CAREY OLSEN

# Cayman Islands quarterly update

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## Limited Liability Company arrives in the Cayman Islands

In what is likely to be a very popular addition to Cayman's stable of corporate products, the Limited Liability Company (LLC) has been introduced, in response to strong demand from the US asset management industry for an offshore vehicle more closely aligned with the Delaware LLC.

The new LLC brings together the best elements from the exempted limited company and exempted limited partnership in a flexible hybrid structure, with separate legal personality, but no requirement for share capital.

## Italy adds Cayman Islands to white list

The Cayman Islands was included in Italy's 'White List' in early September, in a positive development, which reaffirms recognition in Europe of the strength of Cayman's robust framework to combat financial crime and tax evasion. The inclusion means that Cayman funds can invest in certain Italian securities such as bonds and securitisation instruments without attracting withholding tax. Furthermore, Cayman funds may receive full exemption from Italian tax on profits, where they own more than 5% of an Italian Real Estate Investment Fund.

## Case law update

### Court of Appeal clarifies claw back law

When a fund fails, the disappointed investors' sole hope of recompense often rests on the fund's liquidators gathering in and distributing pari passu as many of the fund's assets as possible. On the other hand, those investors who successfully redeemed shortly before the fund's collapse might regard the liquidators' efforts with a degree of concern.

The judgment of the Cayman Islands Court of Appeal in *Skandinaviska Enskilda Banken AB (Publ) v Simon Conway and David Walker (CICA 2 of 2016)*, delivered on 18 November 2016, considered aspects of the liquidators' power to claw back certain types of redemption payments made shortly prior to liquidation as voidable preferences under s. 145 of the Companies Law. The Court of Appeal decision confirms that there is no need for the redemption payments to be tainted with any dishonesty for them to be recoverable and that common law defences, such as change of position by a custodian who transmits the redemption proceeds to a client, are not available in a s. 145 claim.

This will be welcome news for liquidators and frustrated creditors, but may cause some concern for investors in Cayman Islands funds, particularly custodians, because such investors will potentially now face a six month exposure horizon on any redemption proceeds they might receive and dissipate. Investment funds and their managers, in the meantime, will pay close attention to the Court of Appeal's finding that the cash flow test of insolvency in the Cayman

Islands is not limited to debts that are immediately due and payable but can extend to debts that will become payable in the reasonably near future. Click here for a full note on the judgment given by the Court of Appeal.

### Courts clarify liquidators' powers to require the production of documents from third parties

In three recent decisions the courts have examined the limits on a liquidator's ability to obtain court orders compelling third parties to provide documents held by them, as well as deciding on the recoverability of costs incurred by third parties complying with production orders that are made against them.

First, In the matter of Primeo Fund (In Liquidation) (Unreported, CICA No. 08 of 2016, 18 November 2016), the Cayman Islands Court of Appeal determined that a Cayman liquidator cannot use the letter of request process to compel a foreign bank to deliver up documents for the purpose of allowing the liquidators to give discovery in litigation to which that foreign bank was not a party. Amongst other reasons for a overturning a direction from the Court that the JOLs' issue a letter of request seeking documents from the foreign bank, the Court of Appeal confirmed that the liquidator's statutory powers to compel the delivery up of certain documents cannot be used by the liquidator for the purposes of litigation to which the liquidator is a party, in circumstances where the documents do not serve any purpose in relation to the liquidation of the company.

Second, In the matter of *Primeo Fund (In Liquidation) (Unreported, Cause No. FSD 30 of 2010, 21 November 2016),* the Grand Court dismissed the liquidators' application for orders compelling Primeo's auditor, Ernst & Young (Cayman) to use "its best endeavours" to obtain documents held by Ernst & Young (Luxembourg). The liquidators' application failed on numerous grounds, but most importantly the application pursuant to section 138 of the Law (by which the Court can require any person to deliver to a liquidator property or documents to which the company appears to be entitled) was dismissed on the basis that section 138 of the Law is not a mechanism which may be used for the purposes of discovery in litigation. Furthermore, the Court found the liquidators had failed to prove that EY Cayman was entitled, by way of agency or otherwise, to any documents in EY Luxembourg's possession. Separately, the liquidators' application pursuant to section 103 of the Companies Law (the power to compel co-operation with the liquidator) failed because EY Cayman did not fall into one of the categories of persons or entities which can be compelled to cooperate as EY Cayman was not a "professional service provider" as it had not contracted "to provide general managerial or administrative services to [Primeo]".

Finally, in *PricewaterhouseCoopers v SAAD Investments Company Limited (In Official Liquidation) & Anor [2016]* UKPC 33, the Privy Council rejected PWC's claim for recovery of its preparatory costs of complying with production orders obtained against them by Bermudian liquidators, which orders had been subsequently set aside. Obiter comments had been made in the initial judgment to the effect that PWC would be entitled to such costs, and the liquidators' failure to make provision for, or to give an undertaking in respect of these costs counted against them in that decision. However, the absence of undertakings (which the Privy Council held were not mandatory, nor implied) proved decisive in the final judgment on the point, as the Privy Council (by majority) failed to find any basis upon which PWC were entitled to recover their preparatory costs.

## Regulatory Update

### CIMA steps up efforts to collect fees from funds in liquidation

The Cayman Islands Monetary Authority (CIMA) has clarified its intention to collect any outstanding fees and documents from investment funds in Liquidation or Termination status for over six months. Funds which do not comply within the agreed period, will be cancelled by CIMA, although extensions will be granted where warranted. Funds under Liquidation or Termination status must provide comprehensive ongoing updates regarding their progress during this six month period, or again, face cancellation by CIMA.

Where a fund has been cancelled under this procedure, CIMA said this may be taken into consideration when assessing the fitness and propriety of the fund's operators, which could affect the ability of directors to serve on other regulated entities. Where misconduct has been determined, then action may be taken by CIMA under the relevant regulatory law.

### CIMA updates audit waiver policy

CIMA has also updated its policy on audit waivers for investment funds, notably allowing a waiver for up to six months of a financial year, where all investors agree and there were no more than ten investors during the relevant period. Assessment for exemption from annual audit requirements is made on a case-by-case basis and other circumstances that may qualify for an exemption include where funds have not launched, are unable to raise sufficient capital, or are subject to bankruptcy proceedings, legal or regulatory enforcement actions.

Under the policy, CIMA may also consider extending a fund's first audit period or last audit period for a maximum of 18 months. If a fund applies for an exemption for two consecutive years then further information will be required regarding its inability to produce audited accounts.

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## Listing Update

### CSX cuts fees for EU transfers as red tape increases in Europe

As new regulations affecting stock market listings in the EU involve increased compliance work and a greater administrative burden, the Cayman Islands Stock Exchange (CSX) has highlighted its streamlined process, while halving the costs for debt listing transfers.

The new EU Regime, encompassing the EU Market Abuse Regime Regulation and the EU Directive on Criminal Sanctions for Market Abuse came into force on 3 July 2016. This requires issuers to comply with additional disclosure requirements, including insider lists and reports of transactions involving persons discharging management responsibilities.

The new EU Regime does not apply to listings on CSX, which has invited issuers concerned about the new obligations to consider transferring their EU listing, which it can complete in five working days. As an incentive, CSX has reduced its fees for a standalone debt issue transfer by 50% to US$1,250, with similar reductions for programme and series transfers.

## Carey Olsen expands in Asia

As part of our efforts to ensure we have the right expertise in the markets where our clients need us, Carey Olsen continues to expand in Asia, with the relocation of some of our leading talent from the Cayman Islands office.

In August, Cayman Islands partner, Anthony McKenzie, who specialises in corporate, commercial and finance transactions relocated to our Singapore office, which launched just over a year ago. Anthony is recognised as a leading Cayman Islands practitioner for his commercial approach and emphasis on client service and will meet the increased demand we have seen for Cayman structures in Asia. Click here for more Anthony's move to Singapore.

Additionally, Cayman Islands partner, Michael Makridakis, who led our dispute resolution and insolvency team in the Cayman Islands from 2013, has been seconded to head up our new Hong Kong office, which launched in early November. Specialising in contentious insolvency cases and acting for distressed investment funds as well as advising all relevant parties, Michael has practised Cayman Islands law since 2008. Click here for more on our new Hong Kong office

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