

Comparison of Cayman Islands limited liability companies and Delaware limited liability companies

The Limited Liabilities Companies Law (the **Cayman LLC Law**) came into force in the Cayman Islands in 2016, introducing a new type of corporate vehicle in the Cayman Islands, the limited liability company (the **Cayman LLC**). The Cayman LLC Law was drafted using the principles of the Delaware General Corporation Law (**Delaware LLC Law**), existing Cayman Islands legislation (in particular the Companies Law and the Exempted Limited Partnership Law), international obligations to which the Cayman Islands adheres (eg the OECD) and the common law of the Cayman Islands.

This guide summarises the Cayman LLC Law and sets out the key similarities and differences between the Cayman LLC and limited liability companies formed in the State of Delaware (**Delaware LLC**) under the Delaware LLC Law.

Please contact your usual Harneys contact for more information or to discuss forming a Cayman LLC.

Comparison of Cayman LLCs with Delaware LLCs

Formation

The formation of a Cayman LLC is similar to a Delaware LLC, in terms of simplicity. A Cayman LLC is formed by filing a registration statement and paying a fee to the Registrar of Limited Liability Companies (the **Registrar**) in the Cayman Islands. The name of the Cayman LLC can be reserved in advance, as with other Cayman entities.

Registered office

A Cayman LLC must have a registered office in the Cayman Islands but, unlike a Delaware LLC, it does not need to appoint a registered agent.

Legal status

A Cayman LLC and a Delaware LLC are both considered to be a body corporate with separate legal personality to their members and they have the right to undertake any lawful activity (whether for profit or not).

Membership and governance

There must be at least one member of a Cayman LLC and it may be managed by some or all of its members or managers (see below for the position of investment funds registered under the Mutual Funds Law). Unlike the default position for a Delaware LLC, where members govern by a majority in interest, the default position under the Cayman LLC Law is that the management of a Cayman LLC will vest in its members acting by majority in number. A Cayman LLC can override this, and most of the statutory default positions, by making appropriate provision in its limited liability company or operating agreement (**LLC Agreement**).

Definition of manager

The Cayman LLC Law defines a manager as any member or other person in whom management of the Cayman LLC is vested. In comparison, the definition of a manager under the Delaware LLC Law is a person who is named as a manager or designated as a manager, although certain provisions do

provide that the definition of a manager will also include any person who 'participates materially in the management' of the Delaware LLC.

Capital structure

Members of a Cayman LLC may:

- have their economic interests represented by way of a capital account
- make no capital contribution or make capital contributions in the form of cash, property, other assets, services rendered or an obligation to contribute assets or perform services, and
- agree the allocation of profit and losses, as set out in the LLC Agreement.

This is similar to a Delaware LLC. In addition, the Cayman LLC Law provides a right to receive distributions of a Cayman LLC's assets in cash or in kind or by way of release from any obligations to the Cayman LLC to which the member is subject pursuant to the LLC Agreement or the Cayman LLC Law.

Name

A Cayman LLC may, but is not required to, include in its name the words "Limited Liability Company", "LLC" or "L.L.C.". The name may also be preceded by or followed with a dual foreign name. In comparison, the Delaware LLC must include the LLC suffix in its name.

LLC agreement

A Cayman LLC Agreement, unlike a Delaware LLC Agreement, must be in writing and governed by Cayman Islands law. The effective date of the Cayman LLC Agreement must post-date the date of execution by the parties and will only be deemed effective on the date of registration of the Cayman LLC. The parties of a Cayman LLC Agreement can agree between themselves that the agreement will take effect at an earlier date but this would not apply to third parties. Similar to a Delaware LLC Agreement, a Cayman LLC Agreement is not filed with the Registrar or made publicly available.

Statutory registers

A Cayman LLC must maintain the following statutory registers:

- a register of managers
- a register of members
- a register of beneficial ownership (unless an exemption applies, for example for certain regulated LLCs, please see our [Guide to the Cayman Islands beneficial ownership regime](#) for further details of beneficial ownership registers and exemptions available)

- a register of security interests over member interests, and
- a register of mortgages and charges.

This is consistent with OECD commitments in the Cayman Islands. The register of managers must be filed with the Registrar and whilst the register itself is not open to public inspection, the names of the current managers of the LLC are available through a database search at the Registrar of Companies upon payment of a search fee.

The register of beneficial ownership is not publicly available but information contained in it will be filed by the LLC's registered office provider with the Cayman Islands competent authority on a confidential basis. It is then only accessible in limited circumstances pursuant to a proper and lawful request made by certain Cayman government authorities. When an exemption applies, the LLC must file written confirmation of the exemption with its registered office provider, with instructions to file the written confirmation with the competent authority in the Cayman Islands. Where management of the Cayman LLC is vested in the members, the details of the members must be recorded in both the register of members and the register of managers.

Bearer instruments and LLC certificates

Cayman LLCs and Delaware LLCs cannot issue bearer instruments. Both can, but are not obliged to, issue certificates to evidence an LLC interest, although we would not expect Cayman LLCs to do so generally, in line with the usual practice for Cayman exempted companies and exempted limited partnerships.

Migration, conversions and mergers

A Cayman Islands exempted company can be converted into a Cayman LLC provided that it is not a segregated portfolio company. A non-Cayman limited liability company or a foreign company can be re-registered and continue as a Cayman LLC, provided that it has separate legal personality in its home jurisdiction. Cayman Islands companies, LLCs and foreign entities with separate legal personality may merge or consolidate and continue as a Cayman LLC and vice versa.

It is not possible to convert a Cayman Islands exempted limited partnership into a Cayman LLC through any statutory mechanism, although it is possible to achieve such a conversion in practice through standard corporate methods and limited partner consent.

Admission

The Cayman LLC Law provides for the assignment of a membership interest in a Cayman LLC without the need for the assignee to be admitted as a member. However, a member who is not admitted may have limited rights to participate in the management of the Cayman LLC. This is similar to the Delaware LLC Law.

Duties of care and fiduciary duties

The Cayman LLC Law states that the minimum duty of care for a manager or member manager in managing a Cayman LLC is to act in good faith. A member of a Cayman LLC does not otherwise owe a fiduciary duty to the Cayman LLC or any other member. The member may act in its own best interests and as it sees fit, even if this is not in the best interests of the Cayman LLC or any other member. The same principles apply to any person serving on a board or committee of a Cayman LLC.

The duties of care and fiduciary duties set out in the Cayman LLC Law cannot be removed but can be varied by express provisions in the LLC Agreement.

Member liability and clawback

The Cayman LLC Law and Delaware LLC Law differ in terms of a member's liability and when a statutory clawback can be made. A member's liability under the Cayman LLC Law is generally limited to the amount that the member has agreed contractually to contribute to the Cayman LLC. A clawback under the Cayman LLC Law only applies where a member receives a distribution or is released from an obligation where the Cayman LLC is insolvent at the time of that distribution or release and the member has actual knowledge of such insolvency at the time of the distribution or release. There is no limitation period for a clawback if the member has actual knowledge of the insolvency. If the member has no knowledge of the insolvency, there is no clawback.

Security over membership interests

A member of a Cayman LLC may grant a security interest over any part or all of its interest in the Cayman LLC (its **LLC Interest**). This is subject, however, to the terms of the LLC Agreement, as with Delaware LLCs. The Cayman LLC Law provides that:

- a security interest shall have priority according to the time that the written notice of the security interest, signed by each of the secured party and the relevant member, is validly served at the registered office of the Cayman LLC, and
- the notice shall not be validly given unless it specifies the relevant security agreement and certain details including the names of the grantor and the grantee and the LLC Interest that is subject to the security interest.

A Cayman LLC must update its register of security interests within 21 days of receipt of a validly served notice.

Indemnification

A Delaware LLC and Cayman LLC both have the power to indemnify and hold harmless any member or manager or other person from and against any liability, action, proceeding, claim, demand, costs, damages or expenses,

including legal expenses, subject to public policy considerations.

Inspection of books and records

These provisions are similar in the Cayman LLC Law and the Delaware LLC Law. The Cayman LLC Law provides that, unless otherwise provided in the LLC Agreement, each member has the right to inspect from time to time and receive within a reasonable period from the time of their demand:

- true and full information regarding the state of the business and financial condition of the Cayman LLC
- the name and last known business, residence or mailing address of each manager
- a copy of the LLC Agreement, registration statement, certificate of registration and all amendments to the registration statement, and
- true and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by a member and which the member has agreed to contribute in the future, and the date on which the member became a member.

Defaulting members

The LLC Agreement of a Cayman LLC may provide for certain remedies, sanctions or consequences for members or managers. This is the same for a Delaware LLC. The Cayman LLC Law says that any such remedies or sanctions shall not be unenforceable solely on the basis that they are in the nature of a penalty or forfeiture. The remedies and sanctions listed in the Cayman LLC Law are similar to those in the Delaware LLC Law, except that the Cayman LLC Law expressly refers to the payment of default interest.

Classes of interest or members

The LLC Agreement of a Delaware LLC and a Cayman LLC may provide for different classes of LLC Interests or groups of members having such relative rights, powers and duties as may be set out in the LLC Agreement.

Third party rights

Under the Cayman Contracts (Rights of Third Parties) Law, third party beneficiaries to a Cayman LLC Agreement will be able to enforce any rights granted to them, provided that the contract expressly provides that those beneficiaries are entitled to enforce such rights in their own right. In addition, the Cayman LLC Law provides that any member of any board or committee of the Cayman LLC shall be deemed to have notice and the benefit of any provision for the establishment and regulation of such board or committee and such provisions shall not be unenforceable by any person in its own right by reason only that the person is not a party to the LLC Agreement. This is subject to the express

provisions of the LLC Agreement and is likely to be of particular importance in respect of the purported indemnities and exclusions or limitations of liability which may be granted in the LLC Agreement of a Cayman LLC. Regardless of whether the manager is a party to the LLC Agreement or not, the manager of a Cayman LLC shall have the rights, powers and responsibilities afforded to it and be subject to the obligations of such manager specified in or under the terms of the LLC Agreement.

Winding-up and dissolution

A Cayman LLC may be wound up:

- voluntarily
- compulsorily by the Cayman Islands Grand Court, or under the supervision of the Cayman Islands Grand Court.

Except where the provisions are not consistent with the Cayman LLC Law, Part V of the Cayman Companies Law and the Companies Winding Up Rules apply to the winding up and dissolution of a Cayman LLC. The manager or the liquidator (if appointed) must make certain filings with the Registrar and place a notice in the Cayman Islands Gazette to effect the voluntary winding up of the Cayman LLC. The triggers in respect of a voluntary winding-up of a Cayman LLC are similar to those applicable to Delaware LLCs, except that two-thirds in number of the members may approve a voluntary winding-up of a Cayman LLC (subject to the LLC Agreement), as opposed to two-thirds of the then current percentage or other interest in the profits of a Delaware LLC.

Tax undertaking

A Cayman LLC may apply for a tax undertaking certificate from the Cayman Islands Government which provides that no law which is enacted in the Cayman Islands imposing any tax to be levied on profits or income or gains or appreciations shall apply to the Cayman LLC or any member

in respect of the operations or assets of that Cayman LLC or membership interest for a period of 50 years from the date of the undertaking. This is not available for a Delaware LLC.

Other Cayman Islands laws

The Mutual Funds Law and the Securities Investment Business Law treat a Cayman LLC in the same way as a company. For example, a Cayman LLC registered as a mutual fund under the Mutual Funds Law in the Cayman Islands will need to have at least two managing members or managers.

Delaware concepts not included in the Cayman LLC Law

The following concepts from the Delaware LLC Law are not included in the Cayman LLC Law:

- series limited liability companies
- the conversion of an exempted limited partnership into a Cayman LLC (or vice versa), and
- dual registration or domestication of foreign companies.

These concepts may be incorporated into the Cayman LLC Law in the future.



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