

Voluntary Dissolution and Winding Up of a Cayman Islands Exempted Limited Partnership

1 Introduction

- 1.1 This legal guide describes the way in which a Cayman Islands exempted limited partnership ("ELP") is wound up and dissolved under the Exempted Limited Partnership Act (As Revised) (the "ELP Act").
- 1.2 Section 36(3) of the ELP Act states that, except to the extent that the provisions are not consistent with the ELP Act, the provisions of Part V of the Companies Act (As Revised) ("Part V") and the Companies Winding Up Rules 2008 (as amended) shall be deemed to apply to the dissolution and winding up of ELPs. However, where the ELP is wound up voluntarily under section 36(1) of the ELP Act, only a limited number of these statutory provisions will apply.
- 1.3 This Legal Guide summarises the basic steps required as a matter of Cayman Islands law for the voluntary dissolution and winding up of:
 - (a) the ELP; and
 - (b) the ELP's general partner ("General Partner"). The guide assumes that the General Partner is a Cayman Islands exempted company. Additional procedures will be required if the General Partner is an exempted limited partnership or a foreign company.
- 1.4 This guide assumes that each of these entities is solvent and able to pay its debts in full. If they are insolvent, then a liquidation by way of petition to the Court is more likely to ensue.
- 1.5 The liquidations of the ELP and the General Partner could be run simultaneously. However, if the General Partner is acting as liquidator of the ELP, the ELP will need to be fully dissolved before the General Partner reaches its final stage of liquidation, so that the General Partner can sign the partnership dissolution notice in its capacity as general partner of the ELP.

2 Voluntary liquidation of the ELP

- 2.1 An ELP can be dissolved and wound up in accordance with the provisions of the partnership agreement under section 36(1)(a) of the ELP Act at the time or upon the occurrence of an event specified in the partnership agreement.

- 2.2 Alternatively, where there are no dissolution provisions in an ELP's partnership agreement, unless the partnership agreement provides otherwise, the ELP can be wound up and dissolved by a resolution of all the General Partners and a two-thirds majority of the limited partners, under section 36(1)(b) of the ELP Act.
- 2.3 The process for the voluntary winding up of an ELP described below applies to liquidations commenced by either of the above methods.¹
- 2.4 Following the commencement of the winding up of an ELP under section 36(1) of the ELP Act, its affairs shall be wound up by the General Partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the ELP.² This allows for the partners to agree to the appointment of a liquidator other than the General Partner to wind up the ELP's affairs if permitted by the partnership agreement. In most cases it is the General Partner that acts as voluntary liquidator of the ELP pursuant to the terms of the partnership agreement.
- 2.5 Whoever is responsible for winding up the affairs of the ELP will owe personal duties to maximise the returns to those with an economic interest in the ELP. This will include creditors and, where creditors have been paid in full, the ELP's limited partners, in accordance with their respective rights under the partnership agreement. If a liquidator is appointed, he will act as the agent of the ELP and his authority to bind the ELP will effectively displace the authority of the General Partner to do so. The liquidator may delegate certain functions, for example to the General Partner and to the ELP's service providers.
- 2.6 Following the commencement of a voluntary winding up of an ELP, the General Partner or liquidator shall:
 - (a) file notice of the winding up with the Registrar of Exempted Limited Partnerships (the "**Registrar**");
 - (b) in the case of an ELP carrying out regulated business, serve notice of the winding up on the Cayman Islands Monetary Authority ("**CIMA**"); and
 - (c) publish notice of the winding up in the Cayman Islands Official Gazette.³

¹ It should be noted that under section 36(3)(g) of the ELP Act, on application by a partner, creditor or liquidator of the ELP, the Cayman Islands Court may make such orders and give such directions for the winding up and dissolution of an ELP as may be just and equitable. Any such orders made by the Court under section 36(3)(g) of the ELP Act could modify the procedures to be followed in the liquidation described in this guide.

² Section 36(13) of the ELP Act. Following recent case law, it is unclear whether the Cayman Islands Courts will interpret a partnership agreement as excluding the right of a partner under section 36(13) (which is materially the same as section 7(5) of the Exempted Limited Partnership Act (As Revised)) to apply to the Court to appoint a liquidator other than the General Partner to wind up the affairs of an ELP. In *TNT NV v Logispring GP, LP* (Cause No 217 of 2009), Foster J held that the partners of an ELP were entitled in their partnership agreement to provide that only the General Partner was to act as a liquidator in the event of a dissolution and winding up of the ELP and that no other third party could be appointed as liquidator. The Cayman Islands Court of Appeal (CICA No.5 of 2009) reversed Foster J's decision on the interpretation of the specific terms of the partnership agreement in question, but the Court of Appeal did not comment on whether as a matter of law it was in fact possible to exclude that power under the ELP Act through the terms of the partnership agreement.

³ Sections 123(1)(a), (d) and (e) of the Companies Act (As Revised), as applied to ELPs by section 36(3)(d) of the ELP Act. In addition, on its face section 36(6) of the ELP Act applies to both voluntary and official liquidations. Section 36(6) requires the Registrar to be notified of the name and business address of the liquidator within 28 days of their appointment.

Where the ELP was registered prior to 11 May 2009, the above steps must be completed at least 28 days prior to the final distribution of the assets of the ELP to the partners. Where the ELP was registered on or after 11 May 2009, the above steps must be completed within 28 days of the commencement of the voluntary winding up.⁴

A General Partner or liquidator who fails to comply with the above commits an offence and is liable to a fine of CI\$10,000.⁵

- 2.7 Subject to any contrary provisions in the partnership agreement, the General Partner or liquidator should seek to identify all of the creditors and obligations of the ELP and the extent of any outstanding claims or liabilities. The General Partner or liquidator should also seek to identify all of the ELP's assets. They should close out all of the ELP's positions, claim any clawbacks and terminate all dealings with trading managers and other contracting parties. If the ELP is a regulated mutual fund, the General Partner or liquidator must formally de-register it with CIMA under the Mutual Funds Act.
- 2.8 The General Partner or liquidator should then as soon as practicable realise the assets of the ELP to discharge the ELP's liabilities and obligations. When doing so, they should recognise the rights of preferred and secured creditors and give effect to any netting, setting-off or subordination rights of creditors.⁶ Otherwise, the unsecured creditors should be discharged *pari passu* and the residue should be distributed to the limited partners in accordance with their respective interests under the partnership agreement. The voluntary liquidator or any limited partner may apply to the Court to determine any question arising in the voluntary winding up of the ELP.⁷
- 2.9 If the ELP's assets are not sufficient to discharge all of its obligations, the General Partner will be liable for the balance of those obligations and liabilities. The dissolution of the ELP does not necessarily prevent third parties who incurred debts or obligations of the ELP during its term from subsequently claiming against the General Partner, so the General Partner should ensure during the dissolution and distribution of the assets that all the creditors are paid off or sufficient reserves created. In practice, therefore, the complexity of a dissolution of an ELP is linked to the solvency of the General Partner. If the ELP is insolvent and the liquidator does need to use clawback provisions, the options available include:
 - (a) *Return of contributions*: a limited partner who receives a payment representing a return of any part of his capital contribution, or is released from any outstanding obligation in respect of his capital commitment, and at the time of the payment or release (a) the ELP was insolvent⁸ (including where the payment or release causes the insolvency); and (b) the limited partner has actual knowledge of the insolvency of the ELP, then for a period of six months from the date of the payment or release (but not thereafter), the limited partner is

4 Section 36(3)(e) of the ELP Act.

5 Section 123(2) of the Companies Act (As Revised), as applied to ELPs by section 36(3)(d) of the ELP Act.

6 Pursuant to section 36(4) of the ELP Act, notwithstanding the commencement of voluntary winding up of an ELP, a creditor who has security over the whole or part of the assets of the ELP is entitled to enforce his security without reference to the liquidator.

7 Section 129 of the Companies Act (As Revised), as applied to ELPs by section 36(3)(d) of the ELP Act.

8 This is defined in the ELP Act to mean that the general partner is unable to pay the debts and obligations of the ELP, otherwise in respect of liabilities to partners on account of their partnership interest, in the ordinary course of business as they fall due out of the assets of the ELP, without recourse to the separate assets of the general partner not contributed to the ELP. In practice, it may be difficult to prove and police when a general partner is unable to pay the ELP's debts in this manner.

liable to the ELP for the amount of the payment or the performance of the released obligation, to the extent necessary to discharge a debt or obligation of the ELP incurred whilst the contribution or commitment represented an asset of the ELP. Any such amount required to be repaid to the ELP shall bear simple interest of 10% per annum (or such other rate and basis for calculating interest as provided in the partnership agreement).⁹

- (b) *Voidable preferences:* every conveyance, transfer of property, charge on property, payment obligation and judicial proceeding made by the ELP in favour of a creditor with a view to giving that creditor preference over other creditors at a time when the ELP is unable to pay its debts, will be invalid if made within six months prior to the commencement of the winding up of the ELP. Such a payment to a related party of the ELP, i.e. a party which has the ability to control the ELP or exercise significant influence over the ELP in making financial and operating decisions, will be deemed to have been made with the view of giving the related party creditor a preference;¹⁰ and
 - (c) *Fraudulent trading:* if in the course of the winding up of an ELP it appears that any business of the ELP has been carried on with intent to defraud its creditors or creditors of any other person, or for any fraudulent purpose, the liquidator may apply to the Court for a direction that the persons who were knowingly parties to the carrying on of the business in such a manner are liable to make such contributions to the ELP's assets as the Court thinks proper.¹¹
- 2.10 Finally, at the end of the dissolution process, a notice of dissolution should be signed by the General Partner or liquidator of the ELP and filed with the Registrar.¹²
- 2.11 It is recommended that a notice of dissolution is filed at least six months (or longer if the partnership agreement contains specific clawback provisions) after the ELP's assets are distributed, as a result of the clawback provisions referred to at paragraph 2.9 above.

3 Striking off the Register

- 3.1 In a new process introduced in July 2014 by the Exempted Limited Partnership Act, 2014 (currently consolidated into the Exempted Limited Partnership Act (As Revised) as an alternative to the appointment of a liquidator and dissolution in due course, an ELP may be dissolved by simply applying to the Registrar of Exempted Limited Partnerships for it to be struck off the Register.¹³ The Registrar has the power to strike an ELP off the Register (whereupon it is dissolved) if the Registrar has reasonable cause to believe that the ELP is not carrying on business. Dissolution of an ELP in this way is a simple administrative process and does not require the appointment of a liquidator. It therefore does not involve the costs inherent in the liquidation process.

9 See generally section 34 of the ELP Act.

10 Section 145 of the Companies Act (As Revised), as applied to ELPs by section 36(3)(d) of the ELP Act.

11 Section 147 of the Companies Act (As Revised) as applied to ELPs by section 36(3)(d) of the ELP Act.

12 Section 36(2) of the ELP Act.

13 Section 37 of the ELP Act. This process is intended to largely mirror the process for the striking off the Register of defunct companies under Part VI of the Companies Act (As Revised).

- 3.2 This procedure is not appropriate for ELPs that have assets of value, liabilities or otherwise complex affairs. Upon dissolution, any assets held by the ELP that have not been distributed (e.g. because a creditor or limited partner cannot be traced) in the Cayman Islands will automatically pass to the Crown, provided that the General Partner has also been dissolved.¹⁴ Unlike the liquidation process, striking an ELP off the Register does not itself deal with its liabilities to its creditors. A General Partner, limited partner or creditor may apply to the Court to restore the ELP to the Register within two years of its dissolution (which the Cabinet may extend to ten years) on the ground that the ELP was in fact carrying on business or in operation at the time it was struck off the Register.¹⁵ Such an application could be made, for example, to permit creditors to take proceedings against the ELP to recover assets which may have been wrongfully distributed to the limited partners prior to the ELP's dissolution.¹⁶
- 3.3 One of the benefits of a liquidation process is that, if properly administered, it will prevent creditors who have missed the deadline for submitting claims from subsequently attempting to do so. By contrast, the striking off procedure does not have the effect of "locking out" creditors of the ELP who wish to assert claims at a later stage. Therefore, if an ELP is simply struck off the Register, any distributions made to its limited partners will be more vulnerable to attack at a later date than if the ELP had been made subject to a properly administered liquidation.

4 Voluntary liquidation of the General Partner

- 4.1 Where the General Partner was incorporated as a Cayman Islands exempted company under the Companies Act (As Revised) ("Companies Act") it must be administered under the provisions of the Companies Act, which has mechanisms for both a voluntary liquidation and a striking off. Where the General Partner has had significant assets and liabilities, the recommended procedure would be a voluntary liquidation by a liquidator.
- 4.2 To prepare for the voluntary liquidation and ultimate dissolution of the General Partner, the General Partner's directors (the "Directors") should, where appropriate, take practical steps before the voluntary liquidation is commenced to simplify the General Partner's asset and liability position. For example:
- (a) all creditors should be paid in full; and
 - (b) the assets should be reduced to cash.
- 4.3 Taking these steps will help to ensure that at the time the liquidation is commenced, the General Partner has few (if any) assets and no outstanding liabilities. The formal liquidation of the General Partner should then be little more than an administrative exercise.
- 4.4 To commence the formal liquidation process, the Directors should sign written resolutions or pass a resolution at a board meeting to resolve to convene an extraordinary meeting of the shareholders

¹⁴ Assets located outside the Cayman Islands will devolve according to the law of ownerless property where the assets are located.

¹⁵ Sections 37(5) – (10) of the ELP Act.

¹⁶ However it remains to be seen whether such a step is necessary if the General Partner has not been dissolved, given that the General Partner holds the property of the ELP on trust for the ELP pursuant to section 16(1) of the ELP Act and may be able to be sued if it remains in existence.

of the General Partner ("Shareholders") at which the Shareholders will consider, and if thought appropriate, resolve to place the General Partner into voluntary liquidation.

- 4.5 The special resolution should be put to the Shareholders at a general meeting. A special resolution to place a company in voluntary liquidation must be passed by a special resolution, that is by two thirds of the votes of those members present in person or by proxy at the meeting (unless the company's articles of association specify a higher majority). At this meeting, the Shareholders would also appoint a voluntary liquidator who may be a Director or Shareholder or any other third party. The liquidator does not have to be a Cayman Islands resident. Upon the appointment of a liquidator, the powers of the Directors cease and the business of the General Partner will be terminated by the liquidator except to the extent necessary to facilitate the winding up.
- 4.6 The Directors should sign a declaration of solvency confirming that a full enquiry into the General Partner's affairs has been made and that, to the best of the Directors' knowledge and belief, the General Partner will be able to pay its debts in full together with interest within a period not exceeding 12 months from the commencement of the liquidation. If such declarations are not signed and filed within 28 days of the commencement of the liquidation, the liquidator will be obliged to apply for the liquidation to continue under the supervision of the Court. In practice, a prospective liquidator will ask for these declarations before he gives his consent to serve as liquidator.
- 4.7 It is the duty of the liquidator to collect in all the assets of the General Partner in liquidation, settle its liabilities and then distribute its net assets to its Shareholders. Failure to discharge any one or more of those obligations could lead to personal liability of the liquidator and the person agreeing to act as liquidator should be advised as to his personal liabilities. The Shareholders will need to consider whether they will appoint a local firm of accountants or specialists to act as liquidator. The liquidation team at Maples Liquidation Services (Cayman) Limited can (subject to their acceptance of the appointment) provide liquidation services in some cases. Alternatively, the Directors may consider acting as liquidators if they feel confident that the company is solvent and that they can handle the duties of the liquidator and prepare the final accounts and are prepared to accept the personal liability.
- 4.8 When the claims of the creditors of the General Partner have been satisfied, the liquidator will be in a position to distribute the remaining assets to the Shareholders (although there is no objection to interim distributions being made to the Shareholders provided sufficient reserves are retained for payment of the creditors). The liquidator should prepare liquidation accounts, and present them to a final meeting of the Shareholders. Further, the liquidator is under an obligation to liquidate the General Partner as quickly as he reasonably can.
- 4.9 Notice of the liquidator's appointment must be published in the Cayman Islands Official Gazette. The notice must invite creditors of the General Partner to submit to the liquidator details of their claims against the General Partner. If the liquidator believes that there are unpaid creditors, he should advertise his appointment and give notice to creditors to submit claims in the country or countries where he believes the advertisement or notice is likely to come to the attention of those creditors.
- 4.10 As soon as the affairs of the General Partner are fully wound up, i.e. when the liquidator is in a position to bring about the dissolution of the General Partner, the liquidator must lay his final report

and accounts (showing the manner in which the winding-up has been conducted) before a final general meeting of the Shareholders. The notice of this final general meeting must be published in the Cayman Islands Official Gazette at least 21 days before the general meeting takes place. At the final general meeting of the Shareholders, the liquidator should ask the Shareholders to approve the accounts and discharge the liquidator from further duties.

- 4.11 No later than seven days after the final meeting, the liquidator must provide the Registrar of Companies with a Final Return confirming the date on which the meeting was held and, if a quorum was present, particulars of the resolutions passed at the meeting. Three months after the date of registration of that return, the General Partner is deemed to be dissolved.

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