

The Nevis Limited Liability Company Ordinance: Registration of Charges and Creditors

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The Nevis Limited Liability Company Ordinance 2017 (the Ordinance), unlike its 1995 predecessor as amended, makes provisions that affect how security interest is undertaken with respect to Nevis limited liability companies (LLCs). First, there is an express option for placing a charge on a Nevis LLC's shares and/or its property. Historically, it was always possible to place various forms of security over the assets of a Nevis LLC, particularly via the Conveyancing and Law of Property Act,¹ which deals with all forms of property including shares and real estate not registered pursuant to the Title by Registration Act,² and with some even voluntarily registering security interest in the public registries.³ The legislatures have now deemed it appropriate to make provision in the Ordinance to address security interest, which raises the question – is it fit for purpose, particularly as it relates to creditors?

The term 'charge' is defined in the Ordinance as “any instrument which creates a security interest over a limited liability company's shares or property, whether fixed or floating, wherever situated, and any variation of such instrument, which is created after the effective date of this Ordinance, but not an interest arising by operation of law”. A 'chargee' is said to mean “a person who holds a charge over the interest or property of a limited liability company,” and a 'chargor' means “the member of a limited liability company who pledges their interest or property in a limited liability company as security for a debt owed to a chargee”. Consequently, there is no restriction on the form of security interest that can be placed on the shares or property of a Nevis LLC, which leaves the security landscape for creditors and debtors wide open for business, and innovative business when using a Nevis LLC. That flexibility is essential, as the Ordinance permits security products to be tailored in unique forms alongside conventional forms of secured transactions. Let's focus on the process for creating a charge under the Ordinance. While the legislation is flexible, there are peculiarities that must be followed when creating a charge.

Any instrument in writing may be used to create a charge on a Nevis LLC.⁴ Charges must be done with the authority of the Nevis LLC or its members. The charge must clearly indicate between the parties an intention to create a charge, the amount secured by the charge, and how the interest and fees on the charge will be calculated – those details are critical to ensure that future chargees and other stakeholders doing business with a Nevis LLC are aware of the nature and details of an existing encumbrance on a Nevis LLC. The governing law provision of a charge is salient, as that provision is used to determine whether a charge is valid, enforceable and binding. The governing law for a charge is the law agreed to between the parties and expressly stated in the charge, and is taken as being binding for both parties. If the governing law is not expressly stated in the charge,

¹ Chapter 10.04 of the 2009 Revised Laws of St. Christopher and Nevis

² Chapter 10.19 of the 2009 Revised Laws of St. Christopher and Nevis

³ The Ordinance uses the terminology “earlier charge” to reference any instrument creating a security interest over a Nevis LLC prior to the 2017 Ordinance. The Title by Registration also made provision for using property situate in Nevis as security.

⁴ Only written instruments are accepted as charges: Section 35 of the Ordinance

the governing law of the charge will be the laws of St. Kitts and Nevis. The peculiarities or requirements to create a charge, pursuant to the charge's governing law, must be satisfied since it means that, if 'jurisdiction A' is the governing law of the charge, all steps that must be taken for a charge to be legally valid, enforceable and binding in jurisdiction A must be complied with, failing which, the charge will be nothing more than a simple contract – if deemed a contract at all. The governing law is also used to determine the remedies available in relation to a charge, however, at all times, the rights between a chargor and a chargee as members of a Nevis LLC are governed by the Nevis LLC's operating agreement, its articles of organisation and the Ordinance. Notably, if the governing law is St. Kitts and Nevis, the Ordinance prescribes the following remedies on a 'chargor' defaulting as being immediately available to a 'chargee', though it does not restrict remedies to merely those stated and it does make provision for parties to exclude remedies of their choosing. The remedies in the Ordinance are set out in Section 35(4), which provides as follows :

- “(a) subject to any limitations to the contrary in the terms of the charge, the right to sell or transfer the interest or property; and
- (b) the right to appoint a receiver who, subject to any limitations to the contrary in the terms of the charge, may until such time as the charge is discharged:
 - (i) vote the interest or property;
 - (ii) receive distributions in respect of the interest or property; and
 - (iii) exercise other rights and powers of the chargor in respect of the interest or property.”

The remedies prescribed in the Ordinance can be utilised without notice to a defaulting 'chargor', which means that practitioners should follow best business practices and notify defaulting parties of the steps being taken, or that were taken on defaulting. Notably, the failure to exercise a right, remedy or delay does not operate as a waiver of a right or remedy. Being able to pursue a 'remedy as of right' gives creditors greater enforcement power on a Nevis LLC's security interest, which makes doing business with a Nevis LLC more attractive.

The registration of a charge is not mandatory, but given that it affects the ability to enforce a charge, it is necessary that all charges be registered and copies of all charges must be maintained at the registered office of the Nevis LLC. Registered charges are prioritised based on the date of registration unless chargees of a Nevis LLC expressly consent in writing to forego their priority ranking. Additionally, only registered charges shall be received as evidence in any legal action before the High Court. To register a charge, an application must be lodged through a registered agent in order for the charge to be registered with the Registrar of Companies using Form 36 as prescribed in the Regulations⁵ to the Ordinance. All charges filed must be done within three months of its execution. On registration, the Registrar of Companies issues a Certificate of Registration, which details the date and time of registration of the charge and which stands as conclusive proof that the requirements for registration have been complied with. Furthermore, all variations to a charge must be registered, though there is no indication in the Ordinance of what happens to the validity and/or enforceability of a variation of a charge that is not registered. The better position will always be for a chargee to take the necessary steps for the variation to the charge to be registered, noting what is done on the initial registration of a charge, and how registration affects priority ranking and enforcement. With respect to priority ranking, the legislation addresses

⁵ Nevis Limited Liability Company (Forms and Fees) Regulations No. 3 2017

charges that were created prior to the 2017 Ordinance and indicates that steps may be taken for those charges to be registered in accordance with the 2017 Ordinance. If not done, the priority of those charges will be in accordance with the prior legislation.⁶

On satisfaction of a charge, the chargee of a Nevis LLC has the option of filing a ‘satisfaction of the registered charge’. Though filing a satisfaction is not mandatory, it is always best for the public record to reflect the true affairs of the company, and as such, all Nevis LLCs should ensure that satisfactions are lodged.

The crafting of a specific language to address charges is a welcomed feature to the Nevis LLC product and works to the advantage of creditors keen on doing business with a potential debtor (using a Nevis LLC). The new language eliminates uncertainty relating to charges, including registration of charges, and increases the likelihood that encumbrances on a Nevis LLC’s interest and property are found on a search of that entity at the Companies registry. Further, clarifying the priority ranking of charges makes enforcement easier for creditors (when there are competing creditors) as this is not left to be determined by a judicial officer. Likewise, the remedies that can be utilised without reverting to the Court also empower creditors. The Ordinance is therefore esteemed to be fit for purpose insofar as it relates to charges and will surely make the use of Nevis LLCs seeking financing more appealing and competitive.

⁶ Under the prior legislation, priority was established based on the date of creation. However, the problem with that position was always that, there was no public record of various charges (unless a voluntary filing was done), which made it difficult to use a Nevis LLC to do business.