

CONYERS

A photograph of a modern glass skyscraper with a grid-like facade, viewed from a low angle. The building is partially obscured by a semi-transparent blue overlay containing text. The foreground shows a paved plaza with a pattern of light and dark tiles.

Private Equity in Bermuda: The Bermuda Limited Partnership

Preface

This publication has been prepared for the assistance of those who are considering the formation of private equity vehicles in Bermuda. It deals in broad terms with the requirements of Bermuda law for the establishment and operation of limited partnerships. It is not intended to be exhaustive but merely to provide brief details and information which we hope will be of use to our clients. We recommend that our clients and prospective clients seek legal advice in Bermuda on their specific proposals before taking steps to implement them.

Before proceeding with the formation of a private equity vehicle in Bermuda, persons are advised to consult their tax, legal and other professional advisors in their respective jurisdictions.

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1. INTRODUCTION

Modern company, limited liability company, partnership, trust, and other related laws have made Bermuda a leading offshore financial centre for the formation of private equity vehicles. The Bermuda government's attitude towards, and open communication with, the private sector encourages the promotion and maintenance of Bermuda's offshore business. The island enjoys a sophisticated telecommunications system, an abundance of professional service providers, as well as economic and political stability.

The majority of private equity vehicles are structured as a limited partnership. As such, this publication focuses on partnerships in this context.

The principal statutes governing the formation and operation of Bermuda partnerships are:

- (1) Partnership Act, 1902 (as amended) (the "**Partnership Act**")
- (2) Limited Partnership Act, 1883 (as amended) (the "**LPA**")
- (3) Exempted Partnerships Act, 1992 (as amended) (the "**EPA**", and together with the Partnership Act and the LPA, the "**Partnership Acts**").

Bermuda partnership law tends to follow English principles. The Partnership Act substantially codified common law on partnerships but provides that existing rules of equity and of common law shall continue in force except so far as they are inconsistent with the express provisions of the Partnership Act. The Partnership Act deals generally with the nature of partnerships, relations of partners to persons dealing with them and relations of partners to one another. The Partnership Act provides that a "partnership is the relation which subsists between persons carrying on a business in common with a view to profit."

2. EXEMPTED LIMITED PARTNERSHIPS

The exempted limited partnership is a popular vehicle for international ventures primarily because it is often regarded as fiscally transparent and is generally subject to a lesser degree of regulation than a company. Unlike company law, partnership legislation in Bermuda does not attempt to regulate the affairs of a limited partnership to any great extent. The operation of the partnership is primarily left to agreement between the partners. However, where the agreement is silent on a matter, partnership legislation may apply. The partnership agreement is not a public document, although certain limited information is contained in the Certificates of Exempted and Limited Partnership, described below.

3. PROCEDURE FOR FORMATION OF PRIVATE EQUITY PARTNERSHIP

The proposed name of an exempted limited partnership must be approved and, if available, reserved with the Registrar of Companies. An application is then made to the Bermuda Monetary Authority ("**BMA**") for consent to the formation of an exempted partnership. The application must include the identities of the general partner(s) and a personal declaration from each individual who owns, directly or indirectly, 10% or more of the general partner. No beneficial ownership information is required to be supplied in respect of the limited partners. The BMA's consent normally takes around two to three business days although this may be accelerated in special circumstances.

One feature of Bermuda limited partnerships which has proven attractive to private equity promoters is that, unlike some other offshore jurisdictions, there is no requirement that the general partner be an entity formed in Bermuda or, if a non-Bermuda entity, that it be registered in Bermuda. This results in simpler structures and less administrative fees.

Once the BMA's consent has been obtained, signed copies of the certificates of Exempted and Limited Partnership must be delivered to the Registrar of Companies ("**ROC**") who will then register the partnership as an exempted limited partnership. Such certificates must contain the name of the Exempted Limited Partnership, the name(s) and address(es) of the general partner(s), and the registered office. The certificate of exempted partnership must also state the partnership's resident representative and whether or not the partnership has elected to assume legal personality under the Partnership Act. The certificates of Exempted and Limited Partnership are public records.

The partnership agreement is not required to be filed with the BMA or the ROC, but the Exempted Partnerships Act requires that the partnership agreement expressly provide that the law applicable to the exempted partnership is the law of Bermuda.

4. ADMINISTRATION

4.1. Maintenance

The administration of exempted limited partnerships in Bermuda is reasonably straightforward. Each partnership must maintain a registered office (which cannot be a post office box address) and must appoint a "resident representative" in Bermuda. The resident representative may be a Bermuda exempted company or limited liability company formed to act as general partner.

An exempted partnership is required to maintain audited financial statements in accordance with generally accepted accounting principles for such period as the partnership agreement may provide. However, these provisions may be waived as long as the partners make provision for this in the partnership agreement. An exempted partnership must also keep records of account with respect to its business including with respect to its assets, liabilities and capital, cash receipts and disbursements, purchases and sales and income costs and expenses. Such records must be kept at the Partnership's registered office, or such other place as the partners think fit, for a period of five years from the date on which they were prepared. The records of account are open to inspection by the limited partners and the resident representative. The accounts are not required to be filed with any governmental body.

4.2. Amendments to the Partnership

Consent is required from the ROC to change the name of the exempted partnership. The BMA's consent is required to change the general partners (but not limited partners). Once the approval has been granted, a supplementary certificate of exempted partnership has to be filed with the Registrar of Companies. Any such change, or any other change in any particulars specified in the Certificate, is effective on the date of registration by the ROC of the supplementary certificate incorporating such change.

5. LEGAL PERSONALITY

As a matter of common law, a partnership is merely a contractual relationship among the partners. In Bermuda, however, a partnership may elect to have legal personality separate from its partners and file a declaration to that effect with the ROC. In the absence of such election, the partnership would have the common law position of being merely a relationship between the partners. Any election to have legal personality will be irrevocable.

The effect of a partnership's election to have separate legal personality is that it shall be a legal person separate from its partners with the power to own and deal with its separate property in accordance with the agreement of its partners and shall have unlimited capacity. Even if the election to take on a separate legal personality is not made, under Bermuda law a partnership may function for all practical purposes as an entity. The rules of court permit a partnership to sue and be sued in its partnership name and Bermuda's partnership legislation allows the partnership to carry on business in its own name.

Having legal personality can be useful in situations where it is anticipated the private equity vehicle may need bank financing (such as in real estate or infrastructure funds) as it is simpler to grant security. It may also be useful in situations where the partnership trades or carries on business in another jurisdiction which may not recognise the limited liability of the limited partners in the same way Bermuda does. Election also allows a partnership to convert to a company or limited liability company.

6. ACCESS TO INFORMATION

6.1. Exempted Limited Partnership

As stated in section 3 above, a partnership's certificates of exempted and limited partnership will be filed with the ROC upon its formation and such certificates are available to the public. Both certificates contain the names and addresses of the general partner or partners, but not those of the limited partners.

A limited partnership register must be maintained at the registered office of the partnership and shall contain current information as to the names and addresses of all limited partners. The register is available for inspection by any limited partner but it is not open to the public

6.2. General Partner

If the manager decides to incorporate an exempted company or form an exempted limited liability company in Bermuda to act as the general partner, the following records of such company would be available for public inspection at the ROC:

- (a) the memorandum of association of the company and any amendments thereto;
- (b) the certificate of incorporation of the company or certificate of formation of the limited liability company;

- (c) the notice or certificate of formation stating the registered address of the company or the limited liability company; and
- (d) the register of charges of the company or the limited liability company.

In addition, the register of directors and officers and the register of members of a company and the register of managers of a limited liability company must be available for inspection by the public at the registered office of the company or the limited liability company.

While the memorandum of association of a company will state on its face the name of the initial subscribers, it is usual to provide for nominee subscribers to the memorandum of association. In particular, it should be noted that the supporting information on the beneficial owners, including their personal declarations delivered to the BMA, is not a matter of public record.

Where shares of a Bermuda company are held in the name of a nominee, only such nominee's name will appear on the company's register of members.

7. REGULATION

7.1. Regulation of Private Equity Fund

Closed-ended Bermuda investment funds and overseas (non-Bermuda) funds managed or carrying on promotion in or from within Bermuda are subject to the Investment Funds Amendment Act 2006 ("IFA"). Closed-ended investment funds will need to be authorised or registered under one of the categories of Authorised Funds or Registered Funds or alternatively registered under the specific category of Professional Closed Fund under the IFA. Sponsors should contact their usual legal advisors in respect of the registration of new private equity funds.

7.2. Regulation of General Partner

If the general partner of a Bermuda limited partnership carries on investment business in or from Bermuda, in accordance with the Investment Business Act 2003 (the "IBA") it may require a licence issued by the BMA. The IBA's definition of "investment business" includes any activity involving the buying, selling, subscribing for, or underwriting of investments and securities, or agreeing to do so as principal or agent.

A person carries on investment business in or from Bermuda only if (i) that person carries on such business from a place of business maintained by him in Bermuda or (ii) he engages in an activity deemed to be carrying on investment business in or from Bermuda pursuant to an Order made by the Minister (no such Orders have yet been made). As such, unless operations are actually conducted from physical premises in Bermuda, the necessary nexus to Bermuda is not established and the general partner and any overseas investment adviser to the private equity vehicle will not need to be licensed under the IBA.

Even if it is decided to have the general partner establish a physical place of business in Bermuda, the general partner may qualify for exemption under the Investment Business (Exemptions) Order 2004.

8. TAXATION, EXCHANGE CONTROL AND ANNUAL GOVERNMENT FEES

8.1. Taxation

At the date of this publication, there is no Bermuda income or profits tax, withholding tax, capital gains tax, capital transfer tax, estate duty or inheritance tax payable by a Bermuda exempted partnership or their partners, other than partners ordinarily resident in Bermuda. Further, no such tax is imposed by way of withholding or otherwise on any payment to be made to or by such partnerships.

An exempted limited partnership, an exempted company and an exempted limited liability company (if the general partner is incorporated or formed in Bermuda) can receive from the Minister under the Exempted Undertakings Tax Protection Act 1966 an assurance that, in the event of there being enacted in Bermuda any legislation imposing tax computed on profits or income, or computed on any capital assets, gain or appreciation, or any tax in the nature of estate duty or inheritance tax, such tax shall not until 31 March 2035 be applicable to such entity or to any of its operations or to the shares, interests, units, debentures or other obligations of such company, partnership or unit trust except in so far as such tax applies to persons ordinarily resident in Bermuda and holding such shares, interests, units, debenture or other obligations of the company or to any land leased or let to the company

8.2. Exchange Control

Bermuda is independent for the purposes of exchange control which is operated under the Exchange Control Act 1972 and related regulations. Bermuda exempted partnerships and overseas permit partnerships are designated non-resident for exchange control purposes. The non-resident designation allows such partnerships to operate free of exchange control regulations and enables them to make payments of distributions, to acquire, hold and sell any currency and foreign securities without reference to the exchange control authorities.

8.3. Fees

Information about the fee payable on registration and the annual government fee payable thereafter for an exempted partnership is available upon request.

This publication should not be construed as legal advice and is not intended to be relied upon in relation to any specific matter. It deals in broad terms only and is intended merely to provide a brief overview and give general information.

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