BERMUDA LLCs: A NEW ENTITY IN A FAMILIAR FORM

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Bermuda’s Limited Liability Company Act 2016 (the Bermuda LLC Act) came into force on 1 October 2016. The legislation provides for the formation and operation of limited liability companies (LLCs), which will be familiar to those with experience of Delaware LLCs. Bermuda is now one of a small number of offshore jurisdictions offering LLCs.

The Bermuda LLC Act provides for a new form of legal entity which can be used for any lawful business or activity, including trading, asset holding, financing and investment. Except as specifically provided otherwise in the LLC agreement, a Bermuda LLC will have the capacity and power of a natural person and authority to engage in any activities in connection with the business of the LLC.

A Bermuda LLC, like its Delaware counterpart, is a hybrid entity combining characteristics of a limited partnership and a corporation. The limited liability company concept was first developed in the United States, where it has become one of the most common forms of business entity, due to its flexibility and ease of operation. The central provisions of the Bermuda LLC Act were closely modelled on the corresponding provisions of the Delaware LLC legislation, so that Bermuda LLCs will look, feel and operate much like Delaware LLCs.

A Bermuda LLC is, like a corporation, a separate legal entity and its members have limited liability. However, in common with a partnership, the affairs of a Bermuda LLC are governed by an agreement, rather than by statutorily mandated constitutional documents. This provides great flexibility, as the Bermuda LLC Act, like its Delaware counterpart, expressly provides that it is to be construed to give maximum effect to the principle of freedom of contract in relation to LLC agreements – thus allowing the LLC agreement to fully reflect the parties’ intentions and eliminate many of the formal constraints applicable to corporations.

The Bermuda LLC Act provides that the debts, obligations and liabilities of a Bermuda LLC, whether arising in contract, tort or otherwise, are solely the debts, obligations and liabilities of the LLC, and no manager or member of the LLC is obligated personally for the LLC’s debts, obligations or liabilities solely by reason of being a member or a manager of the LLC.

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A Bermuda LLC is formed by filing a Certificate of Formation with the Bermuda Registrar of Companies. The Certificate of Formation must include the name of the LLC and its registered office in Bermuda. The Certificate of Formation may be amended or corrected by similarly filing a Certificate of Amendment or Certificate of Correction respectively. Such certificates will be effective at the time of filing or at any later time specified in the certificate.
Members are admitted on the formation of the LLC or later in accordance with the LLC agreement. Members may be admitted and receive an LLC interest without any obligation to make a contribution to the LLC or may be admitted without acquiring an LLC interest. LLC interests may be assigned in whole or in part, except as provided in the LLC agreement, and members may grant security over their LLC interests. LLC interests may also be acquired by the LLC by purchase, redemption or otherwise.

Unlike corporations and limited partnerships, Bermuda LLCs are not required to have a separation of ownership and management and can be managed by their members, so there is no need for a board of directors or a general partner. Alternatively, one or more non-member managers can be appointed if that is what the parties desire.

The LLC agreement can provide great flexibility in regulating the relationship between the members, including rules for voting and governance and the basis for distributions and for allocating profits and losses. The LLC agreement can grant voting rights to all or some members or managers or to any specified class or group of members or managers on a per capita, number, financial interest, class, group or any other basis and may provide that any member or class or group of members shall have no voting rights. Member resolutions may be passed by written consents signed by members holding the necessary number of votes.

The profits and losses of a Bermuda LLC are allocated, and distributions made, among members and among classes and groups of members in the manner provided in the LLC agreement or, if the agreement is silent, on the basis of the agreed value of contributions. A Bermuda LLC may not make distributions if there are reasonable grounds to believe that the LLC would, after payment of the distribution, be unable to pay its liabilities as they become due. A member who receives a distribution when the LLC is insolvent, without knowledge of such insolvency, will not be liable to the LLC for the amount of the distribution.

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Substantial flexibility also exists in relation to the extent of the duties of members and managers to the Bermuda LLC and to each other. The Bermuda LLC Act provides that any such duties (including fiduciary duties) that would otherwise exist at law or in equity may be expanded, restricted or even eliminated by the LLC agreement (except that fraud and dishonesty cannot be permitted). Bermuda LLCs also have a broad power to indemnify members and managers (except in respect of their fraud or dishonesty) and the Bermuda LLC Act expressly permits members and managers to vote in their own self-interest.

A Bermuda LLC is bound by and entitled to enforce the LLC agreement whether or not the LLC agreement is signed by the LLC. Members, managers and assignees of LLC interests are also bound by and entitled to enforce the terms of the LLC agreement. The LLC agreement may provide for specified penalties or consequences against any non-performing member, including the subordination, reduction, forced sale or forfeiture of the defaulting member’s LLC interest.

Any security interest over the assets of a Bermuda LLC can be registered in Bermuda, and such registration will ensure priority under Bermuda law over any unregistered and any subsequently registered security interests, regardless of the date of creation. This provides important certainty to lenders.

As for fundamental changes, Bermuda LLCs are extremely flexible. They are able to (i) merge or amalgamate with other Bermuda LLCs; (ii) merge or amalgamate with foreign entities; (iii) discontinue from Bermuda and continue in another jurisdiction; (iv) convert to Bermuda limited partnerships with separate legal personality and (v) convert to Bermuda corporations. In addition, such limited partnerships and corporations can convert to Bermuda LLCs, and foreign LLCs can move to Bermuda by continuing as Bermuda LLCs.

There is a defined regime in the Bermuda LLC Act for winding up and dissolving Bermuda LLCs based on the well understood corresponding regime for Bermuda corporations. A Bermuda LLC will be wound up voluntarily upon the determination of the members, the expiration of the period fixed for its duration in its LLC agreement or the occurrence of an event specified in its LLC agreement.

The Bermuda LLC is a flexible commercial vehicle designed to enable parties to more easily reflect their commercial agreement in the entity’s constitution. This is achieved by providing primacy to the principle of freedom of contract. Bermuda’s legal framework also allows for the ease of administration and efficient operation of Bermuda LLCs.

Drawing closely on the corresponding legislation in Delaware, the Bermuda LLC Act provides for LLCs in a form that will already be familiar to many. Although Bermuda’s legislation is new, it comes with the provenance of a tried and tested model.