

CHAPTER FOURTEEN

NEVIS

14.1 GENERAL

14.1.1 LOCATION AND ACCESSIBILITY

Nevis is a 36 square mile island in the Caribbean; its capital is Charlestown. The island is located 250 miles southeast of Puerto Rico, 30 miles west of Antigua and 2 miles south of its sister island of St. Christopher (better known as St. Kitts). Nevis is four hours behind London time and 1 hour ahead of New York time. The Island does not observe Daylight Savings Time. The renovation of Vance Amory International Airport has recently been completed and regional carriers provide daily access from St. Kitts, Antigua, St. Maarten-St. Martin and Puerto Rico. There is also sea ferry service to St. Kitts which provides a breathtaking view of the coastlines of both islands.

14.1.2 BACKGROUND AND LEGAL SYSTEMS

The island is almost circular, with a cloud capped 3,232 foot mountain called Nevis Peak rising in its center. It was sighted by Christopher Columbus on his second voyage in 1493. He mistakenly thought that the clouds surrounding Nevis Peak was snow and named the island, "Nuestra Senora de Las Nieves", which translates to "Our Lady of Snows". Originally settled by the British in 1628, the island was conquered by the Spanish, Dutch and French before being returned to the Britain in 1728. In 1983, Nevis, along with St. Kitts achieved independence from Britain, and the two islands constitute a sovereign Federation within the British Commonwealth.

The political structure for St. Kitts-Nevis is based on the Westminster Parliamentary system; however, Nevis has a certain level of autonomy as it has its own laws, Parliament and Premier. There is a High Court in St. Kitts-Nevis, from which appeals are taken to the Eastern Caribbean Supreme Court in St. Lucia, with final appeals to the Privy Council in London.

Tourism is the major source of revenue for Nevis. There are several resorts on the island and is the home to Four Seasons Nevis, the only five star hotel in the Caribbean. A growing sector of the economy is offshore financial services, as several banks, trust companies, asset management firms have established offices on Nevis. The official currency is the Eastern Caribbean Dollar (EC\$), which is shared by eight other Territories in the region. The EC\$ is pegged to the US Dollar (US\$) at a rate of EC\$2.70 to US\$1.00. The US\$ is also widely accepted and exchangeable throughout the island.

English is the official language of the island. The population is approximately 10,000, mostly the descendants of African slaves. Nevisians enjoy a literacy rate of 98%, the highest in the Western hemisphere. The island is quite noteworthy historically as it was the birthplace of Alexander Hamilton, a signatory to America's Declaration of Independence.

14.2 TRUST LAW

14.2.1 Development

The basis for the trust law of Nevis is a codification of English common law trust principles.

14.2.2 LEGISLATION

The main Nevis legislation relating to Trusts is the Nevis International Exempt Trust Ordinance 1994, (As Amended) (NIETO). The law was enacted to provide fiduciaries with a progressive trust statute which incorporated modern concepts to allow international clients to place assets in trust for estate planning purposes, and to provide protection against the claims of third parties.

14.2.3 TYPES OF TRUSTS AND THEIR USES

The NIETO allows the establishment of International Trusts for Beneficiaries, which can also provide spendthrift protection. The legislation also provides for the creation of Purpose Trusts, both Charitable and non-Charitable.

International Trust

Under S. 2 NIETO, a Trust will qualify as an International Trust and will thus be exempt from all forms of Nevis taxation and exchange controls if it satisfies the following three criteria:

- At least one of the Trustees is either a licensed Nevis Trust Company or a Company incorporated under the Nevis Business Corporation Ordinance (NBCO); and
- The Settlor and Beneficiaries are at all times non-residents of Nevis; and

- The assets do not include any land situated in Nevis or St. Kitts.

Spendthrift Trusts

Under S 6(1) NIETO, the terms of an International Trust may make the interest of a Beneficiary subject to termination or diminution in the event that he becomes insolvent, or if his property becomes liable to seizure, or sequestration by his creditors.

If such an event occurs, under S. 6(2) NIETO, the Trustees shall at their discretion pay income to the Beneficiary until such event terminates. They shall also appoint any spouse or child of the Beneficiary to receive the assets. If no such person exists, the assets will be divided amongst all those persons entitled under the law of Nevis to receive the estate as if the Beneficiary had died intestate while domiciled in Nevis.

S. 6 (4) NIETO provides that a Settlor may establish a spendthrift trust for which he is a Beneficiary.

Purpose Trusts

A Purpose Trust is not one which holds assets for the benefit of Beneficiaries, but has purposes for which assets are to be applied. Under S. 5 NIETO, a Purpose Trust may exist in perpetuity.

Non-Charitable Purpose Trusts

A Trust can be created for non-charitable purposes under S. 8 NIETO, if its purposes are "...specific, reasonable and capable of fulfillment" and not "...immoral, unlawful or contrary to public policy". All non-charitable trusts must have a Protector, to ensure that the Trustees fulfill their duties. The Deed must also provide for the successor to the Protector.

Charitable Purpose Trusts

Under S. 7(1) NIETO, a Charitable Trust may be established to assist the following purposes:

- the relief of poverty; or
- the advancement of education; or
- the advancement of religion; or
- the protection of the environment; or
- the advancement of human rights and fundamental freedoms; and
- any other purposes which are beneficial to the community.

A purpose will not be recognized a charitable one unless fulfillment of that purpose is for the benefit of the community or a substantial section thereof. There

is no requirement that any charitable purposes must be carried out exclusively in Nevis.

Under S. 11(2) NIETO, the common law doctrine of “cy-pres” has been codified. If a purpose cannot be fulfilled because of impossibility or impracticability, the Court, upon applications by the Trustee, may approve any arrangement which varies or revokes the purposes or terms of the Trust.

Qualified Foreign Trusts

Under S. 37(3) NIETO, where a Trust provides for the governing law to be that of a jurisdiction other than Nevis, an application shall be made to the Registrar of International Trusts within 45 days of the Trust’s creation.

14.2.4 CREDITOR PROTECTION

Under S. 24(1) NIETO, a creditor seeking to set aside an International Trust or a transfer thereto, has to establish two burdens of proof, both “beyond reasonable doubt”. The creditor must first prove that the Trust was established or the transfer was made with the principal intent to defraud. The creditor must also prove that the Trust’s establishment or funding left the Settlor insolvent or without property by which that creditor’s claim, if successful could have been satisfied.

S. 24(1)(b) NIETO provides that if a creditor is successful in such an action, the entire transfer will not be undone, but only that portion which is sufficient to satisfy that particular creditor. Such liability shall only extend to the interest that the Settlor had in the property prior to the Trust’s establishment or the disposition, and any subsequent accumulation thereto.

If the fair market value of the Settlor’s property immediately after the transfer exceeds the claim of the creditor, under S. 24(2) NIETO, the transfer will not be deemed to have been made with the intention of defrauding the creditor.

Under S. 24(5), the following factors alone are insufficient to impute that an intention to defraud a creditor:

- an International Trust has been created or property was transferred thereto within two years of the accrual of a creditor’s cause of action; or
- the Settlor is also a Beneficiary; or
- the Settlor has the power to revoke, amend or receive benefit from the Trust, has the power to appoint or direct a Trustee or Protector;

S. 24(3) NIETO states that an International Trust settled or established or a disposition thereto shall not be regarded as an act of fraud against a creditor, if:

- the establishment or the disposition to the Trust takes place more than two years from the date on which the creditor's cause of action accrued; or
- the establishment or disposition takes place before the expiration of two years from the date on which the creditor's cause of action accrued, and the creditor fails to commence an action before the expiration of one year from the date of establishment or disposition.

Under S. 44(1) NIETO, an action to set aside the establishment of a Trust or any disposition thereto, must be commenced in the High Court of St. Kitts-Nevis within two years of the date the trust was settled or the disposition took place.

S. 55 NIETO stipulates that before any creditor may commence an action, he must deposit with the Nevis Ministry of Finance, a US\$25,000.00 bond from a Nevis financial institution, in order to cover costs.

14.3 PROPER LAW OF A TRUST

14.3.1 CHOICE OF PROPER LAW

Under S. 4(1) NIETO, an International Trust or a severable aspect of the Trust may have as its proper law, the law of Nevis or that of any other jurisdiction. If no proper law is expressed in the Deed, the Trust will have as its proper law that law with which the Trust had its closest connection at the time of creation. In determining the proper law, S. 4(2) NIETO states that reference shall be made to;

- the place of administration of the Trust designated by the Settlor; or
- the status of the assets of the Trust; or
- the place of residence or business of the Trustee; or
- the objects of the Trust and the places where they are to be fulfilled.

14.3.2 REQUIREMENTS TO GIVE PROPER EFFECT TO THE CHOICE OF LAW

To give effect to the choice of law, a statement must be included in the Deed to the effect that the Trust will be governed by the laws of Nevis or that of any other jurisdiction. Depending on its choice of law, the Trust must then be registered as an International Trust or a Qualified Foreign Trust. Only the name of Trust, the Trustees and the Registered Office need be revealed.

14.3.3 EFFECT OF CHOICE OF PROPER LAW

The proper law that applies to the Trust will determine the validity, interpretation, effect, administration or a severable aspect of the Trust.

14.3.4 CHANGING THE PROPER LAW

Under S. 4(4) NIETO, an International Trust may, if its terms allow, change either its proper law or the law governing a severable aspect from one jurisdiction to that of another.

Under S. 4(5) NIETO, where the proper law of an International Trust or a severable aspect, is changed from the law of another jurisdiction to the law of Nevis, no provision of the law of the prior jurisdiction shall operate so as to render the Trust void.

Under S. 4(6) NIETO, where the proper law of an International Trust or a severable aspect, is changed from the law of Nevis to that of another jurisdiction, no provision of the law of Nevis shall operate so as to render the Trust void.

14.3.5 FOREIGN LAWS - CONFLICT

S. 29 NIETO excludes the enforceability of all foreign laws if those laws are inconsistent with those of Nevis. S. 28 provides that judgments obtained in a foreign jurisdiction are not enforceable as against an International Trust, the Settlor, Trustee, Protector or Beneficiary of an International Trust.

14.3.6 HAGUE CONVENTION ON TRUSTS

The Hague Convention of 1st July 1985 on the Law Applicable to Trusts and on their Recognition has not been signed or ratified by Nevis or the Federation of St. Kitts-Nevis.

14.4 CREATION OF A TRUST

14.4.1 SETTLING OF A TRUST

An International Trust may be created under the NIETO either orally or in writing and may be established either *inter vivos* or by a testamentary disposition.

14.4.2 TRUST PROPERTY

14.4.2.1 What Property May be Settled on a Trust

S. 2 NIETO provides that any property, of any description, wherever situated, whether the rights to such property are contingent or vested, may be held in an International Trust. The legislation excludes real property located in Nevis or St. Kitts from being held in an International Trust.

14.4.2.2 Initial Settlement and Subsequent Additions to the Trust

As required by the common law, there must be an initial corpus, and there must be assets held in trust throughout the existence of the trust. Under the NIETO, there is no requirement that a minimum amount of property be placed in a trust at its inception or added to the Trust's corpus at any time during its existence.

14.4.3 Duration and Termination of a Trust

The maximum duration of an International Trust is 100 years as per S. 5 (1) NIETO. An International Trust shall terminate on the centenary of its creation unless it is terminated sooner.

The Rule against Perpetuities does not apply to Charitable and non-Charitable Purpose Trusts created under the NIETO. Such Trusts may therefore continue in perpetuity.

14.4.4 BENEFICIARIES

14.4.4.1 Definition

Under S. 2 NIETO, a Beneficiary is a person who is entitled to benefit under the terms of a Trust. Such person may be living or ascertainable at the time of the creation of the Trust. The Settlor or a Trustee may also be a Beneficiary.

14.4.4.2 Appointment

The terms of the Trust may provide for the addition of a person as a Beneficiary under S. 32(2) NIETO.

14.4.4.3 Removal

There is no provision in the NIETO for the removal of a person as a Beneficiary of a Trust. Such a provision would need to be addressed by the Trust Deed.

14.4.4.4 Exclusion

The terms of the Trust may also provide for the exclusion of certain persons or classes of persons as Beneficiaries of a Trust under S. 32(2) NIETO.

14.4.4.5 Rights of Beneficiaries

Under S. 13 NIETO, the rule in the English case, *Saunders v. Vautier*, (1841) 49 E.R. 282, has been codified. The Beneficiaries may require the Trustee to terminate the Trust and distribute the assets as they direct where all of the Beneficiaries are:

- in existence; and
- of majority; and
- not under a legal disability.

The Beneficiaries also have common law rights to an accounting of Trust assets, to

require the Trustees to administer the Trust in accordance with its terms and to comply with their duties.

14.4.4.6 Liabilities of Beneficiaries

S. 32(3) NIETO provides that the terms of the Trust may impose upon on a Beneficiary an obligation as a condition for benefit.

14.4.4.7 Failure of interest

When an interest lapses, or a Trust terminates, or there is no Beneficiary and no person who may become a Beneficiary unless the terms of the Trust provide otherwise, under S. 10 NIETO, the interest or property concerned shall be held by the Trustee in trust for the Settlor absolutely, or if he is dead, as if it had formed part of his estate at death.

14.4.5 TRUSTEES

14.4.5.1 Definition

Under S. 53 NIETO, a Trustee is defined as a natural person or a body corporate which holds property on trust for the benefit of a Beneficiary or for a valid purpose, other than to benefit the Trustee.

14.4.5.2 Qualification - Number

S. 53 NIETO also provides that there may be more than one Trustee. Under S. 34 NIETO, a Trust which was established for Beneficiaries, the maximum number of Trustees is four, but a Trust which was established for a purpose, an unlimited number of Trustees are allowed. For all Trusts, under S. 2, at least one of the Trustees must either be a Trust Company licensed to do business in Nevis or a Company formed under the NBCO.

14.4.5.3 Appointment

Under S. 35(1) NIETO, unless the terms of the Trust Deed provide otherwise, the following persons may appoint further Trustees;

- the Protector; or
- the remaining Trustees; or
- the personal representative or liquidator of the last remaining Trustee; or
- the Court, if there is no such person existing or is willing to act.

14.4.5.4 Retirement

There is no provision in the NIETO with regard to the procedures which govern the retirement of a Trustee. Such procedures would need to be specified in the Trust Deed. In the absence of such provision, any Trustee wishing to retire, should probably make a written request to the person who has the power to appoint new or additional Trustees, or make an application to the Court.

14.4.5.5 Removal

Under S. 35(3) any Trustee having the power to appoint a new Trustee, and fails to exercise such power may be removed from office by the Court.

14.4.5.6 Powers

The NIETO sets out by way of Schedule, the list of Authorized Trustee Investments. It should be noted that the Schedule does not, however, include shares in private Companies. The Trust Deed should specify that the Trustee has the power to make such investments; otherwise the Trust cannot hold such shares.

Under S. 35(1) NIETO, unless it is specified by the Deed, the Trustee has the power to appoint new or additional Trustees. With the exception of this power, there are no provisions in the NIETO with regard to the Trustee's powers. Any powers to be held by the Trustee would need to be specified in the Trust Deed.

14.4.5.7 Duties

The Trustee has fiduciary duties to the Beneficiaries or the purpose for which the Trust was created; as such the Trustee is bound to act in good faith and exercise care and skill in making decisions.

14.4.5.8 Liabilities

If the Trust's assets diminish due to a breach of trust, the Trustee has a duty to make good the loss and any profit to the Trust, as if the breach had not taken place.

14.4.5.9 Indemnities

Under S. 17 NIETO, a Beneficiary may relieve a Trustee of liability for breach of trust, if:

- the Beneficiary is of majority and not under a legal disability; and
- has full knowledge of all of the material facts; and
- the Beneficiary was not improperly induced by the Trustee.

Under S. 18 the Court may relieve the Trustee for breach of trust if it is determined that the Trustee acted "...honestly and reasonably".

14.4.5.10 Remuneration

There is no provision in the NIETO with regard to Trustee remuneration; as such a Trustee shall be entitled to charge a fee in accordance with express provisions in the Trust Deed. The Trustee should ensure that they have the right to demand a raise depending on market conditions, changes in legislation, responsibilities or an increase in the value of assets held.

14.4.6 Protector

14.4.6.1 Definition

Under S. 2 NIETO, a Protector is defined as a natural person or a body corporate

capable of directing the Trustees in matters relating to the Trust.

14.4.6.2 Qualification - Number

Under S. 9(3) NIETO, the Protector of an International Trust may also be a Settlor, Trustee or Beneficiary. There may be more than one Protector. In the case of multiple Protectors, unless the terms of the Trust provide otherwise, they must act by majority decision. To avoid the possibility of conflict of interest and to ensure proficiency in the position, a Protector should be an independent third party professional having knowledge in the Trust legislation of Nevis and expertise in trust administration.

14.4.6.3 Appointment

The terms of an International Trust may provide for the office of Protector under S. 9(1) NIETO. The terms of a non-Charitable Purpose Trust must provide for the appointment of a Protector and any successor under S. 8(1)(c).

14.4.6.4 Retirement, Removal and Succession

Subject to the terms of the trust, a Protector may be removed at any time. In order that a non-Charitable Purpose Trust will not be left without a Protector, the Trust Deed must contain provisions for the appointment of a successor Protector under S. 8(1)(c) NIETO.

14.4.6.5 Powers

Under S. 9(2) NIETO, unless the terms of the Trust provide otherwise, the Protector shall have the power to remove and to appoint additional or new Trustees. Any other powers must be specified by the terms of the Trust.

14.4.6.6 Duties

Subject to the terms of the Trust, under S. 9(5) NIETO, a Protector shall owe a fiduciary duty to the Beneficiaries or the purpose for which the Trust was created.

14.4.6.7 Liability

The Protector shall not be regarded as a Trustee under S. 9(4) NIETO, but will have fiduciary duties depending on the terms of the Trust.

14.4.6.8 Remuneration

There is no provision in the NIETO with regard to the Protector's remuneration; as such a Protector shall be entitled to charge a fee in accordance with express provisions in the Trust Deed. The Protector should ensure that they have the right to demand a raise depending on market conditions, changes in legislation, responsibilities or an increase in the value of assets held.

14.4.7 TRUST DEED

14.4.7.1 Essential Contents to Constitute a Valid Trust

With regard to a Trust for Beneficiaries, as provided by the common law, the “three certainties” must exist. The Settlor must display an intention to create a trust, and the trust property and the persons intended to be Beneficiaries must be identified.

A Trust can be created for non-charitable purposes under S. 8 NIETO, if its purposes are “...specific, reasonable and capable of fulfillment” and not “...immoral, unlawful or contrary to public policy”. All non-charitable purpose trusts must have a Protector.

Under S. 7(2), a Trust may be created for a charitable purpose, if the fulfillment of that purpose is for the benefit of the community or a substantial section thereof. See further requirements for charitable purpose trusts in Clause 14.2.3 above.

14.4.7.2 Invalid - Unenforceable Trusts

Under S. 3 NIETO, an International Trust will be valid even if it may be invalid according to the laws of a Settlor’s domicile. A Trust will be invalid if it seeks to do anything contrary to the laws of St. Kitts-Nevis, or if the assets are the proceeds of a crime for which the Settlor was convicted.

Under S. 23(1) NIETO, the Court may declare a Trust invalid, if:

- the Trust was created by duress, mistake, undue influence or misrepresentation, or
- the Trust is immoral or contrary to public policy; or
- its terms are uncertain so as to render performance impossible; or
- the Settlor was at the time of creation incapable of creating a Trust.

Where an International Trust is created with dual purposes, one lawful and another unlawful, if those two purposes can be separated, S. 23(2) provides that the Court may declare that the Trust is valid as to the lawful purpose.

14.4.7.3 Amending a Trust

There is no provision in the NIETO for the amendment of a Trust. Any such right and the procedures for implementing that right must be specified in the Trust Deed. S. 47(b) provides that an International Trust shall not be declared invalid if the Settlor retains the right to amend the Trust.

14.4.7.4 Letter of Wishes

This is a correspondence addressed from the Settlor to the Trustees providing suggestions as to how they should exercise their powers. Although this memorandum has no legal effect, the Trustee does use it for guidance in the

administration of the Trust. There is no provision under the NIETO regarding a Letter of Wishes.

14.4.8 FORMALITIES

14.4.8.1 Signature

There is no provision in the NIETO as to the formalities which must be followed to ensure due execution of a Trust Deed. It is suggested that the signature of the Settlor should be affixed to the Deed either in the presence of two attesting witnesses or in the presence of a Notary.

14.4.8.2 Stamp Duty

Under S. 43 NIETO, an International Trust shall be exempt from Stamp Duty with respect to all instruments relating to the assets or to actions of the Trustee.

14.4.8.2 Registration

Under S. 37 NIETO, all International Trusts and qualified foreign Trusts must be registered with the Registrar of International Trusts. Only the name of the Trust, the Trustees and the Registered Office need be revealed. As required by S. 38, a Certificate must be submitted annually from; a Trust Company, Barrister or Solicitor confirming that the Trust is an International Trust or a qualified foreign Trust, the name of the Trust and its Registered Office. In the case of a qualified foreign Trust, the law under which the Trust was settled must be specified. The Trustee must notify the Registrar when an International Trust terminates as per S. 39 NIETO. The Registrar collects a fee in the amount of US\$225.00 upon initial registration of the Trust and an annual renewal fee in the amount of US\$220.00.

14.5 ADMINISTRATION

14.5.1 GENERAL MANAGEMENT OF THE TRUST

The terms of a Trust may provide that its administration may be governed by the laws of a jurisdiction other than in Nevis under S. 4(3) NIETO.

14.5.2 DISTRIBUTIONS FROM THE TRUST

As provided by Trust law principles, the Trustee is under a strict duty to distribute assets in accordance with the Trust Deed. Failure to follow the requirements of the Deed, will leave the Trustee liable to the possibility of action being taken against him by the Beneficiaries or Protector, for breach of trust.

Under S. 12 NIETO, on termination of the Trust, the Trustee shall pay any liabilities and shall distribute all remaining assets within a reasonable time.

14.5.3 TRUSTEE MEETINGS AND RESOLUTIONS

Although not addressed by the NIETO, Annual Meetings and Resolutions are advisable. If either the Trustee or Protector is Corporations, such actions would be required as a matter of corporate law.

14.5.4 EMPLOYING AGENTS

There is no provision in the NIETO for the employment of an Agent by the Trustee. Any terms regarding the employment and remuneration of Agents should be determined by the Trust Deed.

14.5.5 CHANGE OF ADMINISTRATORS

Unless stated in the Trust Deed, the change of Trustees would be determined by S. 35(1) NIETO. Under this Section; the Protector, the remaining Trustees, the personal representative or liquidator of the last remaining Trustee or the Court is none of these persons are willing or able to act.

It is suggested that the Protector should have the power to remove and appoint the Trustee. Concomitant with that power, the Protector should also have the power to change the governing law of the Trust and the power to change the forum of administration.

14.6 TAXATION AND FISCAL REGULATIONS

Under S. 43 NIETO, an International Trust is exempt from:

- all income tax; and
- all taxes payable by reason of death; and
- Stamp Duty with respect to all instruments relating to the assets or to actions of the Trustee
- all exchange controls.

14.7 CONFIDENTIALITY AND NON-DISCLOSURE

The name of the Trust, the Trustees and the Registered Office must be registered with the Registrar of International Trusts, together with a statement certifying that the Trust conforms with the provisions of the NIETO. The Deed itself is not filed with the Registrar, and remains a private document thus ensuring confidentiality of the names of the Settlor and Beneficiaries. Beyond the common law requirement for Trustees to render accounts of their activities to the Beneficiaries of the trust, there is no requirement under the NIETO to disclose any financial information about the Trust. The Protector, if one has been appointed does not

have the right to any information; any such rights must be determined by the Trust Deed.

14.8 STATUTES

Nevis International Exempt Trust Ordinance 1994 (As Amended).

We would like to thank Attorney Jan Alex Dash from Liburd and Dash, Nevis (www.LiburdDash.com), for his assistance in preparing this chapter.