Nevis – An Evolving IFC

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THE ISLAND OF NEVIS in the Caribbean, has long boasted some of the most sophisticated and innovative international financial services laws in the world. The island's laws include: the Nevis Business Corporation Ordinance, 1984, as amended (the 'NBCO'); the Nevis Limited Liability Company Ordinance, 1995, as amended (the 'NLLCO'); the Nevis International Exempt Trust Ordinance, 1994, as amended (the 'NIETO'); and the Nevis International Insurance Ordinance, as amended, 2004 (the 'NIIO'). All of these laws and several others have been welcomed and have been extensively utilised by practitioners around the globe.

In an effort to keep up with changes in the law, commercial realities and to allow different types of planning, Nevis' Government is currently considering proposals to amend the NBCO, the NLLCO and the NIIO. These proposals include: allowing companies and corporations to segregate their different business interests; enabling captive insurance companies ('captives') to have segregated business units; strengthening the charging order provision of the NLLCO; and adding a fraudulent conveyance provision to the NLLCO.

Segregated Companies and Corporations

The segregated company concept enables companies to have 'series' also known as 'protected cells' which would permit businesses to segregate risks and assets among isolated sleeves in a cost-effective manner without the need to separately incorporate each segment. Once enacted, a business can utilise a single Nevis business corporation ('NBC') or a single Nevis limited liability company ('NLLC') to shield various business lines and assets from debts and liabilities incurred by other business lines and assets. Each series may have its own ownership, management and rules of operation and distributions.

Captive Insurance Company Series Business Units

With the proposed amendments to the NBCO, NLLCO and NIIO, risk managers and businesses around the world will be able to create series business units ('SBUs'). The amended NIIO will provide that insurance risks may be segregated into series 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 other statutory funds.

This proposed format will permit a variety of captives and other insurance structures, including managed insurers, to offer specified SBUs 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.

Charging Orders

Since inception, the NLLCO provided specifically that a creditor of the member of a NLLC will have no recourse to a company's assets other than through a charging order. A charging order is a court order which requires the managers to send distributions that would otherwise go to a member, to the member's creditor. While in many jurisdictions, it is one of several possible remedies available to a creditor attempting to collect on a claim, the NLLCO has always provided that this is the sole remedy. However, recent developments in case law has given some practitioners concerns about the strength of this protection, and changes appear to be necessary to quell such concerns. The amendments would explicitly extend the charging order exclusivity to single member NLLCs, prevent the imposition of punitive damages being ignored, permit the redemption of a member's interests, and prohibit the debtor from acquiring the complete membership rights of the creditor.

Fraudulent Conveyance

Another major amendment would adapt the fraudulent conveyance rule from the NIETO to the NLLCO. Fraudulent conveyance is a transfer of property by someone who is or will become a debtor, where that transfer makes the transferor insolvent. When the NLLCO was initially enacted it was generally understood that the transfer of assets to a company in exchange for an interest in a company did not invoke the same factual inhibition on collection or self-inflicted insolvency. There is now a concern that there may be certain legal developments that would make it less clear that 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.

The NIETO provides that, the intent to defraud a creditor by transferring property to a Nevis trust must be proven beyond a reasonable doubt, that it rendered the transferor insolvent, and that any action must be brought within a two-year period following the accrual of the cause of action. Inasmuch as the law in some jurisdictions analogise limited liability companies to trusts in this context, it is appropriate to adapt the fraudulent conveyance language from the NIETO to the NLLCO to similarly define 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. ■