Nevis entertains amendments to its Business Corporations, LLC and Insurance Ordinances

By David S. Neufeld, Esq., Attorney,
The Law Office of David Neufeld, New Jersey USA
and Jan Dash, Esq., Liburd & Dash, Nevis[1]

The island of Nevis in the Caribbean, part of the nation of Saint Kitts-Nevis, while physically small, casts a long shadow in the world of international business and trust legislation. It has long boasted some of the most sophisticated and forward looking laws in the world, going back to its international business corporations law, the Nevis Business Corporation Ordinance (NBCO), which was enacted in 1984. This law was followed over the years by the Nevis Limited Liability Company Ordinance, (NLLCO), the Nevis International Exempt Trust Ordinance (NIETO), the Nevis Offshore Banking Ordinance and the Nevis International Insurance Ordinance (NIIO) and most recently, the Multiform Foundation Ordinance (MFO). Many of these laws have been welcomed and extensively utilised by practitioners around the globe.

But tempus fugit - time marches on. In some instances there have been new legal interpretations that take provisions of the law into new, unanticipated directions. In other cases, new legal planning or commercial needs develop that help further define the need for improvements in the law, accordingly laws need to change as well. That is what Nevis is currently contemplating. The Nevis government is currently considering proposals to amend the NBCO, the NLLCO and the NIIO. This article is a glimpse into these proposals which, if enacted generally as proposed, should be online early in 2013.

Segregated series LLCs

As series limited liability companies (LLCs) have taken hold primarily with the impetus provided by Delaware in the US, the Nevis government determined that its highly regarded NLLCO would benefit from a face lift that, among other things, integrates the series concept. With the already robust LLC law, this would further cement Nevis' reputation in the pantheon of business friendly jurisdictions.

Segregated series, which will also be available within the NBCO, are today standard arrows in the quiver of many real estate, securities and insurance businesses, but certainly not limited to those areas. It permits businesses to segregate risks and assets among isolated sleeves without the need to separately incorporate each segment. The flexibility and cost-effectiveness are significant motivators. Once enacted, a business can utilise a Nevis business corporation (NBC) or Nevis limited liability company (NLLC) to shield various business lines and assets from liabilities incurred by other business lines and assets. Furthermore each sleeve will be able to have its own ownership, management and rules of operation and distributions.

Captive insurance protected cells

One commercial area that has seen the value of segregated series has been the casualty insurance industry, with particular emphasis on captive insurance companies. Through a complex interplay of the proposed amendments to the NBCO and NLLCO, along with proposed amendments to the NIIO, risk managers and businesses around the world will be able to create what has come to be known in some jurisdictions as series business units (SBUs). The amended NIIO will provide that insurance risks may be segregated into sleeves currently

known as statutory funds. While these statutory funds provide some degree of risk segregation, overlaying the series NLLC or series NBC lends a significantly higher and more dependable level of confidence that liabilities from one set of risks will not bleed over to other assets of the insurance company or of other statutory funds.

This proposed format will permit a variety of captive insurance and other insurance structures, including that of the sponsored captive insurer that will be able to offer specified SBUs or protected cells to individual companies or pooled groups, while offering other SBUs organised within the same insurer to other individual companies or pooled groups, providing risk financing at costs otherwise unattainable not to mention coverage that might not otherwise be available at any cost. When considered in light of the relatively lower government fees and capital requirements these solutions will be an inevitable option for most businesses seeking efficient risk financing and management. Those US interests seeking to qualify as small insurers and obtain the tax benefits provided under Internal Revenue Code, Section 831(b) will find this structure even more attractive.

Other changes

There are other proposed changes. These include

- an amendment that would confirm that the "mind and management" of an NBC or NLLC would be in Nevis, if a director, who may be a natural or corporate person, is either resident or registered on island, which could assist in the onshore tax analysis of the entity;
- a provision clarifying that the NLLC may have a single member (as was always the case but not clearly apparent to some);
- clarification on how certain filings may be made and other mechanical improvements, including provisions dealing with filings in non-English characters;
- provisions ensuring the protection of confidential information; and
- changes to the NLLCO to improve its charging order provision and addition of a fraudulent conveyance provision, borrowing from the NIETO, discussed below.

Charging orders

Since inception, when the NLLCO was one of the first, if not the first, limited liability company law of its kind, anywhere in the world, including the United States, to provide specifically that a creditor of the member of an LLC will have no recourse to LLC assets other than through a charging order, the NLLC was not just a pre-eminent business vehicle but also among very few asset protection tools at the top of almost everyone's list.

A charging order is an order issued by a court that, stated very simply, orders the management of a company to send distributions that would otherwise go to a member to instead send them to the member's creditor. While in many jurisdictions it is generally one of several possible remedies available to a creditor attempting to collect on a claim, the NLLCO has always provided that this remedy is the sole remedy, notwithstanding any other remedy that might be available. However, with recent developments in case law and other developments giving some practitioners concerns about the strength of these protections without more, changes appeared to be necessary, if only to quell such concerns. For instance, in In *re LaHood,* 437 B.R. 330 (Bankr. Ct. D. Ill. 2010), the United States Bankruptcy Court interpreted the interplay between the Illinois LLC Act's provision that the charging order is the exclusive remedy and other procedural collection provisions of that state and determined that a lien may be imposed notwithstanding the exclusivity language. In *re Modanlo,* 412 B.R. 715 (Bankr. Ct. D. Md, 2007) the court permitted alternative remedies because of the unique nature of a single member LLC as distinguished from a multi-member LLC (i.e. that there are no other members to be harmed by a lien or foreclosure), effectively ignoring the exclusivity language of the Delaware law under which the LLC was formed.

Accordingly the amendments would extend the charging order exclusivity to a variety of situations previously thought to be already excluded by current law, including the specific application to single member LLCs. Other changes would include the requirement that punitive damages be ignored, that interests may be redeemed and that the debtor never stands in the shoes of the creditor. This will be covered by an article discussing those provisions in depth.

Fraudulent conveyance

Another major amendment would be the addition of a fraudulent conveyance rule to the NLLCO. Fraudulent conveyance is, again stated very simply, a transfer of property by someone who is or will inevitably become a debtor where that transfer makes the transferor insolvent or otherwise unable to satisfy those existing or reasonably foreseeable debts. The classic situation is the transfer of the bulk of one's assets to an irrevocable trust for the benefit of family members without receiving equal value in return whilst facing a money judgment. When the NLLCO was initially enacted it was generally understood that the transfer of assets to a company in exchange for a company interest did not invoke the same factual inhibition on collection or self-inflicted insolvency. However there is a concern that there may be certain legal developments that would make it less clear that the courts will view such a transfer to a company as different from a transfer to a trust, particularly when the company has characteristics which inhibit collection, such as the charging order provisions.

In the context of transfers to a Nevis international trust, the NIETO provides that, among other things, the intent to defraud by transferring property to a trust must be proven beyond reasonable doubt, that it rendered the transferor insolvent, that the intent may not be imputed under certain circumstances, and that any action must be brought within a two year period following the accrual of the cause of action. In as much as the law in some jurisdictions seems to be analogising LLCs to trusts in this context, it would seem appropriate to adapt the fraudulent conveyance language from the NIETO to the NLLCO to define similarly the rights of judgment creditors and debtors where the debtor or potential debtor makes a transfer to a NLLC in exchange for a company interest. Thus analogous provisions are proposed to be added to the NLLCO.

Summary

Once enacted as proposed, these amendments to Nevis' quiver of laws will further reinforce Nevis as among the few jurisdictions of choice when it comes to company and insurance structures.

END NOTES:

1. *David S. Neufeld, J.D., LL.M., is an attorney in Princeton New Jersey and the draftsman of the proposed amendments to the NLLCO, NBCO and NIIO that is the subject of this article, as well as the NLLCO itself in 1995. Jan Dash, J.D., is an attorney with the law firm of Liburd & Dash in Nevis and worked with Mr. Neufeld in developing parts of these proposed amendments.*

Corporate Migration to Nevis
November 2010, Issue 211
ARCHIVE LINK offshoreinvestment.com/archive