

AMENDED LAW APPEALING TO PRIVATE EQUITY FUNDS

by Sarita Ebbin

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Recent amendments to partnership legislation in Bermuda, effective in December 2015 (**Amendments**), allow for greater flexibility in how partnerships conduct business, thereby further strengthening the appeal of Bermuda partnerships for use in private equity fund structures.

In Bermuda, a partnership is the relationship between persons carrying on business in common with a view to profit. General partnerships and limited partnerships are permitted, and these can be local, exempted or overseas partnerships.

Partnerships are often used as vehicles for private equity funds, which are entities used by high net worth individuals and institutions typically to invest in the acquisition of companies.

Limited partnerships tend to be the vehicle of choice when setting up a private equity fund. This is because limited partnerships in many jurisdictions, including Bermuda, are tax transparent and are generally subject to a lesser degree of regulation than companies.

In addition, closed-ended private equity funds in Bermuda (where the ability to redeem is only at the option of the fund and not the investor - whether a company or a limited partnership) are excluded from the *Investment Funds Act 2006 (IFA)* and are therefore not regulated by the Bermuda Monetary Authority. If an open-ended private equity fund (where the ability to redeem is at the option of the investor) has fewer than 20 participants and the offer is not made to the public, then they are also deemed private and are excluded from the IFA.

The operation of a Bermuda limited partnership is primarily left to the limited partnership agreement. Traditionally, Bermuda partnerships did not have separate legal personality; however, since amendments to the partnership legislation in 2006, it is possible for a partnership to elect to have separate legal personality under Bermuda law. Such an election is irrevocable, and if made, eliminates any uncertainty as to whether the partnership continues to exist in the event that there is a change in the constitution of the partnership, or if all the partners die, or are declared bankrupt. The election of legal personality is also useful when a partnership has entered into loan facility arrangements and has granted security; any change of limited partners will not affect the facility arrangements and the need to novate contracts upon the change of limited partners is avoided.

General partners are fully liable for partnership debts and obligations and they are responsible for the day to day operation of the partnership in much the same way as a board of directors of a company. However, the liability of limited partners is limited to the value of money and the value of any property (i.e. the value assigned to property other than cash) that it contributes or agrees to contribute to the limited partnership. The position of a limited partner in a limited partnership is in this way similar to that of a shareholder in a limited company.

The essence of a limited partnership is that the limited partner is protected in the event of a claim against the partnership. The establishment of separate legal personality in Bermuda went a long way to ensuring that limited partners are protected, and the recent amendments have boosted that protection.

As a result of the Amendments, the safe harbour provisions of the *Limited Partnership Act 1883 (LPA)*, which specify the acts that do not constitute taking part in the conduct of the business of a limited partnership, have been clarified and extended with a view to ensuring that such acts will not affect a limited partner's liability. They also make similar provision with respect to boards and committees.

By clarifying the safe harbour provision, the LPA makes it clear that if a limited partner undertakes such actions they will not be surrendering their limited liability status as a limited partner.

The Amendments also allow partnerships that have elected to have separate legal personality to hold assets and grant security in their own name.

Any person interested in a charge on the assets of such a partnership may apply to have that charge registered on a register maintained by the Registrar of Companies. On registration, to the extent that Bermuda law governs the priority of the relevant security, such security will have priority over any unregistered charges, and over any subsequently registered charges, in respect of the assets that are the subject of the security. This is particularly helpful for those partnerships that wish to enter into loan facilities.

The Amendments also mean that an exempted company may now convert to an exempted limited partnership with separate legal personality and vice versa. As well, the Amendments allow a partnership formed outside of Bermuda to be registered in Bermuda as an exempted and/or limited partnership by way of continuation and to deregister in Bermuda and continue in another jurisdiction. Both amendments allow a private equity fund to change its legal form with little disruption to its business.

The Amendments can only enhance Bermuda's attractiveness as a jurisdiction of choice for private equity fund structures.

This article has been written by:

Bermuda
Sarita Ebbin
Associate

+1 441 298 3281
sebbin@applebyglobal.com

Sarita Ebbin is an Associate in the Corporate Department at Appleby.

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