



Guide to
Cell Companies
in Jersey

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PREFACE

This Guide explains the concept of the cell company which culminated in the inclusion of the Companies (Amendment No. 8) (Jersey) Law 2005 of Part 18D of the Companies (Jersey) Law 1991. It describes various insurance and non-insurance applications of the cell company before providing a commentary in relation to the major sections of Part 18D of the Companies (Jersey) Law 1991.

All references in this Guide to “pounds” or “£” are to Sterling.

It is recognised that this Guide will not completely answer the detailed questions that clients and their advisers may have. It is intended to provide a sketch of Jersey’s legal and regulatory environment in relation to cell companies. The Guide is, therefore, designed as a starting-point for a more detailed and comprehensive discussion of the issues.

Whilst we have made every effort to ensure the accuracy of the statements made herein, we accept no liability for any errors. In all cases expert legal advice from a qualified practitioner of Jersey law should be obtained.

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Introduction

The Companies (Amendment No. 8) (Jersey) Law 2005 came into force on 1 February 2006 permitting the creation of Jersey cell companies by amendment of the Companies (Jersey) Law 1991 (the “Law”).

A cell (in some jurisdictions described as a “segregated account” or “segregated portfolio”) is an account containing assets and liabilities that are legally separated from the assets and liabilities of the company’s ordinary account, called its “general account” and also separate from such company’s other cells (if any).

Two types of cell company are permitted under the Law, the protected cell company (“PCC”) and the incorporated cell company (“ICC”). Each is a corporate vehicle and, whilst the concept of PCCs (or their equivalent) is not new to offshore jurisdictions, each are innovative flexible structures that are widely used in financial transactions.

The PCC is a single legal entity that attributes its assets and liabilities either to the protected cell company itself or to the individual cells it creates. The assets and liabilities of the protected cell company and those attributed to its cells are “ring-fenced” from each other. As a result, the cells will be self-dependent, such that only the assets of a particular cell may be applied to the liabilities of that cell, i.e. the protected cell takes the concept of limited liability to a micro-level. The effect of this statutory division is to protect the assets of one cell from the liabilities of other cells.

For example, where contractual dealings of a PCC are attributable to protected cells maintained on the company’s books, a creditor under those contractual dealings will have restricted recourse, and will be entitled to make their recoveries, only as against assets attributed and credited to the specific cells to which the contract is also attributed. Accordingly, such creditor will not be legally entitled to make recovery against assets attributed and credited to other cells of the PCC, or (save to the extent otherwise provided in any relevant contract) against the general assets, being those assets which have not been attributed and credited to any cell of the PCC.

Therefore the statutory divisions between cells and the PCC does not create separate bodies corporate, but rather achieve within a single company what could otherwise be achieved, for example, by incorporating subsidiaries or by using complex contractual and trust structures.

The ICC, however, is a new vehicle and a further development of the PCC concept. Each cell of an ICC is itself an individual incorporated company which can hold assets and incur liabilities in its own name without contamination of or by the assets and liabilities of another cell. The rights of the shareholders in such cells are fettered in that cells, although individual companies, cannot act independently of the incorporated cell company that created them. It is expected that the combination of the umbrella of the incorporated cell company and the separate legal personality of each individual cell will prove extremely attractive to investors seeking segregation of assets and liabilities within one vehicle whilst allowing those jurisdictions unfamiliar with the PCC concept to recognise and respect such segregation.

The legislation governing PCCs and ICCs in Jersey is therefore designed to give certainty to investors and parties transacting with both PCCs and ICCs.

A PCC or ICC may be used for a variety of insurance purposes, including rent-a-captives, life and annuity companies, transformer vehicles, as well as financial guarantee, securitisation and derivatives structures and special purpose vehicles, not to mention numerous uses in the mutual and hedge fund industries.

Jersey’s legislation therefore provides details on the practical aspects of cell companies and substantive (as opposed to procedural) statutory provisions. Creditors in particular can see that cell companies are being properly established, with a comprehensive legal structure to deal with the segregation of cell assets and the

insolvency of a cell. For many business models and arrangements it is the comprehensive statutory framework, coupled with the underlying contractual base that will provide a level of comfort in respect of the segregation of assets.

All references to statutory provisions are to the relevant Articles (“Article”) of the Law, unless otherwise stated.

1. Applications

a. Advantages of the PCC Concept

Part 18D of the Law has several advantages over traditional routes to creating legal divisions between cells; it is less expensive and less unwieldy than forming numerous subsidiaries and it avoids the need for explicit limited recourse provisions in contracts with third parties and the issues associated with such provisions (though such provisions may be retained as an added reinforcement). Most importantly, Part 18D of the Law establishes substantive law governing the application of particular assets in favour of particular cells and their respective liabilities. In this regard, it is believed that the new substantive provisions will significantly enhance the prospects for enforceability of transactions in jurisdictions where the assets of a particular protected cell might be situated, and furthermore, the extent to which procedural as well as substantive law provisions may bind third parties.

b. Range of Applications

The Law represents a major opportunity for many international businesses. Prospective non-insurance uses include “master-feeder”, umbrella or other mutual fund structures, providing for multiple classes of shares and multiple investment options, property development companies, e-commerce companies, ship and aircraft (or fleet) owning companies, non-insurance securitisation and derivatives transactions, replacement for operating subsidiaries or divisions of any company, facilitation of product line or geographic segmentation, temporal segregation and a variety of trust company arrangements. The list could easily go on and is bounded only by the imagination and creativity of clients and their professional advisors.

Insurance applications, fund applications as well as some of the other potential applications are considered below.

i. Funds

In the field of investment funds, traditionally the need to have efficient structures whereby investors could access different trading strategies or other differential features through a single vehicle led to the development of ‘multi class’ and ‘umbrella’ funds. In the case of a corporate multi-class fund there is typically a single entity offering various classes of shares designated according to, say, the intended investment strategy with ‘pools’ or portfolios of assets relating to that strategy expressed to be attributable to a relevant particular share class.

In the event of the winding up of a multi-class fund, however, the segregation breaks down with distributions being made in the liquidation to creditors generally and there is also the possibility of a creditor attaching an asset without regard to its attribution to a particular class in the fund. Properly organised corporate umbrella funds involving a feeder fund with subsidiary trading entities address this problem of ‘cross-class liability’ and achieve the desired segregation of assets but with the cost and complication of a group structure.

The cell company legislation therefore provides an attractive alternative and gives the cell

company, through a single legal entity, the ability to operate in a way analogous to a corporate group comprising parent and subsidiaries.

ii. Capital Markets and Securitisation Transactions

In capital markets and securitisation transactions, the ability to limit recourse of a creditor holding a particular class or series of the issuer company's debt securities to specific underlying assets in an efficient way, through use of segregated portfolios, is attractive.

iii. Companies Owning Real Estate, Ships, Aircraft or Other Assets

Traditionally, certain businesses holding multiple assets e.g. real estate, ships or aircraft companies are structured such that within the group a separate subsidiary company is used to hold individual (or groups of individual) underlying assets. A cell company, however, may provide a more efficient and economic alternative where each asset is owned by a separate segregated portfolio.

iv. Business Divisions

Similar considerations may apply where a business is operated on the basis of several discrete divisions within a single company or group.

In certain cases an SPC may be a convenient and effective structure for joint venture arrangements, for example, where a particular party to the venture is to retain effective indirect ownership of a given asset or income stream within the joint venture structure.

v. Ring-fencing in Special Cases

There are potential applications for PCCs in the context of corporate rehabilitation and reorganization. For example, where there are multiple parties participating in a rescue of a business in financial difficulty it may be appropriate for them to do so with the benefit of liability segregation which can be efficiently achieved through a PCC.

vi. Trust Applications

Employee benefit schemes and other arrangements where a trust might otherwise be used lend themselves to the idea of a PCC structure.

Where a trustee operates numerous trusts for unrelated beneficiaries the assets and liabilities of each trust are already legally separated. Nevertheless, at least for administrative purposes, it may be appropriate to reinforce the division between the assets and liabilities of each trust, and between those and the trustee's own assets and liabilities, by using a PCC as the trustee. Special licensing as a trustee company may also be required in addition to registration as a PCC.

vii. Insurance

PCCs may be used for a variety of insurance purposes including rent-a-captives, life and annuity companies, transformer vehicles, as well as financial guarantee, securitisation and derivatives structures, and special purpose vehicles.

2. Registration Under the Law

a. Application Procedure

Cell companies are established in the same manner as conventional companies (please see Part 2 of the Law and the ‘Guide to Companies in Jersey’ which is available from the Appleby website). A company will be an ICC if its memorandum of association provides for this (Article 3I(1)) and similarly will be a PCC if the memorandum of association so provides (Article 3I(2)).

Any cell company used to carry out a regulated activity will be required to comply with the Island’s regulatory framework and the requirements of the Jersey Financial Services Commission.

A cell company may, by special resolution, resolve to apply to the Registrar of Companies (the “Registrar”) to create one or more cells of the company (Article 127YA(1)). The Special Resolution must assign the cell a name and adopt a memorandum and articles of association of the cell including all the information required by the Law in respect of the memorandum of a conventional company and pursuant to Article 127YB of the Law (eg. events that would trigger the winding up and dissolution of a cell; whether the cell may create shares of par or no par value shares or guarantee member(s); and how the Articles of the cell may be amended, e.g. by a manner set out in those Articles or by special resolution of both the cell and the company of which it is a cell). There will also be an implied provision in the articles that a cell may not own shares in its cell company and, subject to a contrary intention expressed in the articles, a provision that a cell may own shares in any other cell of its cell company (Article 127YB(3)).

Application to the Registrar to create a cell must be the cell to which the resolution relates. The special resolution must be filed with the Registrar within 21 days in accordance with Article 100 of the Law.

b. Creation and Registration of Cells

Subject to Article 127YC of the Law, the provisions of the Law that apply to companies (see Part 2 of the Law) apply to cells and cell companies.

If the Registrar is satisfied that all the requirements of the Law in respect of the registration of the cell company have been complied with, the Registrar shall issue a certificate of recognition or incorporation in relation to the protected or incorporated cell, as the case may be. Accordingly, the cell of a PCC is created on the date specified in the certificate of recognition and the cell of an ICC is a company from the date specified in the certificate of incorporation.

Once a cell company is incorporated, however, there are special procedures that apply in order for it to amend its memorandum or articles of association for it to cease to be a cell company, or for it to convert from an ICC to a PCC or from a PCC to an ICC. Likewise a company which intends to alter its memorandum and articles of association to provide for it to be a cell company should follow the procedures set out in Article 127YM of the Law. Such an alteration may only be authorised by:

- a sanction by the Court as an arrangement in accordance with Article 125;
- the unanimous consent of the creditors and members of the company; or
- if the unanimous consent of the creditors cannot be obtained, the alteration is authorised by a special resolution of the company and is sanctioned by the Court on it being satisfied that no creditor will be materially prejudiced by the alteration.

Where a company seeks to change its status by one of the above methods, the company must deliver to the Registrar a copy of the special resolution altering the memorandum and the (cell) company's name (see below at 2.c) together with satisfactory evidence that the requirements of the above procedures have been met. The Registrar will then issue a certificate of incorporation (Article 127YM(3)).

Where an entity is incorporated outside of Jersey and redomiciles (or continues) to Jersey, then that entity may, with the approval of the Jersey Financial Services Commission (the "Commission") and in accordance with the above provisions, continue as a cell company in accordance with Part 18C and the change of status will have effect on the issue of the certificate of continuance (Articles 127YM(6) and (7)).

c. The Nature of Cells

Articles 127 YD(1) and 127YD(3) of the Law provide respectively provide that the cell of an ICC is a company within the meaning of the Law and the cell of a PCC is to be treated as a company for the purposes of applying the Law, except that a cell of a PCC is not a body corporate and has no legal identity separate from that of its cell company (Article 127YP(1)). Furthermore, a cell of a PCC is not a subsidiary or wholly owned subsidiary of the company (Article 127YD(5)).

Cell companies may be public or private companies, with limited or unlimited liability (Article 3I(3)). Just like a company, a cell company may issue par value shares, no par value shares or have guarantee members. Unlike a conventional company with a share capital, however, which may issue only par value shares or no par value shares (but not both), a cell company may issue par value shares in respect of one cell and no par value shares in respect of another (Article 127YB(2) and see also 6. below).

The name of an ICC must end in the words "Incorporated Cell Company" or "ICC" or, in the case of a PCC, end with the words "Protected Cell Company" or "PCC". A cell company must assign a distinctive name to each of its cells that distinguishes the cell from any other cell of the company and, in the case of an ICC, must end with the words "Incorporated Cell" or "IC" (Article 127YL(3)) or, in the case of a PCC, must end with the words "Protected Cell" or "PC" (Article 127YS(3)).

3. Management and Administration

a. Cell Administration

As a matter of policy, all cell companies will ordinarily be required to appoint a business regulated under one of the Island's regulatory laws to provide administrative and/or secretarial services to the cell company.

b. Management Duties

The Law provides that a cell must have the same secretary and registered office as its cell company (Article 127YDA(1)). Unlike cells of an ICC, cells of a PCC are not obliged to comply with the requirements of the Law relating to the register of directors and secretaries; this duty is imposed on the cell company (Article 127YDA(2)). A cell of an ICC must notify its cell company within 14 days of any change in the directorship of the cell (Article 127YDA(3)) and failure to comply with this duty is an offence (Article 127YDA(4)).

Part 18D also sets out a number of further duties that a cell company's directors each have to fulfil. While these are described elsewhere in this Guide, a few of the key duties are outlined below.

i. Directors

The Law requires that directors of companies must act honestly and in good faith with a view to the best interests of the company and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (Article 74(1)).

In relation to PCCs, the Law imposes on directors certain additional duties to ensure that cellular assets of a PCC are kept separate and are separately identifiable from the non-cellular assets of the PCC and from the cellular assets attributable to other cells of the PCC (Article 127YR(1)), as well as further duties in relation to contracts with third parties (see 3.b.ii.)

A director who fails to comply with the above requirements will be guilty of an offence (Article 127YR(3)).

It should be stressed that a director of a cell does not have any duties or liabilities in respect of the cell company in relation to the cell or any other cell of the cell company by virtue of their directorship of a particular cell (Article 127YDA(5)) and, accordingly, is not entitled to any information in respect of the cell company or the cells to which he is not a director (Article 127YDA(6)).

ii. Contracts with Third Parties

The Law includes several provisions intended to ensure that third parties dealing with cell companies will be aware of that fact. The primary requirement is that the directors must ensure, when the PCC enters into an agreement in respect of a cell, that the other party to the transaction knows or ought reasonably to know that the PCC is acting in respect of a particular cell (Article 127YR(2)(a)). In addition, the minutes of the relevant directors' meeting held with regard to the agreement must clearly record the fact that the PCC was entering into the agreement in respect of the cell and that the obligation to ensure that the counter party knows this was or will be complied with (Article 127YR(2)(b)).

iii. Accounts, Records and Registers

Individual cells are not obliged to comply with the requirements of the Law relating to annual returns; this is the responsibility of the cell company (Article 127YE(1)). However, a cell of a cell company must provide all relevant information to the cell company in sufficient time to allow the cell company to include in its annual return the information required by Article 71 in respect of each cell (Article 127YE(4)) and the cell, and, where the cell company is a public company, every officer in default, will be guilty of an offence where it fails to do so (Article 127YE(5)). The cell company must, in respect of each of its cells, deliver to the Registrar a copy of so much of its annual return as relates to the cell (Article 127YE(2)(b)).

Each cell of a cell company is required to keep accounting records which are sufficient to show and explain its transactions and are such as to:

- disclose with reasonable accuracy, at any time, the financial position of the cell at that time; and
- enable the directors to ensure that any accounts prepared by the cell comply with the requirements of this Law.

Accordingly cells are required to prepare accounts, just as a company is required to prepare accounts under Article 105 of the Law.

Similarly, all registers, save the register of directors and secretaries in relation to the cell of a PCC which is maintained by the cell company, must be maintained by each cell, e.g. the register of members pursuant to Article 41 of the Law.

iv. Offences under the Law

Part 18D of the Law creates a number of offences, which are described throughout this Guide. It should be noted, however, that where a PCC is liable for any criminal penalty due to an act of the company or an officer of the company, the penalty may only be met by the company from the cellular assets of the cell and will not be enforceable against any other assets of the company or any other cells of the company (Article 127YP(3)).

v. Effect of Infringement of the Law

The legislation does not state that a transaction or interest in a cell company becomes ineffective by reason only that the cell company fails to comply with, or is in breach of, any provision of the Law. Accordingly, and subject to the standard rules of capacity, power and constructive notice, a transaction or interest in a cell will be effective notwithstanding the fact that the company may not be registered to create cells.

The intention is to ensure that if a breach of the Law occurs, the consequences should be as set out in the legislation, rather than generally rendering business transactions ineffective. In some circumstances it could cause unfair hardship to the company or the third party if either of them were able to terminate the transaction.

4. Governing Instruments and Contracts

The rules that relate to cell companies in relation to contracts are the same that apply to companies in Jersey under the Law, i.e. a person acting under the express or implied authority of a company may make a contract or sign an instrument on behalf of the company in the same manner as if the contract were made by a natural person (Article 20(1)).

a. Governing Instruments (Shareholders)

The articles forming part of the application process and delivered to the Registrar set out the shareholders' rights, interests and obligations. Such rights, interests or obligations may be further qualified in the case of a cell company that is, for example, a public investment fund that is a cell company, a prospectus. The Law explicitly provides, however, that non-cell shareholders are only members of the company and a cell's shareholders are only members of the cell to which they have subscribed (Article 127YQ).

b. Contracts (Counterparties)

As stated above, the rules that relate to cell companies in relation to contracts with third parties are the same that apply to companies with the exception that a director of a PCC must ensure, when the PCC enters into an agreement in respect of a cell, that the other party to the transaction knows or ought reasonably to know that the PCC is acting in respect of a particular cell (Article 127YR(2)(a)).

c. PCC and Management Duties to a Cell, Shareholder or Counterparty

The Law requires directors to act honestly and in good faith with a view to the best interests of the company and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

d. Contracts – Internal Transactions

The Law provides that a cell of a PCC may enter into an agreement with its cell company or with another cell of the company, and that agreement will be enforceable as if each cell of the PCC were a body corporate that had legal identity separate from that of its PCC (Article 127YP(2)).

5. Assets and Liabilities

a. Application of Assets and Liabilities

Pursuant to the Law, “cellular assets” or “cellular liabilities” in respect of a PCC means the assets or liabilities that are attributable solely to a cell of the PCC. Conversely, “non-cellular assets” or “non-cellular liabilities” in respect of a PCC means its assets or liabilities that are not its cellular assets (Article 127YO).

The Law makes special provision for the ring-fencing of assets and liabilities attributable to the cells of a PCC and to the PCC itself. No such specific provision is necessary in respect of an ICC and its cells as each cell of an ICC is itself an incorporated company with its own legal personality.

As the PCC may act on its own behalf or in respect of a particular cell or cells, any person transacting with a PCC should ensure that it is clear that the transaction is in respect of the PCC or a particular cell. Where a PCC enters into a transaction in respect of a cell or incurs a liability arising from an activity or asset of a particular cell, a claim by any person in connection with the transaction or liability extends only to the cellular assets of the cell (Article 127YT(1)). Where the transaction, activity or asset is undertaken or held by the company in its own right and not in respect of any of its cells, the claim by any such person extends only to the non-cellular assets of the company (Article 127YT(2)).

A PCC has no power to apply its non-cellular assets to meet any liability attributable to a particular cell or to meet any liability (whether attributable to a cell or not) from cellular assets of another cell, unless permitted by its articles (or the article of that other cell) and the requirements of the Law as to solvency of the company (or the cell in question) are met (Article 127YT(4) and (6)). The requirement as to solvency is that the directors who authorise the liability to be met in such a way make a statement that, having made full enquiry into the affairs and prospects of the company (or the cell whose cellular assets are to be applied to meet the liability) have formed the opinion (Article 127YT(5) and (7)):

- i.** that, immediately following the date on which the liability is to be met, the company (or the cell in question) will be able to discharge its debts when they fall due; and
- ii.** that, having regard to the prospects of the company (or cell) and to the intentions of the directors with respect to the management of the company’s (or cell’s) business and to the amount and character of the financial resources that will in their view be available to the company (or cell), the company (or cell) will be able to continue to carry on business and to discharge its liabilities as they fall due for a period of one year immediately following

the date on which the liability is to be met or until the company (or cell) is dissolved on a summary winding up, whichever is first.

b. Apportionment of Assets and Liabilities

Generally, the intention of Part 18D of the Law is to ensure that assets and liabilities of protected cells will not be intermingled with the assets and liabilities of the company of which it is a cell. However, in many cases it will be convenient for commercial purposes for an asset, such as a bank account, to be held to the credit of more than one account. The same will sometimes be true of liabilities. Accordingly, and as stated above, the Law expressly enables the apportionment of assets and liabilities between cells providing its articles (or the article of that other cell) and the requirements of the Law as to solvency of the company (or the cell in question) are met (Article 127YT(4) and (6) and see also 5.a above).

There is nothing in the Law that prevents the directors of a PCC from permitting both protected portfolio assets and general assets to be held by or through a nominee of the company.

c. Transfers between Accounts

As stated above at 5.b, the legislation expressly provides that assets and liabilities may be transferred between cells providing certain criteria are met; this includes a transfer between a protected cell and the general assets of the company.

d. The Cell Owner's Interest

The cell owner's interests and rights are set out in the articles of the cell company. The Law does not provide any additional requirements by virtue of the company also being registered to operate protected cells.

e. Creditor Enforcement Rights over Account Assets

To reinforce the ring-fencing of the assets and liabilities of a PCC and its cells, the Law makes provision for the protection of cellular and non-cellular assets. Article 127YU provides that a creditor of a protected cell company may only have recourse to the cellular assets of the company held in respect of the relevant cell (Article 127YU(1)) or, if the creditor's claim against the company is not in respect of a particular cell, then the cellular assets of the company shall not be available to the creditor (Article 127YU(2)). Accordingly, the Law provides that creditors have no rights to seek proceedings anywhere in the world to claim cellular assets that the creditor does not have a claim against (Article 127YU(3)). The Article goes on to provide that if the creditor is successful (anywhere in the world) in accessing assets of the PCC other than assets held in respect of the relevant cell (or non-cellular assets, where applicable) then the creditor shall be liable to pay to the company an amount equal to the benefit so obtained (Article 127YU(4) and (5)). The right to claim this liability and any amount recovered by the PCC shall form part of the cellular assets of the company held by it in respect of the cell whose assets have been accessed by the creditor (Article 127YU(6)).

Where, in pursuit of a claim against the PCC, a creditor is successful in seizing, attaching or otherwise levying execution against the assets of the PCC which are not assets held in respect of the relevant cell (or non-cellular assets, where applicable), the Law provides that the creditor shall hold such assets (or their proceeds) on trust for the company or, as the case may be, the cell of the company whose cellular assets were wrongfully seized or attached (Article 127YU(7) and (8)). In respect of such a trust, the creditor must keep the assets on trust separated and identifiable as trust property and pay or return them on demand to the PCC, and failure to do so amounts to an offence committed by the creditor (Article 127YU(9)). The provisions of the Trusts (Jersey) Law 1984 shall also apply to such

trust, imposing upon the creditor all the duties and responsibilities of a Jersey trustee. Any amount recovered by the PCC by virtue of a trust will form part of the cellular/non-cellular assets, as applicable (Article 127YU(10) and (11)).

If the company is unable to recover from the creditor the amounts or assets due from the foregoing provisions, the PCC must procure an auditor (acting as expert) to certify the loss suffered by the company and then transfer to the company from the relevant cell an amount sufficient to make good the loss suffered by the PCC's other cells (or buffered by the PCC's non-cellular assets, as the case may be) (Article 127YT(12)). If the original liability to the creditor was attributable to the PCC's non-cellular assets, the PCC must transfer from its non-cellular assets an amount sufficient to make good the loss suffered by its cellular assets (Articles 127YT(13) and (14)).

Failure to comply with this inter-cell accounting for cross-losses suffered by a cell in breach of the ring-fencing provisions will be an offence for the company and each of its officers who are in default (Article 127YT(15)).

f. A Cautionary Note

Despite the growing popularity of PCCs, there remains one risk that should be particularly borne in mind: the company may operate or have assets, or be subject to claims, in jurisdictions that may not recognise the segregation of assets and liabilities. In those jurisdictions, the assets of one cell may potentially be exposed to the liabilities of another. This risk is higher in jurisdictions that do not have protected cell/segregated account type legislation, and there is currently no case law in such jurisdictions in which the structure and standing of a Jersey PCC has been tested in the courts. There is therefore very little guidance to indicate the manner in which the courts will deal with this issue. The enactment of substantive as opposed to procedural legislation, prescribing the inherent legal nature of a protected cell, is intended to mitigate this risk on the basis that a foreign court, in applying the law of another jurisdiction, more usually respects substantive provisions even though they may apply their own procedure.

To reduce the risk associated with this, PCCs should make every effort to hold their assets in jurisdictions that have protected cell/segregated account type legislation, for example the Cayman Islands, Bermuda, the British Virgin Islands, Guernsey and Mauritius. PCCs should also endeavour to have their contracts governed by the Law, and made subject to the jurisdiction of the courts of a segregating jurisdiction, such as Jersey. Contracts should also contain language that limits the recourse of any potential creditor of a particular protected cell to the assets in the relevant account.

In considering these issues, it is likely that a court considering a Jersey PCC would also have close regard to whether the PCC has in fact been operated in accordance with the requirements of the Law considered in this Guide. Consequently, it is vital that PCCs ensure that there is strict adherence to these requirements.

6. Securities

a. Issue of Securities Linked to a Protected Cell

Unlike a company with a share capital, which may issue only par value shares or no par value shares, but not both, a cell company may issue par value shares in respect of one cell and no par value shares in respect of another (Article 127YB(2)). However, individual cells may not issue both par and no par value shares.

A register of members must be maintained by each cell of the cell company in the same way that an ordinary company must maintain a register of shareholders (Article 41).

The Law implies a provision in the articles that a cell may not own shares in its cell company and, subject to a contrary intention expressed in the articles, a provision that a cell may own shares in any other cell of its cell company (Article 127YB(3)).

Dividends, Distributions and Redemptions

There are no special rules that apply to a company by virtue of the fact that it is registered to create protected cells in respect of dividends, distributions and redemptions. For more information on this topic, please refer to ‘The Guide to Companies in Jersey’, which is available from the Appleby website.

b. Reduction of Capital

There are no special rules that apply to a company by virtue of the fact that it is registered to create protected cells in respect of reduction of capital. For more information on this topic, please refer to ‘The Guide to Companies in Jersey’, which is available from the Appleby website.

7. Receivership and Winding Up

a. Receivership

The concept of receivership is unknown to Jersey law (although the Jersey courts are likely to recognise and assist any foreign receivers appointed).

b. Winding up

The provisions of the Law as to winding up apply to each cell independently as they do to a company. However, where a cell company with one or more cells is being wound up under Part 21 of the Law (‘Summary Winding Up’), the company shall not be taken to have no assets and no liabilities while the company continues to have any cells (Article 127YJ(1)). Accordingly, in the course of the winding up of the company, each cell of the company must (Article 127YJ(2)):

- be transferred to another cell company (see 10.c below);
- be wound up;
- be continued as a body corporate or cell under the law of another jurisdiction (see 10.b below);
- be incorporated independently of the cell company; or
- be merged with another company.

Where a cell of a PCC is being wound up, the company’s powers in respect of the cell shall not be exercised except so far as may be required to realise, discharge or distribute assets attributable to the cell, as may be applicable (Article 148). However, where a cell is being wound up, this restriction on the exercise of the PCC’s powers will not apply in respect of the company or any other cell (Article 127YV(2)). Similarly, where the PCC is being wound up, the restriction on the company’s powers shall not apply in respect of any cell of the PCC (Article 127YV(1)).

8. Removal from the Register

The Registrar does not maintain a separate register of companies registered to create protected cells. The general rules in the Law with respect to removal of defunct companies from the Register apply equally to PCCs.

9. Fund Provisions

There are no explicit rules that specifically apply to a PCC by virtue of the fact that it operates collective investment funds. Collective investment fund PCCs remain governed by the rules and regulations which apply to any Jersey fund company. However, the provisions and principles in this note may be relevant in certain cases.

10. General

a. Power of Court to Determine Liability of PCC

The court may, on the application of a PCC, determine if a liability of the PCC is to be met by its non-cellular assets, by the cellular assets of a specified cell or by a combination of those assets, in accordance with the Law (Article 127YW(1)). Equally, on the application of a PCC, the court may determine to what extent an asset of the company is a cellular or a non-cellular asset of any of the cells of the cell company (Article 127YW(2)).

b. Spinning off Cells by Separate Incorporation

The Law makes provision for a cell of a cell company, whether an ICC or a PCC, to be incorporated as a company independent of the cell company, by application to the registrar of companies (Article 127YH(1)). The application must be approved by a special resolution of each class of members of the cell, unless the articles of the cell provide otherwise (Article 127YH(2)). If a member of the cell objects to the application, it may (within 30 days of the application (Article 127YH(6))) apply to the court for an order that the incorporation or the terms of the incorporation unfairly prejudice the member's interests under Article 143 of the Law (Article 127YH(5)).

The application for independent incorporation of a cell must contain all the information that would otherwise be required for the incorporation of a new company under the Law (Article 127YH(3)), and the cell will have to change its name by removing the words "IC" or "PC", as the case may be, and include the words "Limited", "Ltd", "avec responsabilité limitée" or "a.r.l."

The Law provides that the assets, liabilities, contracts, debts, obligations, actions and proceedings of and against a cell of an ICC or to which it is subject shall continue, on incorporation as an independent company, to be the assets, liabilities, contracts, debts, obligations, actions and proceedings of or against that independent company. In addition, all property and rights of a PCC in respect of a cell which is registered as an independent company shall, on registration, become the property and rights of the independent company. All contracts, debts and obligations of the PCC in respect of the cell, become the contracts, debts and obligations of the independent company. All actions and other legal proceedings of or against the PCC in respect of the cell may be continued by or against the independent company (Article 127YH(7)).

The assumption by the new independent company of all the property and rights, liabilities and obligations of the PCC in respect of the cell which has applied for registration as an independent company will not, under Article 127YH(8), constitute a breach of any contract or confidence or

contractual prohibition on assignment or transfer of any rights or liabilities, nor shall it give rise to any remedy as an event of default or permit the termination of any contract or other instrument or obligation. However, if the relationship of the cell to its PCC is important to a party contracting with a PCC in respect of one of its cells (or even a cell of an ICC) it may be possible to provide within the contract that an application for registration as a separate company shall constitute a breach of contract or event of default.

c. Transfer of Cells between Cell Companies

The Law allows transfers of cells between cell companies (Article 127YI(1)), by written agreement between the cell companies setting out the terms of the transfer (Article 127YI(2)). The transfer agreement must be provisionally approved by (Article 127YI(3)):

- the directors of each cell company;
- a special resolution of the transferee cell company; and either:
- a special resolution of the cell being transferred, with the sanction of the court as an arrangement under Article 125 of the Law;
- all the members and all the creditors (if any) of the cell being transferred; or
- a special resolution of the cell being transferred and the sanction of the court on it being satisfied that no creditor of the cell will be materially prejudiced by the transfer, if consent of all creditors cannot be obtained.

The directors of the transferring cell company must, as soon as is reasonably practicable after the transfer has been provisionally approved, sign a declaration stating that the director(s) believe on reasonable grounds that the cell being transferred is able to discharge its liabilities as they fall due, that the transfer has been provisionally approved and ensure that a copy of the declaration is delivered to the transferee cell company (Article 127YI(4)). The directors will be guilty of an offence if they make a false declaration (Article 127YI(5)).

On receipt of the declaration, the transferee cell company must, within 21 days, deliver to the Registrar (Article 127YI(6)):

- a copy of the special resolution approving the transfer agreement;
- a copy of the transfer agreement;
- a copy of the new memorandum and articles of the transferred cell; and
- a copy of the director's declaration referred to above.

Should a cell company fail to deliver these documents then the company and every officer in default will be guilty of an offence (Article 127YI(7)). The Registrar will not approve the transfer if the transfer would be inconsistent with the memorandum and articles of any of the parties involved, including those of the cell being transferred (Article 127YI(10)).

If the Registrar approves the transfer, the Registrar shall register the transfer of the cell, along with the (new) memorandum and articles of the cell (Article 127YI(11)(d)). In the case of a transfer of a cell to an ICC, the Registrar shall issue a certificate of incorporation and, in the case of a transfer to a PCC, the Registrar shall issue a certificate of recognition (Article 127YI(11)(e)).

The Law makes provision (in a manner similar to that described for independent incorporation of cells above) for the continuation of ownership of property and rights, debts, obligations and liabilities and actions and legal proceedings in respect of a transferred cell by the cell itself if it is the cell of an ICC or by the transferee cell company if it is the cell of a PCC (Articles 127YI(12) and (13)). The Law also anticipates the transfer of cells between PCCs and ICCs, such that ownership of property

and rights, debts, obligations and liabilities and actions and legal proceedings in respect of a transferred cell will be transferred to the cell, if the company is an ICC, or to the company in respect of the cell, if the company is a PCC. In addition, the Law makes provision for the statutory override of any contractual provisions prohibiting assignment or transfer of liabilities or events of default that may be otherwise triggered by the transfer of a cell, in a manner similar to that described for independent incorporation of cells above (Article 127YI(14)).

Pursuant to Article 127YIA, a company may also become the cell of a cell company, be it an ICC or a PCC. The procedure is the same as that described above in relation to the transfer of cells.

d. Taxation of Cell Companies

Although not part of the EU Jersey has introduced legislation to achieve a uniform income tax system for the whole business sector which meets the stringent requirements of the tax package adopted by all Member States of the EU in June 2003. As a result, between June 2008 and 1 January 2009 the Jersey taxation system moved to the so-called zero/ten system of corporate taxation. All Jersey companies incorporated (and foreign companies becoming resident in Jersey) on or after 3 June 2008 were immediately subject to the zero/ten regime.

Financial services entities, that is defined regulated businesses, are taxed at a higher rate of 10% on net revenue or trading profits. Utility companies and rental income and property development companies are taxed at 20%. Non-financial services companies are zero-rated.

PCCs will only be required to file a single annual tax return covering the entire structure. In the case of ICCs, given that each cell is, as a matter of law, a separate company, each incorporated cell will be treated for the purposes of the Income Tax (Jersey) Law 1961 as a separate entity with its own tax treatment.

However, companies incorporated in Jersey may be considered exclusively tax resident in another jurisdiction where they are centrally managed and controlled outside Jersey, are tax resident in the jurisdiction of control and management and where the rate of corporation tax in that jurisdiction is 20% or higher.

A Goods and Services Tax ("GST") was introduced in May 2008, the current rate of GST is 5%. The tax is payable on the domestic consumption of imported and locally-produced goods or services unless those goods or services are explicitly excluded by law as "exempt" or "zero-rated".

It would be expected that a PCC and all ICC cells would seek approval by the Comptroller of Income Tax to qualify as "International Services Entities", allowing them to avoid the burden of registering for GST, charging GST on their supplies, and, in most cases, paying GST on supplies made to them. The fees for listing as an International Service Entity are set out in our Guide to the Goods and Services Tax (Jersey) Law 2007. Please consult us if you need particular advice on this point.

e. Fees and Regulatory Treatment

The Law contains a general and fairly standard provision enabling the States of Jersey to amend Part 18D by Regulations (Article 127YN). Regulations would deal with such things as fees payable under the Law as well as prescription of standard forms and documents to use for the purposes of the Law.

i. Fees

A cell company will be required to pay fees under the Law. In addition, in the event that the cell company or the cells it creates carry out a regulated activity, fees may be payable to the Jersey Financial Services Commission in respect of that activity. This aspect of the regulatory treatment of cell companies is covered below.

The fees payable in respect of a cell company should be the same, whether the company is an ICC or a PCC. The fees payable in respect of each type of cell company should not be a factor in determining which form of cell company to establish.

It should be particularly noted that there will be no fee payable in respect of the creation of a cell of a cell company. The full scale of applicable fees is set out in the Schedule to the Companies (Fees) Order 2008. For more information, please refer to the contact details at the end of this Guide.

Regulatory Treatment

From a regulatory perspective, ICCs and PCCs will, insofar as is possible, be treated in the same manner, both as regards the manner in which permits are sought and the fees levied. Each cell company will hold a single document that sets out all of the regulatory permits that apply to the company and its cells.

The terms of the permit will, however, differ, as a PCC will be a regulated entity, whereas it is the cells of the ICC that will be regulated entities. Nevertheless, from a practical perspective it is sensible to require all regulatory applications in relation to a cell company to be co-ordinated through the cell company itself, rather than through ad-hoc applications made by each cell.

A permit issued to a PCC will apply directly to the PCC, whereas a permit issued to an ICC will apply directly to the individual cells. In each case the permit will list all of the cells of the company and any permit conditions that apply to each cell.

Collective Investment Funds

The approach taken has been to treat cell companies as being analogous to existing umbrella funds. However, as a matter of law, where it is cells themselves that issue units, it will be the PCC that is the functionary where a PCC structure is used, whereas individual cells will be the functionaries when an ICC is used. The fees Order addresses this through a provision providing that, in total, an ICC will be required to pay the same amount of regulatory fees in relation to itself and all of its cells as a similar PCC would be required to pay.

The full fees structure is set out in the Collective Investment Funds (Permit Fees) (Jersey) Order 2008, which is the authoritative source for the level of fees payable under the Collective Investment Funds Law. For more information, please refer to the contact details at the end of this Guide.

In addition, the Collective Investment Funds (Unclassified Funds) (Prospectuses) (Jersey) Order 1995 sets out statements which should be included in the prospectus of a PCC or an ICC.

Insurance Business

The Financial Services Commission (Jersey) Law 1998, as amended, sets out the fees applicable to cell companies or cells of cell companies granted Category B permits. For more information, please refer to the contact details at the end of this Guide.

Conclusion

The legislation pertaining to cell companies represents a major opportunity for many international businesses in the insurance and mutual fund industries, to name but a few. Rather than forming numerous subsidiaries, it creates an inexpensive and less unwieldy system to the traditional route of creating legal divisions between accounts.

Most importantly, however, Part 18D of the Law establishes substantive law governing the application of particular assets in favour of particular accounts and their respective liabilities. In this regard, it is believed that the new substantive provisions will significantly enhance the prospects for enforceability of transactions in jurisdictions where the assets of a particular protected cell might be situated, and furthermore, the extent to which procedural as well as substantive law provisions may bind third parties.

For more specific advice on Cell Companies in Jersey, we invite you to contact one of the following:

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