

'NEW KID ON THE BLOCK!!'
LIMITED LIABILITY PARTNERSHIPS: THE IMMINENT
BUSINESS ENTITY IN MALAYSIA

by

ZUHAIKRAH ARIFF ABD GHADAS
Assistant Professor
Private Law Department
Abmad Ibrahim Kulliyah of Laws
International Islamic University Malaysia

Abstract

A business entity is basically a business structure which is recognised by law as a valid medium of carrying on trade. The most common business entities are sole proprietorships, partnerships (firms) and companies. In Malaysia, these are the only three types of business structures available in the market place. However, the business entities in other countries have expanded and developed to cater to business needs. One of the most recent types of business entities is the limited liability partnership ('LLP').

The LLP is a fascinating business structure as it could have the status of either a legal entity which is not a body corporate or one which is a body corporate. In the United Kingdom ('the UK') for example, the off-shore LLPs, such as the Isle of Jersey LLP have the status of a legal entity which is not a body corporate whilst in the mainland; the UK LLPs have the status of a body corporate. In the South East Asian region, at present, LLPs are only available in Singapore. In Malaysia, there is a positive indication towards introducing LLPs in the near future as the Companies Commission of Malaysia ('CCM') had published the consultation document on LLP Bill in April 2008.

This paper intends to discuss the features of the LLP as a new business entity and as the latest creation of a body corporate. Special reference is made to the Isle of Jersey LLPs and the UK LLPs to highlight the different types of LLP structures available, to the Singapore LLP Act 2005 and also to the CCM consultation document (April 2008) to underline the attributes of the LLPs which are proposed for Malaysia.

Keywords: Business entity, limited liability partnerships.

INTRODUCTION

In business, there are always risks to be taken, be they calculated risks or uncalculated ones. One of the measures taken to minimise business risks is to choose the right business structure/entity for the business.

Basically, the three most common business entities that can be found in all parts of the world are the sole proprietorships, partnerships and companies. However, the business entities in other countries have developed to include more options than these three conventional structures; for example, in the United States of America ('the USA') the conventional partnership structure, now includes limited partnership, master limited partnership and limited liability partnerships and in China, there are three types of sole proprietorships.

It is observed that the development and expansion of business structures in countries all over the world cater to business practices, both local and international, and allow recent business entities to maximise the benefits to be derived from tax regimes and to comply with the respective laws and regulations of the country. Nonetheless, all the new business entities have actually originated from one of the three conventional structures, ie the sole proprietorships, partnerships and companies.

This paper intends to discuss the features of one of the most recent types of business entities which combines the best attributes of the two basic business structures, ie partnerships and companies, and yet exists independently.

LIMITED LIABILITY PARTNERSHIPS

The limited liability partnership ('LLP') is a business structure that combines the best features of the partnership and the company. It enjoys all the attributes of a body corporate, namely, separate legal entity, limited liability, perpetual succession and legal entity but at the same time retains the internal flexibility of a partnership.

There are two types of LLPs; the first type is the LLP with the status of a legal person but not a body corporate and the other type is the LLP with the status of a body corporate. For the purpose of discussion, examples shall be derived from the UK where both types of LLPs are available.

THE ISLE OF JERSEY LLPS

The Isle of Jersey is a constituent of the United Kingdom but it has a crown dependency and enjoys a substantial measure of autonomy.¹ The

1 Morris, Phillip and Stevenson, Joanna, *The Jersey Limited Liability Partnership: A New Legal Vehicle for Professional Practice*, *The Modern Law Review*, July 1997, Vol 60 at p 538. For further reading of Jersey's constitutional status, see *Report of the Royal Commission on the Constitution, 1969-73*, Vol 1 (Chairman: Lord Kilbrandon) Cmnd 5460, paras 1347-1349 and 1360-1363; de Smith, SA and Brazier, R,

Isle of Jersey possesses a full fledged court system (with the right of appeal to the Privy Council), its own unicameral Legislature (the States) and an executive branch of government which takes the form of de facto groups of insular officials and presidents of principal committees of the States.² The principal sources of law for the island are the Jersey common law, which originated from the customary law of the Duchy of Normandy.³ Legislation enacted by the Westminster only applies to Jersey if expressly stated or if it does so by necessary implication.⁴

Other than having powers of self-government, Jersey which is subject to the European Community law ('EC law') enjoys free movement of industrial and agricultural produce but is otherwise exempted from most of the EC law, including free movement of persons and tax harmonisation.⁵ Consequently, Jersey is able to thrive as an off-shore financial center with a fiscal structure and portfolio of legal vehicles attractive to manage funds and wealthy individuals.⁶

The LLP (Jersey) Law was enacted and enforced in 1997. Similar to the UK LLP, the Jersey LLP has a separate legal entity, distinct from its partners.⁷ However, different from the UK LLP, it does not have the status of a body corporate.⁸ The safeguard mechanism for the Jersey LLP is a requirement of £5m of financial provision upon registration, where one or more banks or insurance companies on the Island are required upon dissolution of the LLP, to pay the person responsible for the winding up of the affairs of the LLP, the sum of not less than £5m.⁹ Failure to lodge the bond will remove the innocent partners from the personal liability protection and is replaced with the usual joint and several liabilities.¹⁰ The bond need not be in the form of cash,

Constitutional and Administrative Law, London: Penguin Books, (7th Ed), 1994 at pp 61-63. Judicial discussion of the constitutional history of Jersey can be found in *Renouf v Att Gen for Jersey* [1936] 1 All ER 936.

2 *Ibid.*

3 *Ibid.*

4 *Ibid.*

5 [1972] OJ Spec Ed L73, Protocol 3 to the Act of Accession.

6 Morris, Phillip and Stevenson, Joanna, *The Jersey Limited Liability Partnership: A New Legal Vehicle for Professional Practice*, *The Modern Law Review*, July 1997, Vol 60 at p 541.

7 Limited Liability Partnership (Jersey) Law 1997 Art 6(2)(a).

8 Limited Liability Partnerships (Jersey) Law 1997.

9 Limited Liability Partnerships (Jersey) Law 1997 Art 6(2)(a) and (9).

10 Limited Liability Partnerships (Jersey) Law 1997 Art 6(4)(a) and (b).

as a host of financial instruments, for example, bills of exchange and promissory notes are accepted.¹¹ To the Jersey authorities, the bond requirement represents a necessary measure of balance in the legislation and is not a new concept as it is similar to the bond conditions found in the American State LLP legislative scheme, and the working is similar to the operation of maintenance of capital doctrine in company law.¹² In fact, the structure of the Jersey LLP is basically similar to most US LLPs as it has been modeled from the Delaware LLP.¹³

The Jersey LLP is also not subject to the audit requirements.¹⁴ The only disclosure that is required from the Jersey LLP is the particulars of partners and business during registration and the condition for the firm's name to bear an indication that it is an LLP.¹⁵

The LLP (Jersey) Law 1997 contained provisions, which are designed to oust the operation of joint and several liabilities. The Law also protects innocent partners' personal assets from seizure following a successful claim against the firm. The 'innocent partners' are also not liable for the debt or loss of the company caused by the act of another partner in the partnership.¹⁶ Nonetheless, a partner of the LLP who caused loss to the firm due to a default committed within his authority or in his personal capacity will be personally liable for the debts. This means, restrictions on a partner's personal liability in the Jersey LLP does not apply to a partner's personal debts or business losses caused by his own default.¹⁷

For the creditors, the main protection is the £5m financial provision requirement, which must be surrendered upon registration of the LLP.¹⁸ The Law also provides the 'claw back mechanism' that any partner of the Jersey LLP who withdraws LLP property including profits at a time when the LLP is unable to pay its debts shall be personally liable for any debts or loss of the LLP equivalent to the amount of the withdrawal.¹⁹ A similar sanction is

11 Brazier, Q, *A Banker's Perspective in Limiting the Liability of Partners – Managing the Risk*, IBC Conference, London, 18 November 1996.

12 Morris, Phillip and Stevenson, Joanna, *The Jersey Limited Liability Partnership: A New Legal Vehicle for Professional Practice*, *The Modern Law Review*, July 1997 (Vol 60) at p 538.

13 *Ibid.*

14 Limited Liability Partnerships (Jersey) Law 1997 Art 9(2).

15 Limited Liability Partnerships (Jersey) Law 1997 Art 7(1) and (9).

16 Limited Liability Partnerships (Jersey) Law 1997 Art 5(1).

17 Limited Liability Partnerships (Jersey) Law 1997 Art 5(2)(b).

18 Limited Liability Partnerships (Jersey) Law 1997 Art 6(2)(a) and (9).

19 Limited Liability Partnerships (Jersey) Law 1997 Art 5(3).

applied if the partner withdraws LLP property during a period of six months preceding the time when the LLP becomes unable to pay its debts.²⁰ These restrictions mainly seek to prevent misappropriation of LLP property by the partners during or shortly before its insolvency.

Referring to the Jersey laws on LLPs, it is apparent that the LLP is more akin to partnerships rather than to a company, except for the attribute of being a legal entity which automatically bestows upon it the attributes similar to a company.

THE INCORPORATED LLP

The second type of LLP is the LLP with a body corporate status. Examples of this LLP are the UK and Singapore LLPs. An interesting feature of the second type of LLP is that although it has the status of a body corporate²¹ its internal regulation is governed by partners' agreement, which is akin to a partnership agreement.²² This means that the partners of an LLP may adopt any form of internal arrangement, which they prefer. Nonetheless, when it comes to external obligations, the LLP is subject to similar requirements applicable to companies such as reporting and disclosure requirements.²³

One important principle to be highlighted is that despite adopting the internal regulation, which is similar to a partnership, the UK LLP Act 2000 and the Singapore LLP Act 2005 clearly and expressly provide that partnership law is not applicable to the LLP²⁴ whilst company law is expressly (unless otherwise provided) applicable to the LLP.²⁵

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- 20 Limited Liability Partnerships (Jersey) Law 1997 Art 5(4).
 - 21 Limited Liability Partnerships (UK) Act 2000 s 1(3) and Limited Liability Partnerships (Singapore) Act 2005 s 4(1).
 - 22 Limited Liability Partnerships (UK) Act 2000 s 6 and Limited Liability Partnerships (Singapore) Act 2005 s 10(1) and (2).
 - 23 Limited Liability Partnerships (UK) Act 2000; in Singapore, the LLPs are only required to submit annual insolvency/solvency report but there is no obligation to lodge the audited account report to the Registrar; Limited Liability Partnerships (Singapore) Act 2005 ss 24 and 25.
 - 24 Limited Liability Partnerships (UK) Act 2000 s 1(5) and Limited Liability Partnerships (Singapore) Act 2005 s 6.
 - 25 Limited Liability Partnerships (UK) Act 2000 s 1(3) and Limited Liability Partnerships (Singapore) Act 2005 s 8.

Another interesting feature of the incorporated LLP is its tax status. Although it has the status of a body corporate and is subject to company law, the LLP is treated as a partnership for tax purposes.²⁶

The safeguard mechanism for the creditors in incorporated LLP is not in the financial provision upon registration but on the 'claw back mechanism' whereby upon winding up, past or present members of the LLP will be liable to contribute to the assets of the LLP in respect of any property withdrawn from the LLP within specified period preceding the commencement of the winding up, if it can be shown that at the time of the withdrawal, the LLP was insolvent.²⁷ This means, before making withdrawals, members need to be cautious of the possible consequences in the event of insolvency.²⁸ This restriction on withdrawals will act as an assurance to potential creditors that the assets shown in the published balance sheet will not be depleted.²⁹

OBSERVATION

Fascinating facts about the two types of LLPs is that although both are recognised as legal entities, the incorporated LLP has the status of a body corporate³⁰ whilst the other type of LLP is a legal entity which is not a body corporate.³¹ As such, the incorporated LLP is subject to company laws whilst the unincorporated LLP is not subject to company law.

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- 26 Limited Liability Partnerships (UK) Act 2000 s 10(1) and the Income and Corporation Taxes Act 1988 s 118ZA. See also Linda L Ng, *Singapore LLP: A Smart, Flexible Hybrid Vehicle*, Tax Notes International, 23 February 2009 at p 697. Singapore Income Tax Act s 36A; IRAS circular, 'Income Tax Treatment of Limited Liability Partnerships (LLPs)', first published on 15 July 2004, and revised on 16 July 2004, para 5 (IRAS circular on LLPs), available at http://www.iras.gov.sg/irasHome/uploadedFiles/Quick_Links/e-tax_Guides/Individuals_and_employees/2004it6.pdf; Singapore budget speech 2009, para E29, available at http://www.singaporebudget.gov.sg/speech_toc/downloads/index.html.
- 27 Insolvency Act (UK) 1986 s 214A as modified by the Limited Liability Partnerships Regulations 2001 and Limited Liability Partnerships (Singapore) Act 2005 Fifth Schedule at para 84(1)(b).
- 28 Saleem Sheikh, *Limited Liability Partnerships: A New Trading Vehicle*, International Company and Commercial Law Review, 1997, No 8 at pp 270-276.
- 29 *Ibid.*
- 30 Limited Liability Partnerships (UK) Act 2000 s 1(2), Limited Liability Partnerships (Singapore) 2005 s 4(1).
- 31 Limited Liability Partnerships (Jersey) Law 1997 Art 2(4).

There is also a difference in the safeguard mechanism. For example, in the Jersey LLP, the creditors have double protection through the 'financial provision requirement'³² and the 'claw back mechanism'³³ whilst in the incorporated LLP, the safeguard mechanism for the third parties is only the claw back mechanism.³⁴

There are also differences pertaining to reporting requirements. For example, in the Singapore LLP, there is a statutory duty to lodge the annual declaration of solvency/insolvency to the registrar³⁵ whilst in the Jersey LLP, there is no reporting requirement imposed.³⁶ Nonetheless, in both LLPs, there is no duty to submit audited accounts to the registrar though they are required to keep accounting and other records which are sufficient to indicate transactions and the financial position of the LLP so as to give a true and fair view of the state of affairs of the LLP.³⁷

As regards to limitation of liabilities, partners of both types of LLPs will not be held personally liable for any business debts incurred by the LLP.³⁸ However, the partners could be held liable for claims from losses resulting from their wrongful acts or omissions.³⁹

THE SINGAPORE LLP

Generally, the Singapore LLP is akin to the UK LLP. It has the status of a body corporate⁴⁰ and thus enjoys all the attributes of a company.⁴¹ In order to set up the LLP, the members are required to submit certain statements to the registrar.⁴² Different from the UK LLP Act 2000,⁴³ the

32 Limited Liability Partnerships (Jersey) Law 1997 Art 6(2)(a) and (9).

33 Limited Liability Partnerships (Jersey) Law 1997 Art 5(3) and (4).

34 Insolvency Act (UK) 1986 s 214A, Schedule Five; Schedule 1 of the Limited Liability Partnerships (Singapore) Act 2005 para 84.

35 Limited Liability Partnerships (Singapore) Act 2005 s 24.

36 Limited Liability Partnerships (Jersey) Law 1997; Arts 9 and 10.

37 Limited Liability Partnerships (Jersey) Law 1997 Art 9, Limited Liability Partnerships (Singapore) Act 2005 s 25(1).

38 Limited Liability Partnerships (Jersey) Law 1997 Art 5(1), Limited Liability Partnerships (Singapore) Act 2005 s 8(1) and (2).

39 Limited Liability Partnerships (UK) Act 2000 s 6(4), Limited Liability Partnerships (Singapore) Act 2005 s 8(3) and (4).

40 Limited Liability Partnerships (Singapore) Act 2005 s 4(1).

41 Separate legal personality: s 4(1) and 4(3); perpetual succession: s 4(2); right to sue and be sued: s 5(1)(a) and right to hold property: s 5(1)(b).

42 Limited Liability Partnerships (Singapore) Act 2005 s 15(1)(a)-(f).

43 See Limited Liability Partnerships (UK) Act 2000 s 2(b) and (c).

Singapore LLP Act 2005 does not require the submission of incorporation documents for registration⁴⁴ although the content of the incorporation documents of the UK LLP are generally similar to the required statement for registration of Singapore LLPs.⁴⁵ The procedures to register the LLP are generally similar to the procedures to register a company; for example, the reservation of a name and right of the registrar to refuse to register certain names. The only difference between the LLP and a company as regards to registration is the incorporation documents.

As regards internal management, the LLP adapted the flexibility of a partnership whereby the partners have the liberty to decide their duties and rights via the partners' agreement.⁴⁶ In the absence of the partners' agreement, the Act provides default rules which are generally similar to default rules of partnerships under the Partnership Act.⁴⁷ However, despite the freedom to decide the internal arrangement, the LLP Act expressly provides that the LLP must have at least one manager whose duties are akin to the company secretary.⁴⁸

Another important agenda which needs to be highlighted is the external regulation of the LLP as regards to relation with both the regulator and third parties. For the regulators, the LLP Act expressly states that the LLP has the statutory duty to submit annual declaration of solvency/insolvency.⁴⁹ The Act does not require submission of annual reports on accounts although the LLP has an express duty to keep records of accounts and other records which would sufficiently explain the transactions and financial position of the limited liability partnership and enable profit and loss accounts and balance sheets to be prepared from time to time which give a true and fair view of the state of affairs of the LLP.⁵⁰ Failure to perform this duty shall render the

44 Nonetheless, the Registrar may, in any particular case, require the statement referred to in 15(1)(a)-(f) to be verified in such manner as the Registrar considers fit; Limited Liability Partnerships (Singapore) Act 2005 s 15(2).

45 See the Limited Liability Partnerships (Singapore) Act 2005 s 15 and the Limited Liability Partnerships (UK) Act 2000 s 2.

46 First Schedule of the Limited Liability Partnerships (Singapore) Act 2005 s 10(1).

47 First Schedule of the Limited Liability Partnerships (Singapore) Act 2005 s 10(10)-(11).

48 Limited Liability Partnerships (Singapore) Act 2005 s 23(3).

49 Limited Liability Partnerships (Singapore) Act 2005 s 24.

50 Limited Liability Partnerships (Singapore) Act 2005 s 25.

LLP and every partner liable for prosecution and the penalty may be a fine or imprisonment, or both.⁵¹

For the creditors, the LLP Act provides 'clawback' mechanisms which provide that upon winding up, past or present members of the LLP will be liable to contribute to the assets of the LLP in respect of any property withdrawn from the LLP within three years preceding the commencement of the winding up, if it can be shown that at the time of the withdrawal, the LLP was insolvent.⁵²

Pertaining to partners liabilities, the LLP shall be solely liable for all obligations arising in contract, tort or otherwise, is solely the obligation of the limited liability partnership.⁵³ The partners shall not be personally liable, directly or indirectly, for obligations of the LLPs.⁵⁴ However, the shield of limited liability shall not affect the personal liability of a partner in tort for his own wrongful act or omission.⁵⁵ Nevertheless, in the circumstances where a partner of the LLPs is liable to any person (other than another partner of the limited liability partnership) as a result of a wrongful act or omission of his in the course of the business of the limited liability partnership or with its authority, the LLPs shall be liable to the same extent as the defaulting partner.⁵⁶ For criminal liability, only the culpable officers⁵⁷ shall be liable.⁵⁸

THE MALAYSIAN COMPANIES COMMISSION OF MALAYSIA CONSULTATIVE DOCUMENTS ON MALAYSIAN LLP (APRIL 2008)

The initiatives to introduce LLP in Malaysia could be traced back in 2003, when the CCM issued the initial consultative document ('CD') as an alternative business vehicle for small businesses and venture

51 Limited Liability Partnerships (Singapore) Act 2005 s 25.

52 Schedule Five and Schedule 1 of the Limited Liability Partnerships (Singapore) Act 2005 s 84.

53 Limited Liability Partnerships (Singapore) Act 2005 s 8(1).

54 Limited Liability Partnerships (Singapore) Act 2005 s 8(2).

55 Limited Liability Partnerships (Singapore) Act 2005 s 8(3).

56 Limited Liability Partnerships (Singapore) Act 2005 s 8(4).

57 A culpable officer provision shall apply, with the necessary modifications, to a limited liability partnership as if the reference in that provision to a director (or a person purporting to act as a director) were a reference to a partner or manager (or a person purporting to act as a partner or manager, as the case may be) of the limited liability partnership; Limited Liability Partnerships (Singapore) Act 2005 s 58(1).

58 See also Limited Liability Partnerships (Singapore) Act 2005 s 58(2).

capital arrangements.⁵⁹ The second CD was later issued in April 2008.⁶⁰ Different from the UK LLP, which was introduced to resolve the problem of increasing insurance claims for professional negligence of accounting firms,⁶¹ the Malaysian LLP proposed to stimulate growth of the SMEs and to enhance the domestic business activities.⁶² It also aimed to prepare the local market for the international business environment.⁶³

Referring to the 2008 CD, salient features of the proposed LLP is more akin to the incorporated LLP, whereby the LLP shall have the status of a body corporate⁶⁴ but be taxed as a partnership.⁶⁵ The CD highlighted important features of the proposed LLP:⁶⁶

- (1) limited liability for all members of the LLP but without the strict management procedures of an incorporated body;
- (2) perpetual succession of the LLP whereby changes in membership will not affect the legal entity of the LLP; and
- (3) flexibility in determining the internal arrangements between the members.

As the LLP was proposed to have the status of a body corporate, it would have all the attributes of a company, namely separate legal personality, limited liability, perpetual succession, the right to sue and be sued and to acquire its own property.⁶⁷ As regards to limited liability, the CD proposed that all partners of the LLP be entitled to unlimited liability in respect of tort and contractual claims against the LLP.⁶⁸ The conferment of limited liability status was to shelter the individual partners from the debts and liabilities of the LLP as well as personal liability from the acts of another partner, which were carried out during the course of business. However, such power would not insulate a partner of the LLP, which he would otherwise incur by his own wrongful act or omission, even though such acts were carried

59 SSM CD on Limited Liability Partnerships, April 2008 at p 6.

60 SSM CD on Limited Liability Partnerships, April 2008 at p 6.

61 Faber, Diana, *The Law Commission Review of the Law of Partnership*, Butterworths, *Journal of International Banking and Financial Law*, 1997 at p 242.

62 CD on Limited Liability Partnerships, April 2008 at p 8.

63 *Ibid.*

64 SSM CD on Limited Liability Partnerships, April 2008 at p 12.

65 SSM CD on Limited Liability Partnerships, April 2008 at p 65.

66 SSM CD on Limited Liability Partnerships, April 2008 at p 6.

67 See s 16(5) of the Companies Act 1965.

68 SSM CD on Limited Liability Partnerships, April 2008 at pp 28-29.

out in his role as a partner of the LLP.⁶⁹ It was also proposed that limited liability would be given to innocent partners only whilst the defaulting partner was jointly liable with the LLP for the damage, loss or injury suffered by a third party.⁷⁰ In the event that the LLP became insolvent, a partner's liability would be limited to the amount of his capital contribution to the LLP subsisting at the time.⁷¹

Pertaining to the attributes of perpetual succession and rights to enter legal proceedings, the CD did not include any further discussion. A viable explanation for this probably lies in the fact that as these attributes are inherent attributes of a body corporate, it shall also be inherent attributes of the proposed LLP (due to its status as a body corporate). In the Singapore LLP Act 2005, the attributes of perpetual succession⁷² and rights to enter into legal proceedings⁷³ are expressly stated.

In the CD, there are discussions on the right of the LLP to create charges and debentures.⁷⁴ On this matter, the respondents and CCM agreed that as the proposed LLP has a legal personality, it should be allowed to raise capital or create charges over its assets.⁷⁵

Other than the attributes, it is important to highlight that similar to other LLPs, registration is required for the proposed LLP.⁷⁶ However, the partners' agreement is not required to be lodged with the Registrar.⁷⁷ As for the number of members, the CD proposed for the minimum number to be two and there shall be no maximum number.⁷⁸ It was also stated that when the number of partners fell to below two, a certain grace period would be allowed for the LLP to operate.⁷⁹ Failure to fulfill the minimum requirement after the grace period meant that the LLP would be wound up.⁸⁰ Membership of the proposed LLP was to be open to both natural and artificial persons.

69 SSM CD on Limited Liability Partnerships, April 2008 at p 12. Refer to the House of Lords judgment in *Williams & Anor v Natural Life Health Foods Ltd & Anor* [1998] 1 WLR 830 for the justifications.

70 SSM CD on Limited Liability Partnerships, April 2008 at p 28.

71 SSM CD on Limited Liability Partnerships, April 2008 at p 30.

72 Limited Liability Partnerships (Singapore) Act 2005; s 4(2)

73 Limited Liability Partnerships (Singapore) Act 2005; s 5(1)(a)

74 SSM CD on Limited Liability Partnerships, April 2008 at p 38.

75 SSM CD on Limited Liability Partnerships, April 2008 at p 38.

76 SSM CD on Limited Liability Partnerships, April 2008 at p 16.

77 SSM CD on Limited Liability Partnerships, April 2008 at p 16.

78 SSM CD on Limited Liability Partnerships, April 2008 at p 20.

79 SSM CD on Limited Liability Partnerships, April 2008 at p 20.

80 SSM CD on Limited Liability Partnerships, April 2008 at p 20.

The CD also highlighted the need to have a designated compliance officer who must be a natural person residing in Malaysia.⁸¹ The job scope of the designated compliance officer was akin to a company secretary.⁸² Different from the UK and Jersey LLP, the CCM proposed that the designated officer should not necessarily be a partner of the LLP but shall be subjected to disqualification requirements/criteria under ss 125, 130 and 130A of the Companies Act 1965.⁸³

As regards to internal arrangement, the CCM proposed to adopt the UK's approach whereby the members should have all the rights to draft the LLP internal regulation.⁸⁴ However, default rules would be included in the proposed LLP Act, so that in the absence of the partners' agreement, the default rules would be applicable.

Pertaining to relation with the third parties, partners of the proposed LLP shall only be agents to the LLP and not to one another.⁸⁵ The LLP shall be responsible for any act of the partners, which are committed within the partners' authority. However, the CCM highlighted that to avoid unnecessary confusion on whether a person is a partner and the liability of retiring partner, the doctrine of constructive notice should not be applicable where transactions with third party is concerned.⁸⁶ The proposed LLP Act shall resolve these issues by providing provisions to bind the LLP on acts done by its partners as long as they have authority.⁸⁷ The CD also states that any limitation on the authority of partners, which are stated in the partners' agreement, will not prejudice the third party.⁸⁸

As regard to protection of creditors, the CD proposed that there should be a claw-back provision requiring contributions from partners and former partners who had withdrawn any property from the LLP within a stipulated time frame of the commencement of the winding up, if it can be shown that the LLP was insolvent at the time of withdrawal or that the member(s) knew or had reasonable grounds

81 SSM CD on Limited Liability Partnerships, April 2008 at p 26.

82 SSM CD on Limited Liability Partnerships, April 2008 at p 26.

83 SSM CD on Limited Liability Partnerships, April 2008 at p 27.

84 SSM CD on Limited Liability Partnerships, April 2008 at p 36.

85 SSM Consultative Document on Limited Liability Partnerships, April 2008 at p 31.

86 SSM Consultative Document on Limited Liability Partnerships, April 2008 at p 33.

87 SSM Consultative Document on Limited Liability Partnerships, April 2008 at p 34.

88 SSM Consultative Document on Limited Liability Partnerships, April 2008 at pp 33-34.

for believing that the LLP was, or would not be able to pay its debts.⁸⁹ The respondents were also of the view that an appropriate time-frame should be provided to ensure fairness to both creditors and partners of the LLP. It is also proposed that this claw-back provision should be limited only to the amount withdrawn by the partner or former partner of the LLP.⁹⁰

OBSERVATION

It is observed that the LLP proposed by CCM is more akin to the corporate structure, with the status of a body corporate, formal registration requirement, the juristic personality, the attributes and methods of dissolution. Comparing the LLP to a partnership, it is seen that the most significant difference between the two would be that the LLP is recognised as a legal entity and therefore inherits all the attributes of a juristic person whereas a partnership is not a legal entity. On the other hand, the most significant difference between LLP and a company lies in the internal regulation whereby partners in LLP have flexible arrangement in deciding how their internal management should be regulated.

Another obvious difference between a LLP and a partnership is the application of the agency rule. In LLP, partners are only agents to the LLP, whilst in partnerships, partners are agents to both the firm and other partners. There is no dual agency relationship in a LLP. This principle is important as it manages to resolve problems caused by the unlimited liability regime. When partners are only liable for their own actions and not for other partners' action, it is obvious that the scope of partners' liability is reduced. They are only liable for their own action/default and not for other partners' default. To make things better, if the default of the partners was committed within their authority, the LLP will bear the consequences, as it is the principal. Whereas in partnerships, any default committed either by a partner or all partners, results in all partners being liable as the firm is not separated from them and all the partners are collectively, the principal.

The LLP also marked a difference in the requirement of legal existence. In general partnerships, partners could set up their firm without registering the business. As long as the partners fulfill all the elements of partnerships, namely relations between persons carrying on business in common, a partnership could validly be carried on.

89 SSM CD on Limited Liability Partnerships, April 2008 at pp 40-44.

90 SSM CD on Limited Liability Partnerships, April 2008 at pp 40-44.

Whereas for the LLP, the law is clear that registration is a condition for existence although the procedures are not as complicated as registering a company.

Albeit all the differences, there are also some similarities between the proposed LLP and the existing partnership structures. In both structures, the partners' agreement is important in regulating the internal relation. The tax scheme is also similar for both LLPs and partnerships, in that partners are taxed based on their income and not on the business.

CONCLUSION

There shall be no conclusion for this paper at this moment as the proposed LLP still has a long journey to go before it can materialise. The legislative process and the long queue of other proposed legislations mean that the proposed LLP may not be available until a few years to come. Nonetheless, it is strongly hoped that the proposed LLP would be available soon as Malaysia needs to enhance its market to attract more business and investment. Singapore enacted its LLP Act in 2005 and in 2007, passed the Limited Partnerships Act, which allows another interesting business structure, known as limited partnerships to be carried out in the country. It is believed that the more options we provide in the local market, the more attractive it would be, to attract businesses, both local and international.