

BVI Limited Partnership Act 2017

Insights - 12/02/2018

The eagerly awaited British Virgin Islands (**BVI**) Partnership Act, 2017 (the **Limited Partnership Act** or the **Act**) which was enacted in December 2017 has now been officially gazetted and brought into force. The new Act now applies to all newly formed BVI limited partnerships.

Michael Killourhy of Ogier first reported on the new Act in December 2017 and his original note has now been updated to reflect the commencement of the new legislation.

The Limited Partnership Act represents a major addition to the commercial laws of the BVI and replaces the limited partnership provisions found at Part VI of the Partnership Act, 1996 (the **1996 Partnership Act**) for new BVI limited partnerships and those existing ones that choose to re-register under the new Act.

Limited partnerships have become one of the most commonly used legal structures globally for investment fund vehicles. Limited partnerships, wherever formed, typically offer certain common features, including greater constitutional and capital flexibility, tax transparency and limited liability protection to investors, which make them a popular choice for investment funds. However, while the basic qualities of limited partnerships are attractive, because limited partnership legislation in many countries predates, in one way or another, the growth of the modern funds industry^[1], that legislation often contains provisions or concepts incompatible with modern funds practice, and this then needs to be addressed by careful and extensive drafting in partnership agreements and fund documents – adding cost, time and, potentially, uncertainty.

While BVI limited partnerships have existed for some time, the provisions of the 1996 Partnership Act relating to limited partnerships were not, until now, updated or materially amended since its enactment. During the same time however, investment fund activity (and private equity and venture capital activity in particular) has grown significantly and, consequently, so has the appetite for limited partnership structures. While the 1996 Partnership Act provided a solid legislative platform for BVI limited partnerships in fund structures, like limited partnership legislation in many other jurisdictions, it was not conceived with those structures in mind – with

the results as already described.

However, the BVI is a jurisdiction committed to ensuring that its business legislation is both modern and purposive, reflecting the actual commercial landscape in which entities operate. The new Limited Partnership Act is intended as decisively modern and purposive. On the one hand, the new legislation updates the existing approach to limited partnerships by adapting existing basic statutory positions to better meet actual market practice and norms; while, on the other, the Act brings new and innovative features (such as the ability to choose legal personality and register security interests) aimed at making BVI limited partnerships a first choice for modern investment structures.

Highlights of the new Limited Partnership Act include:-

- The ability to choose whether a limited partnership is formed with or without legal personality.
- The ability to publicly register a charge against a limited partnership with legal personality and obtain priority under BVI law over subsequent charges as result. This ability and the certainty on priority that it brings as a result is a feature unique to BVI law.
- The full application to limited partnerships of key statutory reorganisation and reconstruction concepts and methods once confined to companies, including the ability to: merge or consolidate limited partnerships; migrate existing limited partnerships to and from the BVI; compulsorily redeem minority interests; and enter into schemes and plans of arrangement, in each case in a fashion analogous to that applicable to BVI companies under the BVI Business Companies Act, 2004 (the **BVI Business Companies Act**). This is another feature of the new Act which is unique to BVI law, making available to managers a whole new array of tools for the reorganisation and reconstruction of structures.
- An extensive safe harbor list of activities that limited partners may engage in without risking their limited liability (including involvement in the management of service providers to the limited partnership or investments held by it).
- New statutory arrangements for capital calls and commitments, which both facilitate an investor's ability to finance capital calls and also grant general partners and management a broad flexibility for dealing with limited partners who default on calls.
- Provisions allowing for general partner fiduciary and conflicts rules to be relaxed by agreement. These are specifically aimed at situations where the a single general partner acts in relation to multiple limited partnerships and thus will enhance the ability of managers to manage a range of structures through a single general partner.
- General partners and limited partner investors are given much greater flexibility to define their roles, liabilities and limitations in respect of the limited partnership and its activities.

- The basic statutory positions on certain key organisational and constitutional aspects of limited partnerships, including the admission of new partners, the transfer of partnership interests, information rights and returns of partnership capital and contributions are made more closely aligned with standard market custom for investment vehicles (and therefore the need dis-apply or make significant modifications by way of the limited partnership agreement will be reduced).
- The new Act adds further clarity on winding-up and insolvency procedures for limited partnerships.

In addition, the overall approach, layout and language of the new Act is consciously modelled on the popular and highly successful BVI Business Companies Act. The BVI Business Companies Act is admired for its clear and pragmatic approach, and using aspects of its construction as a model for the Limited Partnership Act, underscores the new Act as modern and innovative, yet equally user friendly and familiar.

While the limited partnership provisions of the 1996 Partnership Act continue to apply to limited partnerships which were formed prior to the commencement of the new Act and which do not elect to become re-registered under the new Limited Partnership Act, those provisions are now repealed for all other purposes and it will no longer be possible to register a new limited partnership under the 1996 Partnership Act. Existing limited partnerships may voluntarily re-register under the new Act, or, after a period of ten years, all limited partnerships remaining under the Partnership Act will be automatically reregistered under the Limited Partnership Act.

More detailed summaries of some of the key provisions of the Limited Partnership Act are set out below.

Ogier, along other major law firms and professional groups in the BVI, was closely involved in the initial formulation and consultation stages of the new Act.

Key Provisions of the Limited Partnership Act, 2017

Legal Personality

The Limited Partnership Act offers those forming a limited partnership a choice between forming a limited partnership with legal personality or one without.

Under section 5(1) of the new Act a limited partnership has legal personality, unless its general partner elects for it to be registered without legal personality. A limited partnership having "legal personality" however is not synonymous with it being a "body corporate", and in fact the Act expressly confirms that a "limited partnership that has legal personality is not a body corporate."

Having legal personality is therefore short of being a body corporate, but nevertheless more

than a mere contractual or equitable relationship (as would be the case for a legal partnership without legal personality). What legal personality means in the context of the Act is defined by the Act itself which sets out certain specific legal personality rights including the following:

- the capacity to carry on or undertake any business or activity or do any act or enter into any transaction (section 5(3)(a));
- the right to institute legal proceedings in the name of the limited partnership (section 49); and
- the ability to create a charge over the assets of the partnership (section 57), and for that charge to be registered against the limited partnership and for such registration to provide priority under BVI law (section 63).

Formation

A limited partnership is formed under the Act by filing with the Registrar of Limited Partnerships^[2] (the **Registrar**) an application comprising:

- a statement signed by or on behalf of each general partner setting out certain prescribed particulars of the limited partnership as set out at section 8(2) of the Act^[3];
- if the general partners of the limited partnership elect that the limited partnership shall not have legal personality, a declaration to that effect; and
- a document signed by the proposed registered agent signifying its consent to act as such.

If the Registrar is satisfied that the application is compliant with the Act, and the registration fee has been paid, the Registrar will issue a certificate of registration, which shall state whether or not the limited partnership has legal personality (section 10(1)(d)). The limited partnership is formed on the date specified in the certificate (section 10(2)(b)).

Sections 18 and 19 require a limited partnership formed under the new Act to have a registered agent and registered office in a manner similar to a BVI business company.

Limited Partnership Agreement and Statutory Model Agreement

A limited partnership formed under the new Act must have a limited partnership agreement (section 7(1)). However, the Act also provides for a statutory form of model agreement (the **Model Agreement**), to be introduced by separate regulations, which will be deemed as adopted at formation except to the extent excluded, modified or later superseded by a signed limited partnership agreement negotiated between the relevant parties (section 7(2)). The form of the Model Agreement is set out in the Limited Partnership Regulations to accompany the Act.

The deemed acceptance of the Model Agreement allows limited partnerships to be formed

quickly, without parties having to wait until the negotiated written limited partnership agreement has been finalised, but the Act of course still preserves the ability of the parties to adopt such an agreement in place of the Model Agreement or otherwise vary its terms should they wish.

Partners and Management

The general partner of a limited partnership formed under the Act is responsible for the management of the limited partnership (section 29(2)). The general partner may, but is not required, to make a contribution to the capital of the limited partnership (section 27(1)). However, the general partner is nevertheless liable for all of the unpaid debts and liabilities of the partnership incurred while general partner – to the extent that the limited partnership itself cannot pay those debts and liabilities (section 28).

A limited partnership may have multiple general partners with joint liability and coextensive power and authority, however the limited partnership agreement may also provide that the powers of certain general partners are limited or that a particular power or authority may only be exercised by a particular general partner (section 29(4)).

The general partner has prescribed statutory duties to act in good faith and in the interests of the limited partnership (section 30(a)). However, while the duty to act in good faith is absolute, the Act allows the duty to "act in the interests of the limited partnership" to be qualified by express provisions in the limited partnership agreement (section 30(b)). Part of the rationale for allowing the best interests duty to be qualified by the limited partnership agreement is so as to allow a general partner to set up other limited partnerships without the requirement to act always in the interests of the first limited partnership.

Limited partners are prohibited from taking part in the management of the limited partnership or transacting business on its behalf (section 32(2)), and, provided they do no breach that prohibition, are not liable for the debts and liabilities of the limited partnership beyond the amount of their contribution or unpaid commitment (section 33). A limited partner's limitation of liability can be lost to the extent that the limited partner is seen as participating in the management of the limited partnership in breach of the general restriction and in such circumstances the limited partners acting in breach are liable to the same extent as the general partner (subject to certain qualifications).

However, what constitutes "participating in the management of the limited partnership" for the purposes of the Act is made subject to a safe harbour provision which sets out an extensive list of activities that are not be considered as taking part in the management of the limited partnership (section 35(2)). The list of excluded activities is extensive, non-exhaustive and was compiled to reflect actual market practice and concerns but without affecting the integrity of the limited partnership model. The list of "safe harbour" activities at section 35(2) includes, for example, holding any office or interest or being employed by the general partner, acting as

surety or guarantor, appointing representatives to sit on any management committee of the limited partnership and acting as a director or otherwise in the management of an entity in which the limited partnership is invested or which provides services to the limited partnership. The list may be expanded by official prescription.

Capital Calls, Commitments and Forfeiture

The new Act facilitates an investor's ability to borrow to finance capital calls by clearly allowing (subject to the terms of the limited partnership agreement) a partner to charge its partnership interest or other rights under the limited partnership agreement as security for such borrowing (sections 44 and 45). Partnerships themselves may also assign the right to a partner's uncalled capital to a third party (section 48).

The new Act at section 40 grants general partners and management a broad flexibility for dealing with limited partners who default on calls, running from the ability to simply refrain from exercising any sanction or penalty without risk of being held in breach of duty to being able to forfeit partnership interests without risk of forfeiture being held unenforceable on grounds of being penal in nature.

Admission of new partners, transfer of interests and return of contributions

For a limited partnership operating as an investment fund being able to admit new investors as limited partners and foster liquidity through the transfer of interests and the return contributions on withdrawal are critical aspects of the basic operating mechanics of the fund. Most limited partnership legislation however, for reasons noted, does not adequately deal with this and usually imposes a basic position which tightly restricts admissions, transfers and returns – but then allows this to be relaxed by consent or under the terms of the limited partnership agreement. For the BVI however the Limited Partnership Act reverses this approach by making the commercial norm the default position (but with the ability to impose tighter restriction by statute).

Under the new Act:

- subject to the limited partnership agreement, the consent of the other limited partners is not required for the admission of a new limited partner (section 26(2));
- partnership interests are expressly stated as being transferable subject only to the consent of the general partner, which restriction itself may be removed by the limited partnership agreement (section 42(1));
- it is made clear that a transferee limited partner is admitted in place of and to the exclusion of the transferor limited partner, subject to the limited partnership agreement (section 43(2));

- the general partner is required to maintain a register of general partners and a register of limited partners (section 53), entries in which are conclusive as to status and ownership; and
- subject to the limited partnership agreement, the consent of the other limited partners is not required for any return of partnership contributions or the release of any commitment to contribute, provided that contributions may only be returned and commitments released, when the LP is solvent.

Registration of Charges and other security interests

Although certain informal methods had been developed by practitioners, previously there was no prescribed method or statutory footing for registering and securing the priority of charges and other security over the assets of a limited partnership – leading to uncertainty for creditors. The Limited Partnership Act changes this.

Under the new Act a limited partnership is required to keep a register of relevant charges (section 58). Charges against a limited partnership may also be registered on the public register (section 59), and section 63 of the Act provides that a registered charge has priority over a subsequently registered charge or an unregistered charge, where the limited partnership has legal personality.

The introduction of a register of charges and the statutory scheme of priority is a significant development and, so far, unique to BVI in that other jurisdictions do not provide for priority of charges filed against a limited partnership.

Continuations, Mergers, Compulsory Redemption of Minorities and Schemes

Although the 1996 Partnership Act did allow for limited partnerships to be continued in to and out of the BVI, the actual procedure for this wasn't clearly set out in the statute. The new Limited Partnership Act rectifies this and goes much further by taking those other key statutory reorganisation and reconstruction concepts found in the BVI Business Companies Act and making them applicable to limited partnerships. The application of these concepts to limited partnerships is clearly stated in the Act, with the process for each being based on the analogous procedure under the BVI Business Companies Act but adapted specifically for limited partnerships. The corporate concepts carried across to limited partnerships include the following:

- the ability of a foreign limited partnership to continue into the BVI (section 66);
- the ability of a BVI limited partnership to continue to another jurisdiction (section 70);
- the ability of a limited partnership to merge or consolidate with another limited partnership, including a foreign limited partnership where the foreign law permits mergers and consolidations of limited partnerships (section 77);

- the ability to compulsorily redeem minority partnership interests (subject to the limited partnership agreement) (section 79); and
- ability of a limited partnership to enter into a plan of arrangement or a scheme of arrangement (sections 82 and 85).

Limited partners are also afforded dissent rights in respect of a merger, consolidation or mandatory redemption similar to those under the BVI Business Companies Act in respect of the same procedures (section 80).

Winding-up, liquidation and strike off

The Act includes detailed provisions for the termination, deregistration and winding-up of a solvent limited partnership, and in this regard, a clear distinction is made between each such concept. Specifically:

- a limited partnership is first "terminated" by its partners (section 86);
- if it has no assets or liabilities it may apply to be "deregistered" (section 88(1)(a));
- otherwise and if solvent its affairs are "wound-up" by the general partner or a liquidator (section 88(1)(b)), and thereafter, the limited partnership may deregister (section 95(7)) by way of application for strike off (section 95(1)(d)).

The ability to simply deregister an empty, defunct partnership, without having to undertake any form of liquidation procedure is welcome.

The Act also makes provision for the applicable procedure for the winding-up of an insolvent limited partnership under the BVI Insolvency, 2003 (section 94), such procedure being essentially the same that would apply to an unlimited company.

There is also the ability of the Registrar to strike off a limited partnership (for example, for non-payment of fees). To the extent a limited partnership has been struck-off for a continuous period of seven years, it is deregistered with effect from the last day of that seven year period). However, the court may restore a deregistered limited partnership within seven years.

1996 Act limited partnerships and transitional arrangements

Limited partnerships formed under the 1996 Partnership Act will continue to be governed by the former provisions of that statute until they voluntarily re-register under the new Limited Partnership Act. However, after a period of ten years, all remaining 1996 Act limited partnerships will be automatically reregistered under the new Act. An automatically re-registered limited partnership will then have an additional two years to adopt a limited partnership agreement compliant with the new Act.

[1] England for example still uses the Limited Partnership Act 1907, with relatively few amendments since its first enactment, and until very recently that same act formed the basis of limited partnership law in many commonwealth jurisdictions.

[2] Essentially the Registrar of Corporate Affairs sitting in dual capacity as the Registrar of Limited Partnerships.

[3] The name of the limited partnership, its registered office address, the name of its registered agent, the name and address of its general partner(s) and its term.

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