

# Cayman Islands Limited Liability Companies

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The purpose of this memorandum is to provide a summary of the main legal requirements and general principles applicable to the formation, registration, operation and winding-up of a Cayman Islands limited liability company.

This memorandum is intended to provide a general summary of the position under Cayman Islands law as at the date shown above; it is not to be taken as specific legal advice applicable to particular issues or circumstances. Anyone considering establishing an LLC should contact one of the Ogier partners listed on the last page.

## Introduction

The Limited Liability Companies Act (Revised) of the Cayman Islands (**LLC Act**) which came into force in July 2016 creates a new hybrid entity, a Cayman limited liability company (**LLC**), similar to its Delaware counterpart. A Cayman LLC is a corporate entity with separate legal personality and limited liability of its members but one which has greater flexibility than a company around its management and organisation and which allocates profits and losses in a manner similar to a partnership. As such, an LLC may be an appropriate vehicle for a range of uses in investment funds, joint venture companies, private equity transactions, securitisations and other corporate transactions and international structures.

## Establishing an LLC

The formation of an LLC is straightforward and similar to the process of forming a Cayman Islands exempted limited partnership or a Delaware LLC. Only one member is required in order to register an LLC, by filing a signed registration statement (**Registration Statement**) with the Registrar of Limited Liability Companies (**Registrar**) containing certain prescribed information and paying the initial registration fee. The Registration Statement must contain the following information:

- the name of the LLC (which may, but need not, contain the words “Limited Liability Company” or the abbreviation “L.L.C.” or “LLC” and must not, in the opinion of the Registrar, be likely to mislead or suggest that it is licensed when it is not so licensed) and, if applicable, its dual foreign name together with its translated name;
- the address in the Cayman Islands of the registered office of the LLC for the service of process and to which all notices and communications may be addressed;
- if the LLC has not been formed for an unlimited duration, the term for which the LLC is formed; and
- a declaration that the LLC shall 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 that LLC outside the Cayman Islands as contemplated by the LLC Act. Contravention of this prohibition would mean that the LLC and every manager responsible for the contravention would be guilty of an offence, and the LLC is liable to be immediately dissolved and removed from the Register of Limited Liability Companies (**Register**) in the discretion of the Registrar.

## Registration Certificate

On receipt of the initial registration fee and the Registration Statement, the Registrar will register the LLC and issue a certificate of registration (**Registration Certificate**). The Registration Certificate is conclusive evidence of compliance with all the requirements of the LLC Act in respect of formation and registration. An LLC is deemed to be registered on the date of filing.

If a change occurs in any matter specified in an LLC’s Registration Statement, the LLC must file a certificate of amendment to the Registration Statement within 30 days of the change.

The Registration Certificate is generally issued by the Registrar between three and five working days (or 24 hours if expedited for an additional fee) following the payment of the initial registration fee and the filing of the Registration Statement.

## Tax treatment

An LLC may apply for a tax undertaking certificate from the Cayman Islands Government on the same terms as currently available to exempted limited partnerships and exempted trusts, to the effect that, for a period not exceeding 50 years from the date of the undertaking, no law enacted in the Cayman Islands imposing any tax to be levied on profits, income, gains or appreciation shall apply to the LLC.

## LLC Agreement

The LLC must have a written LLC agreement (**LLC Agreement**) of the member or members of the LLC as to the business or affairs of the LLC. Although the LLC Agreement may be entered into at any time before, after or at the time of the filing of the Registration Statement, if it is filed before the filing of such statement, it is deemed effective on the date of the Registration Certificate. Such agreement may be referred to as an LLC agreement, operating agreement or otherwise. The Registration Statement can serve as the LLC Agreement for this purpose.

The LLC Agreement is not required to be filed with the Registrar except where the Registration Statement also serves as the LLC Agreement.

Pursuant to the LLC Act, the LLC Agreement may, among other things:

- provide for classes of LLC interests or groups of members having such relative rights, powers and duties as the LLC Agreement may provide or permit;
- permit the future creation in the manner provided in the LLC Agreement of classes of LLC interests or groups of members having such relative rights, powers and duties as may from time to time be established including rights, powers and duties senior to existing classes of LLC interests and groups of members;
- permit the taking of an action, including the amendment of the LLC Agreement, without the vote or approval of any member or class of LLC interest or group of members, including an action to create under the provisions of the LLC Agreement a class of LLC interest or group of members that was not previously outstanding or existing;
- provide that any member or class of LLC interest or group of members shall have no voting rights;
- provide that all or certain identified members or a specified class of LLC interest or group of members have the right to vote separately or with all or any class of LLC interest or group of members or managers on any matter;
- permit voting by members to be on a per capita, number, financial interest, class, group or any other basis; and
- specify provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on by any members, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote.

Unless otherwise provided in the LLC Agreement, written resolutions may be passed by members having not less than the minimum number of votes that would be necessary to authorise or take such action at a meeting at which all members entitled to vote thereon were present and voted. Therefore written members' resolutions do not need to be passed unanimously unless the LLC Agreement requires unanimous consent for written resolutions.

## Membership

The initial member of the LLC is deemed admitted on the date of registration. The LLC Agreement should set out the conditions for admission as a subsequent member which will occur on satisfaction of such conditions and when the member is entered into the register of members of the LLC (**Register of Members**). In the absence of any such provision in the LLC Agreement, the consent of all existing members will be required for admission of a subsequent member. Transfers of a member's interest in an LLC must be in compliance with the LLC Act and the provisions, if any, set out in the LLC Agreement. Provided all requirements for admission have been complied with or waived, a person is deemed to be a member and is subject to the terms of the LLC Agreement without the need of further action on his part.

Unless otherwise specified in the LLC Agreement, a member may be admitted and may receive an interest without making or being obligated to make a contribution.

The LLC Agreement must provide circumstances in which a person ceases to be a member because the LLC Act provides that a person ceases to be a member only on the happening of any event provided by the LLC Agreement. A member may only withdraw from the LLC and cease to be a member at the time or upon the happening of such an event and in accordance with the LLC Agreement or as otherwise specified in the LLC Act or with the consent of all of the members.

## Limited Liability

Generally, unless specified to the contrary in the LLC Agreement, a member's liability is limited to:

- the amount that the member has undertaken to contribute to the assets of the LLC, whether in the LLC Agreement or otherwise;
- making such other payments or performing such services as set out in the LLC Agreement or otherwise agreed between the member and the LLC; and
- such other amounts as set out in the LLC Agreement.

Where a member receives a distribution at a time when the LLC is unable to pay its debts as they fall due, and the member had actual knowledge of such insolvency, such member shall be liable to the LLC for the amount of the distribution.

Members have no duties (fiduciary or otherwise) when exercising their rights or authorities or performing any of their obligations as members under the LLC Agreement.

## Allocations

Unless otherwise provided in the LLC Agreement:

- profits and losses shall be allocated on the basis of the agreed value showing in the records of the LLC of the contribution made by each member;
- distributions shall be made or paid on the basis of the agreed value showing in the records of the LLC of the contributions made by each member and may be made in cash or in kind as specified by the LLC Agreement; and
- members have capital accounts and make capital contributions rather than subscribing for shares. Profits and losses are allocated among members in the manner set out in the LLC Agreement in a manner consistent with the way a Delaware LLC or a Cayman Islands exempted limited partnership allocates profits and losses.

There are no capital maintenance requirements imposed on an LLC that limit the ability of the LLC to make distributions, only a cash-flow based solvency test.

## Management

Unless otherwise provided in the LLC Agreement, the LLC Law provides that the members of the LLC, acting by a majority in number, shall manage the LLC. However the LLC Act permits the members of the LLC to determine the internal governance and management arrangements of the LLC amongst themselves, subject to certain statutory provisions. Such arrangements will be set out in the LLC Agreement. Thus management of the LLC may be undertaken by one or more managing members acting by majority or by one or more appointed non-member managers.

Where a manager is appointed under the LLC Agreement, such manager shall have the rights, powers and responsibilities and shall be subject to the obligations imposed on such manager by the LLC Agreement whether party to the LLC Agreement or not. In the case of more than one manager being appointed, the LLC Agreement may specify which manager is entitled to exercise such authority, consent or power to the exclusion of any other manager.

The LLC Agreement may provide for classes or groups of managers with differing rights, powers and duties and may permit a manager to delegate its rights and powers to manage the LLC. The LLC Agreement may specify the voting rights of the managers and the procedures to exercise such rights unless otherwise provided in the LLC Agreement. Manager resolutions may be passed in writing if signed by the requisite majority that could carry the vote at a meeting of the managers. Under the LLC Act a member may act in its own best interests and not the best interests of the LLC itself or any other member. Similarly, under the LLC Act, a person serving on a board or committee of the LLC may if so provided for in the LLC Agreement, act in the best interests of a particular member and not necessarily the best interests of all of the members of

the LLC as a whole.

The LLC Law provides that, subject to anything in the LLC Agreement to the contrary, a manager does not owe any duty (fiduciary or otherwise) to the LLC “other than a duty of good faith in respect of the rights, authorities or obligations which are exercised or performed, or to which such manager is subject in connection with the management of the LLC, provided that such duty of good faith may be expanded or restricted by the LLC Agreement”. This differs from the duties of a director, which as a matter of general law comprise equitable fiduciary duties and the common law duty to act with appropriate care, skill and diligence. The duties of a manager, however, are partly a matter of statute and partly a matter of contract. There is therefore considerable flexibility to determine the scope of duties that will be owed by the manager to the LLC, subject to a minimum duty to act in good faith. Depending on the drafting of the LLC Agreement a manager may or may not have fiduciary duties akin to the directors of an exempted company or the general partner of an exempted limited partnership under Cayman Islands law but will always have a minimum duty to act in good faith.

A manager may resign as a manager of an LLC at the time and as specified in the LLC Agreement (or any other document pursuant to which the manager is appointed) or with the consent of the members. If a manager wishes to resign in circumstances other than those provided for, he may do so by written notice to the LLC and all of its members but the LLC may seek remedies for breach of contract, including damages, which may be offset against any payments due to the resigning manager.

## **Maintenance of records and accounts**

An LLC must maintain:

- a Register of Members at its registered office or at any other place within or outside the Cayman Islands, which shall contain:
  - the name and address of each person who is a member of the LLC;
  - the date on which such person became a member; and
  - the date on which such person ceased to be a member and such register shall be updated within twenty-one days of any change in the particulars therein.

Where the Register of Members is kept at a place other than the registered office of the LLC, the LLC shall maintain or cause to be maintained at its registered office a record of the address at which the Register of Members is maintained, which record shall be updated within twenty-one days of the date of any change in the particulars therein. Where the Register of Members is kept at a place other than the registered office of the LLC, the LLC shall make available at the registered office, the Register of Members upon service of an order or notice by the Tax Information Authority pursuant to the Tax Information Authority Act (Revised).

- a register of managers which shall contain the name and address of each manager. The register of managers must be filed with the Registrar and the Registrar must be notified within 30 days of any change of manager;
- a register of mortgages and charges; and
- a register of security interests.

The Register of Members, register of mortgages and charges and register of security interests are not publicly accessible unless provided otherwise in the LLC Agreement or as otherwise permitted by the LLC manager. A list of the current managers may be obtained from the Registrar upon payment of a search fee.

## **Beneficial Ownership Register**

Unless falling within an exemption, an LLC must maintain a beneficial ownership register at its registered office and must take reasonable steps to identify any "registrable persons" whose details must be entered in such register. Broadly speaking a registrable person is (i) an individual holding, directly or indirectly, an LLC interest representing a right to share in 25% or more of the capital or profits of the LLC or representing 25% or more of the voting rights of the LLC or holding the right, directly or indirectly, to appoint or remove a majority of the managers of the LLC or who has the right to exercise, or actually exercises, significant influence or control over the LLC, and (ii) a legal entity established or registered in the Cayman Islands which, by virtue of the LLC interest it holds directly in the LLC or its direct control over the LLC, would be a beneficial owner if it were an individual.

LLCs are required to engage a licensed Cayman corporate services provider (**CSP**) to maintain an adequate, accurate and current beneficial ownership register for that LLC at its registered office. The CSP is required by law to report this information to a secure, non-public centralised registry maintained by the competent authority in the Cayman Islands.

Relevant changes in respect of registrable persons (including if they cease to be registrable persons) must be confirmed as soon as reasonably practicable. The LLC (or any registrable person who knows of a relevant change) must notify the registered office, at the latest within one month of the relevant change.

An LLC that is itself a registrable person by virtue of its ownership and control of an underlying Cayman company (including an LLC) may also be required to notify such underlying company of its status as such and to provide relevant particulars within one month of becoming aware that it may be a registrable person.

## **Books of Account**

Every LLC shall cause to be kept such proper books of account as are necessary to give a true and fair view of the business and financial condition of the LLC and to explain its transactions.

Every LLC shall maintain or cause to be maintained in any country or territory, a record of the amount and date of the contribution of each member and the amount and date of any payment representing a distribution or, otherwise, a return of the whole or any part of the contribution of any member, which records shall be updated within twenty-one days of the date of any change in particulars.

Where the LLC causes such books and records to be kept at any place other than at the registered office of the LLC or at any other place within the Cayman Islands, the LLC shall, upon service of an order or notice by the Tax Information Authority pursuant to the Tax Information Authority Act, cause to make available at its registered office copies of its books of account or records, or any part or parts thereof, as are specified in such order or notice.

An LLC shall cause all such books of account to be retained for a minimum period of five years from the date on which they are prepared.

Such books of account and record of contributions are not publicly accessible.

## **Annual Return**

An LLC shall, in January in every year, file with the Registrar a return signed by or on behalf of the LLC certifying that it has, during the calendar year, complied with the provisions of the LLC Act and pay to the Registrar the prescribed annual fee. This will generally be done by the registered office service provider.

## **Winding-Up**

An LLC shall be wound up voluntarily when its term (as set out in the LLC Agreement) expires, or, on the occurrence of a specified event in the LLC Agreement or when the LLC has no members or, unless disapplied by the LLC Agreement, upon the affirmative vote or written consent of at least two-thirds (or such other majority as the LLC Agreement provides) in number of the members of the LLC.

Unless the LLC Agreement expressly provides otherwise, voluntary winding up of the LLC is not caused by the death, retirement, withdrawal, expulsion, bankruptcy, liquidation or dissolution of any member or the occurrence of any event that terminates the continued membership of any member.

Where expressly provided for in the LLC Agreement, a manager or, if no manager has been appointed, a member, shall have authority to present a winding up petition on behalf of the LLC

upon the affirmative vote or written consent of at least two-thirds in number of the members or such other alternative vote or written consent as the LLC Agreement.

Where the Registrar has reasonable cause to believe that an LLC is not carrying on business or is not in operation, he may strike the LLC from the Register and the LLC shall thereupon be dissolved. The further provisions of Part VI of the Companies Act (Removal of Defunct Companies) are applied to defunct LLCs.

## Transfer by Way of Continuation or Conversion of Exempted Company to LLC

Provided that the LLC Agreement expressly contemplates it, an LLC can apply to deregister in the Cayman Islands and transfer by way of continuation to another jurisdiction as a partnership, body corporate or any other form of entity under the laws of that jurisdiction. The LLC Law also permits an existing Cayman Islands exempted company to merge with, consolidate with or convert to an LLC and permits non-Cayman Islands entities to re-register and continue into the Cayman Islands as LLCs. A statutory process is established for each such transaction. There is no mechanism for an exempted limited partnership to convert to an LLC.

## FATCA and the CRS

Under the US Foreign Account Tax Compliance Act (**FATCA**) certain foreign vehicles must disclose to the Cayman Islands Tax Information Exchange Authority the name, address and taxpayer identification number of certain United States persons that own, directly or indirectly, an interest in such vehicle pursuant to the terms of an intergovernmental agreement between the United States and the Cayman Islands (**US IGA**) and implementing legislation and regulations which have been adopted by the Cayman Islands. In addition, over 100 countries have signed the OECD Multilateral Competent Authority Agreement and Common Reporting Standard (CRS) for the implementation of the automatic exchange of tax information based on the OECD's Multilateral Convention on Mutual Administrative Assistance in Tax Matters. The CRS is similar in form and substance to the US IGA. It will be necessary to assess any limited liability company's activities and to classify it under FATCA/CRS regardless of the location of its activities or its members, to determine if any notification and reporting requirements exist. We can provide advice as to these matters in any particular circumstances and assist with limited liability company's compliance with such obligations.

## Economic Substance

The International Tax-Co-operation (Economic Substance) Act (Revised) (**Economic Substance Act**) requires in-scope entities (**Relevant Entities**) that carry on particular activities (**Relevant Activities**) to have demonstrable economic substance in the Cayman Islands. Relevant Entities

will include most Cayman LLCs except (a) investment funds or LLCs (or other companies) through which investment funds directly or indirectly invest or operate; (b) LLCs which are tax resident outside the Cayman Islands; and (c) LLCs which are authorised to carry on business locally in the Cayman Islands as a domestic company. All Cayman LLCs will have to make an annual declaration as to whether they have conducted any Relevant Activities in the preceding financial period and whether or not they are Relevant Entities for the purpose of the Economic Substance Act. LLCs that are carrying on a Relevant Activity and are tax resident in a jurisdiction outside Cayman are required to provide certain prescribed additional information, but are otherwise not required to demonstrate economic substance in the Cayman Islands. Relevant Activities are fund management, banking, insurance, finance and leasing, distribution and service centre business, headquarters business, intellectual property business, shipping, and holding company business. Relevant Entities are required to satisfy the economic substance test in relation to any Relevant Activity as set out in the Economic Substance Act. For a more detailed description of the requirements of the Economic Substance Act, see our client briefing [Cayman Islands Economic Substance Requirements](#).

## About Ogier

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## Meet the Author



[Nick Rogers](#)

Partner

Cayman Islands

E: [nick.rogers@ogier.com](mailto:nick.rogers@ogier.com)

T: [+1 345 815 1844](tel:+13458151844)

## Key Contacts



James Bergstrom

Partner

Cayman Islands

E: [james.bergstrom@ogier.com](mailto:james.bergstrom@ogier.com)

T: [+1 345 815 1855](tel:+13458151855)



Angus Davison

Partner

Cayman Islands

E: [angus.davison@ogier.com](mailto:angus.davison@ogier.com)

T: [+1 345 815 1788](tel:+13458151788)



Kate Hodson 律師 . 律師

Partner and Head of ESG (Legal) 律師

Hong Kong

E: [kate.hodson@ogier.com](mailto:kate.hodson@ogier.com)

T: +852 3656 6049



Joanne Huckle

Partner

Cayman Islands

E: [joanne.huckle@ogier.com](mailto:joanne.huckle@ogier.com)

T: +1 345 815 1895



Bradley Kruger

Partner

Cayman Islands

E: [bradley.kruger@ogier.com](mailto:bradley.kruger@ogier.com)

T: +1 345 815 1877



Nicholas Plowman OGIER

Partner OGIER

Hong Kong

E: [nicholas.plowman@ogier.com](mailto:nicholas.plowman@ogier.com)

T: +852 3656 6014



Justin Savage

Partner

Cayman Islands

E: [justin.savage@ogier.com](mailto:justin.savage@ogier.com)

T: +1 345 815 1816



Giorgio Subiotto

Partner

Cayman Islands

E: giorgio.subiotto@ogier.com

T: +1 345 815 1872

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