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## Cayman LLC – Default Provisions

The Limited Liability Companies Law, 2016 (the “**Law**”) allows for the formation of a Cayman Limited Liability Company (an “**LLC**”) without the need for its members to enter into an agreement as to the business or affairs of the LLC (an “**LLC Agreement**”). Where an LLC Agreement is not entered into the registration statement filed with the Cayman Registrar is deemed to be its LLC Agreement and a number of default provisions set out in the Law will apply to govern the conduct of the LLC’s business.

This guide sets out the default provisions which will apply to any LLC whose members have chosen not to adopt an LLC Agreement. We would recommend that an LLC should only be operated without an LLC Agreement where that LLC will have a sole member who will also act as the manager of the LLC and where the LLC will not undertake any regulated business governed by the laws of the Cayman Islands. In any other circumstances a detailed analysis of the specific purposes of the LLC and the specific needs of its members should be conducted and then discussed with legal advisers to ensure that the business of the LLC and the relationship between its members and managers are appropriately governed by the terms of an LLC Agreement.

### Formation

An LLC is formed by filing a registration statement signed by its members with the Cayman Registrar along with the applicable registration fees. The LLC can be formed for any lawful business, purpose or activity and need not be formed for the purposes of profit. The registration statement is required to include the name, registered office address and term of the LLC and a statement that the LLC will

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not undertake business with the public in the Cayman Islands other than in certain specified circumstances. Any amendment to the registration statement must be filed with the Cayman Registrar within a specified time frame. From the date of its registration the LLC is a body corporate with legal personality separate from its members. The existence of the LLC as a separate legal person will continue until its certificate of registration is cancelled and its deregistration or striking off is recorded by the Cayman Registrar.

## Capacity

Following its registration the LLC is capable of exercising all the functions of a natural person of full capacity, irrespective of any questions of corporate benefit. The LLC has the power to do all things necessary or convenient to carry on its business or affairs. This is subject to the requirement that an LLC shall not carry on business with the public in the Cayman Islands except in certain specified circumstances and subject to certain specific restrictions referred to below.

An LLC may merge or consolidate with another LLC or with a Cayman exempted company. An LLC may also merge or consolidate with a company established in another jurisdiction provided that the foreign company has separate legal personality and the merger or consolidation is not prohibited by its constitutional documents or its domestic law. However an LLC will not be able to transfer by way of continuation out of the Cayman Islands unless it has an LLC Agreement which specifically permits such a transfer. A Cayman exempted company which intends to convert to an LLC is required to adopt both a registration statement and an LLC agreement and will not be able to operate without an LLC agreement under the default provisions of the Law.

## Authority

The management of an LLC without an LLC Agreement will be vested in its members acting by a majority in number. The Law contains no provisions for regulating the calling or holding of members' meetings and any decisions of members of an LLC without an LLC Agreement will need to be effected by written consent signed by the relevant majority. Where decisions are made by members in their capacity as managers the consent will be deemed to be in writing and signed where it is transmitted by electronic transmission by such members but all decisions made in their capacity as members will need to be signed by the relevant members.

Any contracts signed by a person before the LLC is registered with the intention that the LLC should be bound by that contract will bind the person signing the contract personally and will not bind the LLC unless the contract is ratified by the LLC after the LLC has been registered.

Once the LLC is registered its members acting by a majority in number have authority to bind the LLC. Deeds may be executed by any person acting under the express or implied authority of the LLC provided that they are expressed to be executed as a deed or instrument under seal. Other written contracts and oral contracts may be made by any person acting under the express or implied authority of the LLC.

## Management

A person who is both a manager and a member of an LLC has the rights and liabilities of a manager and the rights and liabilities of a member to the extent of their participation in the LLC as a member. A manager of an LLC without an LLC Agreement will not owe any duty (fiduciary or otherwise) to the LLC or to any member of the LLC or any other person in respect of the LLC other than the duty to act in good faith.

Managers have power to delegate their rights and powers to other persons by resolution, agreement or otherwise and such delegation shall not cause the manager to cease to be a manager or cause the delegate to be a manager. Each manager is fully protected in relying in good faith on the LLC's records and on information prepared by other persons as to matters which the manager reasonably believes are within such other person's knowledge or professional or expert competence and who has been selected with reasonable care by the LLC. The Law specifically provides that an LLC has power to indemnify any person from any liability and advance expenses with respect to any such indemnity.

The appointment of a separate manager (who is not also a member) will not be possible without adopting an LLC Agreement which includes provision for its management by one or more managers.

## Members

The debts, obligations and liabilities of an LLC are solely those of the LLC and no member or manager of the LLC shall be personally obligated for them solely by reason of their being a member or acting as a manager of the LLC. This provision does not prevent a member or manager from entering into an agreement to be liable for the LLC's debts, obligations and liabilities, for example under a downstream guarantee.

The admission of new members to the LLC will require the consent of all existing members and that such admission is reflected in the register of members of the LLC. No member will have any pre-emption rights on the issue or transfer of interests in the LLC. LLC Interests may but need not be evidenced by a certificate.

A member shall not owe any duty to the LLC or any member in exercising its rights or authorities in respect of the LLC and may exercise any vote, consent or approval right in respect of its LLC interests as it sees fit and in its own best interests even though this may not be in the best interests of the LLC or any other member.

Any member of an LLC may lend to or borrow from and transact other business with that LLC and shall have the same rights and obligations with respect thereto as a person which is not a member or manager of the LLC.

## Contributions

Contributions can be in cash, property, other assets, services rendered or an obligation to make any such contribution. Alternatively a person may be admitted as a member of the LLC or be granted other rights without making a contribution to the LLC, although such a member may still be required to return distributions to the LLC in certain circumstances under the Law. Contributions which are made other than in the functional currency of the LLC may be deemed to have such value as agreed between the LLC and the member making them. It will be important for such an agreement to be reached at the time of admission of each member to the LLC as this will also impact allocations and distributions made to each member. A conditional obligation of a member to make a contribution or return property to an LLC may not be enforced unless the relevant conditions have been satisfied for waived by the member.

The members of an LLC will have liability to contribute to the assets of the LLC in the event of its being wound up to the same extent such contributions are required from members of a Cayman company. This includes limitations on liability by reference to the time at which a member ceased to be a member, to the date at which contractual liabilities were assumed by the LLC, to the extent to which existing members are able to satisfy the LLC liabilities, to the amounts due on LLC interests and to any specific contractual limitations.

A member's obligation to contribute to the LLC or to return distributions made to it by the LLC can be compromised by the LLC but only with the consent of all members and only if the LLC is able to pay its debts and will remain so immediately following the compromise. Any such compromise will not affect a creditor of the LLC who has not agreed to it and such a creditor may enforce the original obligation to the extent that they reasonably relied upon it in extending credit to the LLC.

## Allocations

Profits and losses of the LLC shall be allocated between members on the basis of the agreed value of contributions made by each member as stated in the records of the LLC to the extent they have been received by the LLC and have not been returned. Regardless of such allocations the LLC interest of a member will not bestow any interest in the specific property of the LLC.

The LLC may obtain an undertaking from the Cayman Government that for a period of up to 50 years, no law which is passed in Cayman after the date of that undertaking imposing any tax on profits, income, gains or appreciations shall apply to the LLC or to any of its members in respect of the operations or assets of the LLC or membership interest of its members and that any such taxes and any tax in the nature of estate duty or inheritance tax shall not be payable in respect of the obligations of the LLC or the interests of its members.

## Distributions

Distributions shall be made among members on the basis of the agreed value of contributions made by each member as stated in the records of LLC to the extent they have been received by the LLC and have not been returned. Members are generally only entitled to distributions on their

withdrawal as, or their ceasing to be, a member (other than by way of transfer) and on the dissolution of the LLC.

The LLC may however, for consideration or for no consideration, acquire by repurchase, redemption or otherwise an LLC interest provided that immediately following the acquisition the LLC is able to pay its debts as they fall due in the ordinary course of business. Unless otherwise agreed to by all its members an LLC interest acquired by the LLC is deemed cancelled on acquisition. Members of the LLC may withdraw and cease to be a member only as provided in the Law or with the consent of all the other members of the LLC. Upon ceasing to be a member (other than by way of transfer) a former member is generally entitled to receive within a reasonable time a distribution equal to the fair value of their LLC interest as of the date of ceasing to be a member based upon a good faith determination of their right to share in distributions from the LLC.

An LLC shall not distribute to a member or release a member from an obligation to contribute to the extent that it would, following the distribution, be unable to pay its debts as they fall due in the ordinary course of business and a member who receives a distribution (or release) with actual knowledge that the LLC was cash flow insolvent is liable to return that distribution (or perform the obligation purportedly released).

## Transfers

A member's rights to distributions are assignable but any such assignment does not entitle the assignee to become, or exercise the rights of a member and the assignor does not cease to be a member or to have the rights of a member other than those which are subject to a security interest which has been notified to the LLC and which has become enforceable.

An assignee may become a member with the approval of all members of the LLC and upon their admission being reflected in the records of the LLC. An assignee that becomes a member is liable for contributions agreed to by the assignor in respect of the LLC interest assigned but not for other obligations incurred by the assignor before the transfer unless otherwise agreed between assignee and assignor. An assignor of an LLC interest is not released from its obligation to return distributions received from the LLC when he knew that the LLC was cash flow insolvent.

The personal representative of a deceased or incapacitated member is capable of exercising all rights of that member. The powers of a member that is being wound up, dissolved or terminated are exercisable by the person entitled to do so under applicable law.

## Records

The LLC will need to maintain 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. The LLC must also maintain a record of the amount and date of each contribution of, and distribution to, each member. Where these records are not kept at the registered office of the LLC they must be made available at the registered office upon service of an order or notice from the Cayman Tax Information Authority. These records must be retained for a minimum of five years from the date on which they are prepared.

Each member has the right to inspect for any purpose reasonably related to their LLC interest within a reasonable period from demand, full information regarding the state of the business and financial condition of the LLC, the names and last known address of each manager and the registration statement and certificate of registration of the LLC. Each member has the same right to inspect full information regarding the cash, and a description and statement of the agreed value of any other property or services, contributed or agreed to be contributed by them and the date on which they became a member. The register of members of an LLC (and, if applicable, the record of the address where it is maintained) is open to inspection only by persons as permitted by the managers or as required by order or notice from the Cayman Tax Information Authority.

The LLC will need to maintain a registered office in Cayman for the service of process and receipt of all notices and communications. The LLC will need to maintain a register of its members, a register of its managers (which will also need to be filed with the Cayman Registrar) and a register of its mortgages and charges at its registered office or, where the register of members is kept at an address other than the registered office, a record of that address. Any member of the public is entitled to be informed by the Cayman Registrar of the location of the registered office of the LLC. The LLC will also be required to file an annual return with the Cayman Registrar in January in each year.

## Winding up and Strike Off

The LLC shall be wound up voluntarily when any term fixed for its duration in its registration statement expires, when any event specified in its registration statement as triggering its winding up occurs and upon the written consent of two thirds in number of its members. An LLC will also be wound up where it has no members provided that the death of a sole member shall not cause its winding up and the personal representative of that member shall be deemed to be a member until they cease to be its sole member or the LLC is dissolved. Any person may apply to the Grand Court of the Cayman Islands within 90 days of an LLC having no members to dis-apply the provisions of the Law requiring its winding up for such period as the Court considers appropriate.

The assets of an LLC being wound up will be applied only after taking account of rights of preferred and secured creditors and of any subordination, set-off or netting agreements and in the absence of any set-off or netting agreements account will be taken of mutual dealings and sums due between parties will be set-off against each other.

In general terms the application of an LLC's assets on a winding up are firstly to its creditors, secondly to persons who have become entitled to distributions and thirdly to members in accordance with the rights of their LLC interests.

Any member or creditor of an LLC can petition for a winding up by or under the supervision of the court. An LCC may also be struck off by the Cayman Registrar in the same circumstances as a Cayman company may be struck off which includes a strike off following a request made on behalf of the LLC.

## Application of Equity, Common Law and Existing Statutes

The Law specifically applies the rules of equity and common law relating to Cayman companies, as modified by applicable Cayman statutes, to the Cayman LLC except in so far as they are inconsistent with the Law. The Law also extends references to companies within all other Cayman statutes to LLCs except to the extent expressly provided otherwise within the Law. There is an extensive body of case law and regulatory law and guidance in the Cayman Islands which may impact on an LLC if it is intended to conduct business in certain specified markets. Legal advice should be taken on the application of these rules and may lead to a decision to adopt a LLC Agreement rather than relying on the default provisions of the Law.

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