comparable to that available for exempted companies under the Cayman Companies Law).
- Changes to the requirements of the Register of LP Interests (**LP Register**) - with the LP Register now not providing details of contributions/commitments but with the introduction of a new requirement for a record of contributions (**Record of Contributions**). A record of where the LP Register is kept must be on file at the RO (if the register is not maintained there) and there are substantial potential penalties for a GP not keeping the LP Register and Record of Contributions and updating within 21 days of changes - on summary judgment (US\$10,000/day).
- Introduction of migration provision for ELPs out of Cayman (previously only migration in provided for).
- Provisions deeming powers of attorneys contained in LPAs (including irrevocable POAs) to have been validly executed for Cayman formalities where the donor has executed or adhered to the LPA (works also retroactively).
- Confirmation effectively that English case law (the *Mercury* case) does not apply in the case of LPAs – confirming the validity of the practice of execution of LPAs/other partnership documents executed as deeds by execution of counterpart signature pages in advance of final form documents and which are then attached with authority to the relevant final agreements such as is typical on a remote (works also retroactively).

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For more information please contact:

Joss Morris

Head of Cayman Private Equity

+1 345 815 2923

joss.morris@harneys.com

Cayman Islands

Jonathan Culshaw

Managing Partner, Hong Kong and Global Head of Investment Funds and Regulatory

+852 3195 7238

jonathan.culshaw@harneys.com

Hong Kong

www.harneys.com

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