

Exempted Limited Partnerships: Winding Up, Dissolution and other Changes

The Exempted Limited Partnership (Amendment) Law, 2009, which was enacted in March 2009 and is expected to come into effect before the end of April 2009, has made significant changes to the regime for the winding up and dissolution of exempted limited partnerships ("Partnerships"). The opportunity has also been taken to clarify certain other provisions of the Exempted Limited Partnership Law (2007 Revision) ("ELP Law").

Winding Up and Dissolution

The ELP Law, as originally enacted, did not contain separate procedures for the winding up of a Partnership and its dissolution. It simply required that, in the event of the dissolution of a Partnership, its affairs be wound up by the general partner, unless otherwise ordered by the court. Similarly, the dissolution of a Partnership was primarily regulated by the relevant partnership agreement, subject to automatic dissolution in certain circumstances (see below) and dissolution by court order on the application of a partner or creditor of the Partnership. Notice of dissolution was required to be filed with the registrar of exempted limited partnerships ("Registrar") before a Partnership could be dissolved otherwise than automatically or by court order. Under normal principles of partnership law, dissolution would precede the winding up of the Partnership's affairs.

The ELP Law, as amended by the Exempted Limited Partnership (Amendment) Law, 2009 (the "Amended Law") contains procedures that will, so far as possible, bring the regime for the winding up and dissolution of Partnerships into line with the new provisions relating to the winding up of companies, contained in Part V of the Companies Law (2007 Revision, as amended) (the "Companies Law") and the Companies Winding Up Rules 2008 (the "Winding Up Rules") which came into effect on 1 March 2009. As a result, the termination of a Partnership will consist of two distinct steps, its winding up and subsequent dissolution.

Winding Up

Pursuant to the Partnership Agreement

Under the Amended Law, a Partnership is to be wound up at the time or upon the occurrence of any event specified in the partnership agreement (a "Voluntary Winding Up").

By Resolution of the Partners

Unless otherwise specified in the partnership agreement, a Partnership continues until wound up and dissolved by resolution of all the general partners, and a two-thirds majority of partners (a "Winding Up by Resolution").

Automatic Winding Up

As originally enacted, the ELP Law provided for the immediate automatic dissolution of a Partnership notwithstanding any express or implied term of the partnership agreement to the contrary, on the occurrence of certain events to the sole or last remaining general partner, subject to the proviso that if, within 90 days of the date of that dissolution, the limited partners unanimously elected one or more new general partners, the business of the Partnership was not required to be wound up but might be assumed and continued as provided for in the partnership agreement or any subsequent agreement.

All of the circumstances requiring automatic dissolution were outside the control of the limited partners, and the proviso enabled the limited partners to prevent the dissolution of a Partnership as a result of events outside their control. However, a Partnership was, for the 90 day period immediately following automatic dissolution, in an uncertain state, since it had been dissolved, but was subject to revival by the limited partners. In addition, it was by no means certain that the limited partners would become aware of the event causing automatic dissolution in time to avail themselves of the full 90 day period.

The Amended Law makes a number of changes to the automatic dissolution provisions. The events causing automatic dissolution are now limited to the death, the commencement of liquidation or bankruptcy proceedings, or the withdrawal, removal or making of a winding up or dissolution order in relation to the sole or last remaining general partner, but other events causing automatic dissolution may be specified in the partnership agreement.

The automatic dissolution date is the date which is 90 days after service of a notice by the general partner (or its legal representative) on all the limited partners informing them of the occurrence of the event giving rise to the automatic dissolution.



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A new general partner or general partners may now be appointed by such majority as is specified in the partnership agreement as being entitled to vote to elect a new general partner, or if no such majority is specified in the partnership agreement, a simple majority of the partners (determined by reference to capital contributions).

Unless the partnership agreement provides otherwise, if a new general partner is not elected by the automatic dissolution date, the Partnership is wound up and dissolved in accordance with the partnership agreement or in accordance with a court order made on the application of any partner or creditor of the Partnership.

Winding Up by Court Order

The Amended Law preserves the power of the court, on the application of a partner or creditor of a Partnership, to make such orders and give such directions for the winding up and dissolution of a Partnership as may be just and equitable. The role of the court is, however, significantly expanded by virtue of the application, subject to certain limitations (please see below) of the provisions of Part V of the Companies Law and the Winding Up Rules to the winding up and dissolution of Partnerships.

Winding Up Procedure

Companies Law and Winding Up Rules

Except to the extent that they are not consistent with the provisions of the Amended Law and subject to any express provisions of the Amended Law to the contrary, the provisions of Part V of the Companies Law and the Winding Up Rules will apply to the winding up and dissolution of Partnerships. For that purpose references therein to companies include Partnerships, references to directors and officers of a company include the General Partner of a Partnership and limited partners of a Partnership are treated as if they were shareholders of a company and contributories (but not so as to render limited partners subject to any greater liability than that for which they would otherwise be liable under the Amended Law). It is beyond the scope of this Updater to examine those provisions in detail, and we refer you to the Ogier February Updater in which they are reviewed.

However, all but four of those provisions are excluded from application to Voluntary Windings Up, and those which do apply are noted below.

Notice

Notice of the winding up of a Partnership is required to be filed with the Registrar (and, in the case of a Partnership carrying on a regulated business, the Cayman Islands Monetary Authority), and published in the Cayman Gazette.

Liquidator

It is no longer a requirement that the Partnership be wound up by the general partner. A liquidator other than the general partner may be appointed pursuant to the partnership agreement.

However, on a Winding Up by Resolution or an Automatic Winding Up, the liquidator must apply to the court for an order that the winding up continue under the supervision of the court unless, within 28 days of the commencement of the winding up, the general partner has signed a declaration of solvency in prescribed form. That declaration is to the effect that a full enquiry into the Partnership's affairs has been made and that to the best of the general partner's knowledge and believe, the Partnership will be able to pay its debts in full, together with interest at the prescribed rate, within such period, not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration.

Priority of Claims

The Amended Law now incorporates express provisions relating to the application and distribution of Partnership property on winding up. It does so by applying the provisions of section 140 of the Companies Law (appropriately amended) to Partnerships. Thus, the Partnership property is to be applied in satisfaction of its liabilities, and any such application is required to take into account any applicable subordination agreements, contractual set off or netting arrangements (bilateral or multi-lateral) and any other agreements for the deferral, postponement or waiver of creditors' claims.

Any surplus remaining after satisfaction in full of all Partnership liabilities is distributed to the partners in accordance with their rights under the partnership agreement.

Voidable Preferences and other recoverable payments

Payments to Limited Partners

The ELP Law contained a prohibition on a limited partner receiving, out of the capital of the Partnership, any payment representing a return of any part of his contribution to the Partnership unless, at the time of and immediately following such payment, the Partnership was solvent. In the event of the insolvency of the Partnership within six months after the date of a receipt by a limited partner in contravention of this prohibition, the limited partner was required to repay the amount so received, with simple interest at 10% per annum, to the extent necessary to discharge any debt or obligation of the Partnership incurred during the period that the contribution, all or part of which was repaid, represented an asset of the Partnership.

This provision has been simplified by removing the prohibition altogether, so that the relevant section now



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contains an absolute obligation on a limited partner who receives such a payment within six months before an insolvency of the Partnership to make repayments in those circumstances. The partnership agreement may vary the rate of interest payable.

Where a Partnership is subject to a Voluntary Winding Up, the period of six months, for the above purposes, is calculated from whichever is the earlier of the date of the passing of a resolution for the winding up of the Partnership, the time of the occurrence of the event specified in the partnership agreement and the insolvency of the Partnership.

The definition of “insolvency” remains unchanged and means that the general partner is unable to pay the debts of the Partnership (otherwise than in respect of liabilities to partners on account of their Partnership interests) in the ordinary course of business as they fall due out of the assets of the Partnership (without recourse to the separate assets of the general partner not contributed to the Partnership).

Voidable Preferences

The provisions of s.145 of the Companies Law relating to voidable preferences now apply, appropriately amended, to Partnerships. Thus, a conveyance or transfer of property, or a charge thereon, and any payment obligation and judicial proceeding, made, incurred, taken or suffered by a Partnership in favour of any creditor at a time when the Partnership is unable to pay its debts with a view to giving such creditor a preference over the other creditors of the Partnership is invalid, if made, incurred, taken or suffered within six months immediately preceding the commencement of the winding up of the Partnership.

As is the case with a company, such a payment made by a Partnership to a creditor which is a related party of the Partnership is deemed to have been made with a view to giving that creditor a preference. A creditor is a “related party” if it has the ability to control the Partnership or exercise significant influence over the Partnership in making financial and operating decisions. This provision is likely to be of particular relevance to investment funds structured as master/feeder funds, where the master fund is a Partnership whose general partner is controlled by the investment manager.

It should be noted that the solvency criterion for voidable preferences differs from that for recovery of payments to limited partners described in the preceding section. A payment or disposition may be invalid as a preference if, at the time it is made, the Partnership is unable to pay its debts (i.e. unable to meet its current debts out of currently available assets, which assets will include any rights against the general partner in respect of its unlimited liability for Partnership debts), whereas a payment may be recovered from a limited partner if the Partnership becomes insolvent within six months of that payment and,

as noted above, insolvency does not take account of recourse to the separate assets of the general partner.

Dispositions at an Undervalue

A disposition at an undervalue by a Partnership has always been capable of being set aside, under the Fraudulent Dispositions Law (1996 Revision) at the instance of a creditor thereby prejudiced, to the extent necessary to satisfy the obligation to that creditor. By virtue of the application of s.146 of the Companies Law to Partnerships, such a disposition may now be set aside in full. However, since it may be set aside only at the instance of an official liquidator, this provision will be relevant only if the relevant Partnership is wound up by, or subject to the supervision of, the court. In any other circumstances, the provisions of the Fraudulent Dispositions Law (1996 Revision) will continue to be applicable.

Dissolution

On completion of the winding up, the general partner or other liquidator must sign and file a notice of dissolution with the Registrar, following which the Partnership is dissolved. A Partnership cannot be dissolved before such a notice has been filed.

New Deregistration Procedure

A new procedure has been included in the Amended Law which permits a general partner of a Partnership, if so permitted under the terms of the partnership agreement, to deregister the Partnership as an exempted limited partnership by filing a written notice of deregistration with the Registrar, together with written confirmation that such action is authorised by the partnership agreement. Upon deregistration, a Partnership ceases to be an exempted limited partnership, but is not dissolved. It therefore continues to exist as a partnership, and all partners will have unlimited liability for its debts. Such deregistration would enable the deregistered partnership to register under the laws of another jurisdiction which permitted such registration, but care will need to be taken to coordinate deregistration under the Amended Law and registration elsewhere, to avoid a period in which all the partners have unlimited liability.

Other Changes

Assignment of Limited Partners’ Interests

The overriding requirement for the consent of a general partner to the assignment by a limited partner of its interest in a Partnership, and the right of that general partner to give or withhold that consent in its discretion regardless of any provision of the partnership agreement to the contrary, has been removed, and a limited partner’s ability to assign its interest in a Partnership is now governed wholly by the partnership agreement.



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Inspection of Register of Limited Partnership Interests

The register of limited partnership interests which was previously available for inspection by any person, may now be inspected only by partners or by any other person with the consent of the general partner.

Limited Partners' Rights to Information

The right of limited partners to information regarding the business and financial condition of a Partnership has been modified, so that it is clear that the partnership agreement may limit the information which a limited partner may demand.

Majorities of Partners

Any "majority of partners" referred to in the Amended Law means such voting majority as may be specified in the partnership agreement or, if the partnership agreement does not so specify, a simple majority of the partners calculated by reference to their capital contributions.

Summary

The Amended Law contains a comprehensive regime for the winding up and dissolution of Partnerships, and resolves uncertainties as to the application of and distribution of Partnership property where a partnership was dissolved but its general partner was not. The new regime reverses the sequence of dissolution and winding up and, in applying the provisions of Part V of the Companies Law, except to the extent that they are not consistent with the provisions of the Amended Law, the Amended Law maintains the tenor of the ELP Law by treating a Partnership as if it was a separate entity without expressly providing for separate legal personality.

A subsidiary theme of the amendments, which is reflected both in the new winding up regime and in other amendments, has been to remove elements of inflexibility from the ELP Law and put greater emphasis on the terms of a partnership agreement.

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