

STRUCTURING THE MANAGEMENT OF AN LLC

by Max Tetlow

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Limited Liability Companies (LLCs) are a relatively new corporate vehicle in Bermuda, having been introduced by the Limited Liability Company Act 2016 (LLC Act).

LLCs differ from their often mistakenly equated namesake, companies limited by shares (Companies) -- which are generally incorporated pursuant to the Companies Act 1981 (Companies Act) -- in that LLCs are effectively a hybrid between partnerships and Companies that offer the flexibility of a partnership within a corporate vehicle.

The LLC Act provides that the members of an LLC must enter into an LLC agreement (LLC Agreement), which can be highly bespoke and which governs the business and affairs of the LLC.

Today, I am going to highlight one example of the flexibility offered that has already started to gain attention among industry stakeholders, namely that the management of LLCs can be structured so as to accommodate the commercial intentions and practical considerations for which each LLC is formed. Some of the more striking examples are explored below.

An LLC can be incorporated by an individual member (similar to a shareholder of a Company) who is also responsible for the management of the LLC (which, in the context of a Company, would typically be vested in the board of directors). Such member management structure is the default position under the LLC Act. This arrangement allows for the member to utilise a separate legal entity and benefit from the consequential limitation of liability afforded to an 'owner' by a corporate structure, while also being involved in the day-to-day control of the LLC. In the event of multiple members, the LLC Agreement can specify how the members can, together, manage the business of the LLC in a way not dissimilar from a traditional partnership.

Noting the default statutory position described above, that management of an LLC is vested in its members, the LLC Act provides that an LLC Agreement can modify this arrangement, allowing for the management of an LLC to be vested in one or more managers who are responsible for the management of the LLC. Further, the LLC Agreement may set out the extent to which management is delegated to such managers (in whole or in part) allowing for members to retain control in certain, previously agreed, circumstances.

In the context of a joint venture, each member may wish to be entitled to appoint a manager (akin to having a seat on the board in a Company). Unlike the Companies Act, the LLC Act allows for a manager's duties, including fiduciary duties, to be expanded, constrained or eliminated (with the exception of permitting fraud or dishonesty). Subject to complying with the irreducible core of duties that cannot be eliminated, this would allow for a manager to act with a view to the best interests of its appointing member, rather than in the best interests of the LLC as a whole. This is not possible in the context of a Company where directors must act in the best interest of the Company and not favour the interests of one member/shareholder over another. One can certainly envisage a situation where an investor, having made a significant investment into a project, wants to be sure their interests will be adequately protected.

If desired, the LLC Agreement can alternatively create a management structure akin to that of a conventional Company. As such, a slate of managers would be appointed by a vote of the members and would be afforded the capacity to manage the business (in the same way that a board of directors would in a Company). As with a Company, provisions could be made to include a combination of executive and independent managers if so desired.

The flexibility offered by an LLC is present in other areas beyond the way in which its affairs are managed and such flexibility is certainly a key factor when choosing a vehicle. An LLC does well in offering contractual plasticity above that which would be found in a Company thus avoiding a "one size fits all" approach. It does so while also providing the comfort of a separate legal entity with limited liability absent from some partnership structures and which many investors and counterparties value.

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