



Guide to Protected Cell Companies in Seychelles

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PREFACE

This is the First Edition of the Guide, which we have produced for the information of our clients and professional colleagues.

This Guide will explain the concept of the protected cell that culminated in the enactment (and subsequent amendment) of the Protected Cell Companies Act, 2003. It will describe various insurance and non-insurance applications of the protected cell company in Seychelles before providing a commentary in relation to the major sections of the Protected Cell Companies Act, 2003.

All references in this Guide to “dollars” or “\$” are to US dollars, and all references to “rupees” or “Rs” are to Seychelles rupees.

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 Seychelles’ legal and regulatory environment in relation to protected 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 Seychelles law should be obtained.

Appleby
Victoria, Seychelles
June 2009

INTRODUCTION

On 30 July 2003, the Protected Cell Companies Act, 2003 (the “PCC Act”) was enacted by the President and the National Assembly which created an incorporation and registration regime whereby a Seychelles company carrying out insurance and collective investment scheme activities would be able to register as a protected cell company. The Seychelles International Business Authority (the “Authority”) administers the PCC Act and the utilisation of the PCC Act for purposes other than for insurance and collective investment scheme activities may be so approved by the Authority.

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

A company having protected cells is known as a protected cell company and will be referred to in this Guide as a “PCC”.

The PCC is a recent and increasingly popular mechanism used to segregate the assets and liabilities of a company. In structuring as a PCC with a potentially vast number of sub-funds (the protected cells), the gains and losses of each protected cell have no impact on the other sub-funds of the company. Accordingly, in many circumstances where there is a desire to limit creditor exposure, the utilisation of a PCC will avoid the need to establish a more cumbersome group company structure.

Under the legislation, any company to which the PCC Act applies (currently limited to insurance and collective investment schemes as stated in the Schedule to the PCC Act) may operate protected cells enjoying statutory divisions between such cells, and also separation from the company’s non-cellular assets. The PCC Act affirms, however, that a protected cell is not a legal person distinct from the PCC itself. The effect of this statutory division is to ensure that the cellular assets attributed to any specific cell will only be affected by liabilities arising from transactions attributable to that same cell. 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, ie the protected cell takes the concept of limited liability to a micro-level.

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

Therefore the statutory divisions between cells do 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.

Seychelles’ legislation therefore provides details on the practical aspects of protected cells and substantive (as opposed to procedural) statutory provisions: creditors in particular can see that PCCs are being properly established, with a comprehensive legal structure to deal with the cellular 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 PCC Act, unless otherwise stated.

1. Applications

a. Advantages of the concept of the PCC

The PCC Act has several advantages over traditional routes to creating legal divisions between cells. It is less expensive and less unwieldy than forming numerous subsidiaries. A PCC structure also avoids issues of time, solvency and perfection in relation to charges. Most importantly, the PCC Act has established 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 substantive provisions contained in the PCC Act 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 PCC Act represents a major opportunity for many international businesses. The Schedule of the PCC Act sets out the qualifying business activities that a PCC may undertake. Such activities currently consist of insurance business and collective investment schemes.

These applications are considered below.

i. Insurance

A company that is or will be engaging in offshore insurance business (ie restricted solely to non-Seychelles policies) and licensed under the Insurance Act 2008 may be incorporated as a PCC (§12).

PCCs may be used for a variety of insurance purposes. Among them include rent-a-captives, life and annuity companies and transformer vehicles.

Rent-a-captives

In Seychelles and in relation to insurance, a PCC is typically a variation of a “rent-a-captive”. A rent-a-captive is a risk financing solution in which the sponsor (such as a captive manager) establishes and licenses a captive insurance company and “rents” the core capital, licence and corporate capacity of the vehicle to program participants, thus providing participants with the many benefits of captive risk financing without the attendant administrative and capital costs associated with a pure captive. Rent-a-captive programs have lowered the cost of establishing one’s own captive, opening this solution to smaller corporations and other entities for which ownership of a captive would otherwise be too expensive.

In a rent-a-captive, which does not offer legal segregation of assets, participants agree among themselves to keep the gains and losses of each program separate from the others. These internal agreements would not generally be effective against third parties such as creditors of the rent-a-captive in the event of liquidation. By taking advantage of the Seychelles legislation, in a protected cell rent-a-captive, each participant’s program is legally segregated from the other, thus making the separation between participants in the rent-a-captive unassailable in the event of liquidation. The protected cell rent-a-captive offers ‘fire walls’ between program participants, which should withstand the claims of third party creditors of another participant. Participants need not be concerned that the underwriting losses of an imprudent participant may bring the whole facility down.

Life and Annuity Companies

Legal segregation of cells also has application in the insurance industry outside of the group captive context. Insurers underwriting long-term risks, such as life, disability, pension plan or annuity programs, can take advantage of the legal segregation of reserves among different programs and products. This can also include composite insurers, where the assets of their life insurance business must be legally separated from its non-life business.

Transformer Companies

So-called ‘transformer’ companies are those engaged in the transformation of insurance risk into capital markets products and vice-versa. In cases where a single company enters into multiple arrangements of this kind, it will often be desirable to do this through protected cells.

ii. Investment Funds

In the context of mutual funds, the utility of the legal segregation of cells is obvious, as different programs can be offered to investors under the same corporate structure. Legally segregated cells are particularly attractive for umbrella or multi-class funds, which would afford each share class the same limited liability that would be obtained if separate bodies corporate were used for each category of investor.

Although the use of PCCs for other purposes is restricted by the PCC Act, the Authority will consider applications individually and as such the Authority is given to scope to approve other structures. Although it is not yet clear what will be contained in any future amendments to the PCC legislation, it is hoped that it will facilitate the use of PCCs for the following types of transactions, which could easily go on and will hopefully be bounded only by the imagination and creativity of clients and their professional advisors:

i. 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 company’s debt securities to specific underlying assets in such an efficient way is attractive.

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

Currently, it is conventional for ship owning businesses or airlines to organize themselves using a corporate structure. The simplest structure entails a holding company owning a separate company for each ship or aircraft in the fleet. Much more complicated structures are also often used.

A PCC would accomplish the same objectives more efficiently and economically, by providing for a separate protected cell owning each separate asset.

iii. Temporal Segregation: Business Divisions

When a company operating a core business decides to enter into a new area of business, prudence dictates that in some circumstances the new venture should be isolated from the core business. This protects the creditors and shareholders of the core business in the event that the new venture fails. If a ‘ring-fencing’ structure is put into place at the outset it is perfectly legal and appropriate, whereas there are severe restrictions which apply to a reorganization of a company’s operations after the failure of one aspect of its business.

Isolation of the new venture may be accomplished by incorporating a new company or by using the protected cell structure and as has been outlined, the protected cell structure would be the more efficient.

The same comments may be made in respect of any company with several distinct businesses in the form of divisions within a single company. In some circumstances it may be desirable to isolate divisions from each other. This is particularly so where, as is normally the case, each division operates as a separate profit center for which separate accounting statements are prepared.

iv. Ring-fencing in Special Cases

There are potential applications for PCCs in the context of rehabilitation and corporate reorganization.

For example, where it is proposed to reorganize a group of companies (or other entities), which are facing severe financial challenges, it may be appropriate to put into place a financial rescue package through the medium of a protected cell entity whose exposure would be limited, rather than contributing assets directly into or entering into unlimited covenants directly with the financially challenged parties. This may be particularly appropriate where there are multiple parties participating in a bail-out on different terms.

v. 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.

2. Registration under the PCC Act

a. Incorporation Procedure

The PCC Act provides that a PCC may be established in Seychelles in one of three ways. A Seychelles company may be directly incorporated under the PCC Act as a PCC, provided it meets the mirrored requirements found in the Companies Act 1972 (the "Companies Act"); a foreign company may be registered by way of continuation as a PCC; or an existing Seychelles may be converted into a PCC (§13(1)).

All applications must be made to the Registrar of Companies (the "Registrar") through the Authority, requesting that the company be so incorporated subject to the consent of the Authority (§12(1)). The application consists of, among other things, the corporate documents set out by the Authority and include a covering letter, application form, a declaration certificate made by the directors and secretaries and of registered address, a detailed business plan, completed personal questionnaires for each director, secretary and shareholder and relevant due diligence documents, memorandum and articles of association, name reservation approval letter and fees as well as any other document so requested by the Authority.

The PCC Act provides for certain additional requirements for a company to be deemed to be a PCC. Section 10 provides that the name of company must clearly include the expression “Protected Cell” or “PCC” or any cognate expression approved in writing by the Authority (§10(1)) and each cell shall have its own distinct name or designation (§10(5)). In addition, the memorandum of a PCC must state that it is a protected cell company (§10(2)).

c. The Nature of Protected Cells

The PCC Act confirms that a PCC is a single legal person and that the creation by a PCC of a cell does not create, in respect of that cell, a legal person separate from the company (§3(2)). This is so even though some of the features of a protected cell are similar to features of legal persons. For instance, each cell must have its own distinct name or designation which must be clearly set out in the subscription agreement for the cell’s shares. Also, dividends may be declared on cell shares by reference only to the cellular assets and liabilities attributable to the cell in respect of which the cell shares were issued (§8(4)).

d. Converting a Private Act Company to a PCC

Companies incorporated by a private Act are not available in Seychelles.

3. Management and Administration

i. Directors

In addition to their duties to the company that are imposed by statute and the common law by virtue of their position as directors, the directors of a PCC are also under a statutory duty to keep cellular assets separate and separately identifiable from non cellular assets; and keep cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells. Directors may become personally liable for a transaction if they fail to inform a person that he is transacting with a PCC (See 3.b.ii below).

ii. Contracts with Third Parties

The PCC Act includes several provisions intended to ensure that third parties dealing with PCCs will be aware of that fact. The primary requirement is that third parties must be informed that they are dealing with a PCC (§16(1)(a)) and, where the transaction is with a protected cell, the cell must be identified (§16(1)(b)). If the PCC fails to inform a third party that they are dealing with a PCC and the third party is otherwise unaware that they are transacting with a PCC then the directors of the PCC will incur personal liability in respect of the transaction. Similarly, the directors will incur personal liability if the PCC fails to identify the cell in respect of which the third party is transacting (§16(2)(i)). In the event that the directors are personally liable, they have the right of indemnity against the non-cellular assets of the PCC, unless they were fraudulent, reckless or negligent, or acted in bad faith (§16(2)(ii)). The Court has the power to relieve a director of all or part of his personal liability (§16(3)).

iii. Offences under the PCC Act

The PCC Act creates offences under the Act, specifically in relation to the contravention of the requirement for companies to have the written consent of the Authority before incorporating or converting to a PCC and also in relation to conduct during the incorporation of or conversion to a

PCC (§30). however the Minister of Industries and International Business (the “Minister”) may make regulations to provide for anything which under the PCC Act is to be prescribed (§31(1)).

iv. Effect of Infringement of the Act

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

The intention is to ensure that if a breach of the PCC Act, or any relevant provision of the Companies Act occurs, the consequences should be as set out in the legislation, rather than generally rendering business transactions ineffective, which could sometimes produce absurd results. 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

a. Contracts (Cell Owners)

The PCC Act, Companies Act do not specify any requirements on the nature of the contract or what must be specified in such a contract that sets out the cell owner’s rights, interests or obligations, except that the distinct name, designation or denomination of the protected cell must be clearly identified. Such rights, interests or obligations may therefore be governed by the PCC Act or set out in a standard contract or, in the case of a public mutual fund that is a PCC, for example, a prospectus.

b. Contracts (Counterparties)

The legislation provides for minimal mandatory requirements for transactions with a PCC. As stated above, a PCC is required to inform any person with whom it transacts that it is a protected cell company and, for the purposes of that transaction, identify or specify the cell in respect of which that person is transacting, if applicable (§16(1)).

The PCC Act also provides that a number of terms will be implied into every transaction entered into by a PCC regarding the creditor enforcement rights over cellular assets (see below at 5.e).

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

In a PCC, the directors have a duty to keep cellular assets separate and separately identifiable from non cellular assets; and keep cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells (§5(2)). It is to be noted, however, that directors of a PCC may cause or permit cellular assets or non-cellular assets, to be collectively invested or collectively managed by an investment manager, provided that the assets remain separately identifiable (§5(8)).

d. Contracts – Internal Transactions

There are no explicit provisions in Seychelles Law with respect to the ability of cells to contract with each other or the general account of the PCC. There is uncertainty as to the legal effect of internal transactions of this kind. Indeed, the general view is that they probably would not have legal effect.

5. Assets and Liabilities

a. Application of Assets and Liabilities

The PCC Act provides that assets of a PCC are either ‘cellular assets’ or ‘non-cellular assets’, or a combination of both (§5(1)). The cellular assets comprise assets representing the proceeds of cell share capital and reserves attributable to the cell, as well as all other assets attributable to the cell (§5(4)). Accordingly, the non-cellular assets of the PCC comprise the assets of the company which are not cellular assets (§5(6)), eg income, receipts and other assets or rights acquired by the PCC that are not otherwise attributable to any particular cell.

The directors of a PCC are under a statutory duty to keep cellular assets separate and separately identifiable from non-cellular assets; and keep cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells (§5(2)).

Pursuant to section 7, cellular assets will only be available and used to meet liabilities to the creditors of the PCC who are creditors in respect of that particular cell and who are therefore entitled to have recourse to the cellular assets attributable to that cell for such purposes. Cellular assets are therefore not available to meet liabilities, and shall be absolutely protected from, the creditors of the PCC who are not creditors in respect of that particular cell.

For these reasons, where a liability of a PCC to a third party arises from a transaction in respect of a particular cell, then such liability will only extend, and that party shall only have recourse, to the cellular assets of the cell in question (§14(1)(a)) and, in certain circumstances, the non-cellular assets of the PCC. Section 14 provides that the company’s non-cellular assets are secondarily liable for the liabilities of any particular cell in the event the cellular assets of the particular cell have been completely exhausted. In no circumstances will a creditor be entitled to have recourse to the cellular assets of any other protected cell (§14(1)(c)). Accordingly, where a liability of a PCC to a person arises or is imposed otherwise than in respect of a particular cell, then that person shall only have recourse to the company’s non-cellular assets (§14(3)).

b. Apportionment of Assets and Liabilities

The intention of the PCC Act is to ensure that cellular assets and liabilities and non-cellular assets and liabilities will not be intermingled. Nonetheless, in some 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 cell. The same will sometimes be true of liabilities. However, the PCC Act does not expressly enable the apportionment of assets and liabilities between cells.

Notwithstanding the above, the directors of the PCC may permit both cellular assets and non-cellular assets to be held by or through a nominee or a company (§5(7)).

c. Transfer of Assets

A PCC may transfer its cellular assets in the ordinary course of business, through payments, investments or otherwise to another person, wherever resident or incorporated, and whether or not a PCC, including to another cell of the PCC, provided a ‘cell transfer order’ has been obtained from the Court pursuant to the conditions outlined in section 19 of the PCC Act. The PCC, however, is not permitted to transfer its non-cellular assets in such manner (§19).

d. The Cell Owner's Interest

The cell owner's interests and rights may be set out in a standard contract or in the articles of the PCC or, for example, in the case of a public mutual fund that is a PCC, in a prospectus. The legislation does not provide any additional requirements by virtue of the company also being registered to operate protected cells.

e. Creditor Enforcement Rights over Cellular Assets

Special provisions are included in the PCC Act to reduce the likelihood that creditors in respect of a particular cell will be in a position to enforce their claims against assets not attributed to that cell. First, the PCC Act implies certain terms into every transaction entered into by the PCC. For instance, it is implied that no party shall seek, whether in any proceedings or by any other means whatsoever or wheresoever, to make or attempt to make liable any cellular assets attributable to any cell of the company in respect of a liability not attributable to that cell (§6(3)(a)).

In addition, if any party succeeds, by any means in making liable any cellular assets that are not attributable to that cell, then that party shall be liable to the company to pay a sum equal to the value of the benefit obtained by him (§6(3)(b)). The PCC Act also provides that any recoveries in breach of the provision are held on trust by the recipient party for the company and that the assets are to be kept separate and identifiable as trust property (§6(3)(c)).

The foregoing provisions may, however, be excluded in writing (§6(3)).

In the event of any cellular assets being taken in execution in respect of a liability not attributable to that cell, and in so far as such assets or compensation in respect thereof cannot otherwise be restored to the cell affected, the PCC must procure its auditor to certify the value of the assets lost and transfer or pay, from the cellular or non-cellular assets to which the liability was attributable to the cell affected, assets or sums sufficient to restore to the cell affected the value of the assets lost (§6(6)). In such circumstances, and where a cell's assets are insufficient to compensate the relevant cell's deficit, then the PCC must, as far as possible, make up the deficiency from its non-cellular assets (§6(7)).

These provisions will be particularly useful in cases where assets attributed to a cell are located outside of Seychelles. In fact, the PCC Act explicitly states that this section has extra-territorial application (§6(8)).

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 protected cell may potentially be exposed to the liabilities of another. This risk is higher in jurisdictions that do not have segregated accounts legislation, and unfortunately there is very little, if any, case law in such jurisdictions in which the structure and standing of a Seychelles 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.

To reduce the risk associated with this, PCCs should make every effort to hold their assets in jurisdictions that have protected cell legislation, for example the Cayman Islands, Bermuda, the British Virgin Islands, Jersey, Mauritius and Seychelles. PCCs should also endeavour to have their contracts governed by the PCC Act, and made subject to the jurisdiction of the courts, of such a jurisdiction.

Contracts should also contain language that limits the recourse of any potential creditor of a particular segregated portfolio to the assets in the relevant account.

In considering these issues, it is likely that a tribunal considering a Seychelles PCC would also have close regard to whether the PCC has in fact been operated in accordance with the requirements of the PCC Act considered in this Guide. Consequently, it is vital that PCCs ensure that these requirements are strictly adhered to.

6. Securities

a. Issue of Shares Linked to a Protected Cell

The PCC Act expressly provides that a PCC may, in respect of any of its cells, create and issue shares, the proceeds of which would of course be comprised in the assets attributable to the cell in respect of which the cell shares were issued (§8(1)).

Where shares are not attributed to any cell, the proceeds are comprised in the company's non-cellular assets (§8(2)).

b. Dividends, Distributions and Redemptions

A PCC can pay a dividend or other distribution in respect of a cell's shares (§8(3)). Due to the inherent nature of a protected cell, cellular dividends and distributions may only be paid by reference to the cellular assets and liabilities attributable to the cell in respect of which the shares were issued (§8(4)).

Accordingly, in determining whether the cell satisfies the solvency test (of whether or not profits are available for the purpose of paying such a dividend) as per section 161 of the Companies Act, no account need be taken of the profits and losses or assets and liabilities attributable to any other cell of the PCC, or to the PCC's non-cellular assets (§8(4)).

There are no specific rules that apply to a company by virtue of the fact that it is a PCC in respect of redemptions. However, it follows from the segregation requirements (see section 5 above) that redemption proceeds should be paid from the applicable protected cell. For more information on this topic with respect to companies in Seychelles, please refer to 'The Guide to Special License Companies in Seychelles', which is available from the Appleby website.

c. Reduction of Capital/Capital Transactions

The PCC Act contains provisions dealing with the reduction of share capital with the intention of protecting the interests of creditors.

A PCC may apply to the court to reduce the cell share capital of any of the PCC's cells. Similarly a holder of cell shares may apply to the court to reduce the cell share capital of the cell in which the cell shares are held (§9(1)).

A notice of the intention to make an application to the court must be published by the applicant in such form and manner, and in such local and foreign newspapers as may be specified by the Authority.

The court may authorise the PCC (§9(4)):

- to extinguish or reduce the liability on any cell shares in respect of cell share capital not paid up;
- to cancel any paid-up cell share capital which is lost or unrepresented by available cellular assets (with or without extinguishing or reducing any liability on any cell shares); or
- to pay off any paid-up cell share capital which exceeds the company's wants (with or without extinguishing or reducing any liability on any cell shares).

Prior to authorising the reduction of cell share capital, the court must be satisfied that (§9(4)):

- the transaction has been approved by special resolution of the company and is filed;
- the company has provided sufficient guarantees to secure payment of its liabilities to the creditors of that specific cell;
- no creditor will be unfairly prejudiced by the reduction; and
- the company satisfies the solvency test set out in the PCC Act (§9(5)).

7. Receivership and Winding Up

a. Receivership Orders

A receivership order is an order made in relation to a cell that requires the receiver to manage the orderly closing down of the business of or attributable to the cell and the distribution of the cellular assets attributable to the cell to those entitled to have recourse thereto (§20(3)).

A receivership order may be made in respect of one or more protected cells (§20(2)) and will be made when the Court is satisfied that (§20(1) and (3)):

- the cellular assets attributable to a particular cell are, or are likely to be, insufficient to discharge the claims of creditors in respect of that cell;
- an administration order would not be appropriate in the circumstances; and
- the making of the order would achieve, the orderly winding-up of the business of, or attributable to, the cell and the distribution of the cellular assets attributed to the cell, to those entitled thereto.

Such an order will not be made, however, if a liquidator has been appointed in respect of the PCC or the PCC has passed a resolution to wind up voluntarily (§20(4)(a)). A receivership order will cease to have effect upon the appointment of a liquidator in respect of the PCC (§20(4)(c)), though in this case, leave of the Court is required before a resolution may be passed to appoint a liquidator of the PCC (§20(5)), ie the shareholders of a PCC cannot pass a resolution to wind up voluntarily without the consent of the Court, which ensures that such a dramatic step will not take place in relation to a PCC unless the Court is aware.

Subject to the PCC Act, any rule of law as to preferential payments and any agreement between the PCC and any creditor of the PCC as to the subordination of the debts due to that creditor to the debts due to the PCC's other creditors, the receiver must, in the winding up of the cell in question, apply the cellular assets in satisfaction of the PCC's liabilities attributable to that cell *pari passu* (§23(5)).

Subject to the memorandum or articles of association, any surplus must be distributed among the holders of the cell shares (or other persons entitled to the surplus), according to their respective rights and interests in or against the company (§23(6)(a)). Where there are no cell shares and no persons otherwise entitled to the surplus, then the surplus goes to the holders of the non-cellular shares of the PCC, according to their respective rights and interests in or against the PCC (§23(6)(b)).

The Court will not discharge a receivership order unless it appears to the Court that the purpose for which the order was made has been achieved, substantially achieved or is incapable of achievement (§23 (1)). On hearing such an application for discharge (or variation), the Court may make such order as it considers appropriate (§23(2)).

Where the Court discharges a receivership order on the ground that the purpose for which the order was made has been achieved (or substantially achieved), then the Court may direct that any payment made by the receiver to any creditor in respect of that cell shall be deemed full satisfaction of the liabilities of the PCC to that creditor in respect of that cell, thereby extinguishing that particular claim (§23(3)). This does not, however, affect any right or remedy a creditor may have against any other person, including any surety of the PCC (§23(4)).

b. Application Procedure

An application for a receivership order in respect of a protected cell may be made by the PCC itself, the directors, any creditor or holder of cell shares in respect of the relevant cell, the administrator of the cell or the Authority (§21(1)). Notice of such an application to the Court, must be served upon the PCC, the administrator of the cell (if any), the Authority and such other persons (if any) as the Court may direct, each of whom will have an opportunity to make representations to the Court before any order is made (§21(3)).

The Court, on hearing such an application for a receivership order (or for leave for a resolution for the winding up of the PCC) may make an interim order or adjourn the hearing conditionally or unconditionally (§21(2)). Once a receivership order is made, the Court will not discharge the order until it appears to the Court that the purpose for which the order was made has been achieved (or substantially achieved or is incapable of achievement) (§23).

c. The Receiver

Pursuant to the PCC Act, the receiver of a protected cell has all the functions and powers of the directors of the PCC in respect of the business and assets attributed to that cell and may do all that is necessary to carry out the purposes of the receivership order (§22(1)).

Accordingly, during the operation of a receivership order, the functions and powers of the directors of the PCC cease in respect of the business and assets attributed to the cell in question (§22(6)). The receiver is deemed to be the agent of the PCC and the PCC Act provides that the receiver will not incur personal liability except to the extent that he is fraudulent, negligent, reckless or acts in bad faith (§22(3)).

The remuneration of a receiver and any expenses properly incurred by him are payable in priority to all other claims from the cellular assets attributable to the cell in respect of which the receiver was appointed (or from the non-cellular assets of the PCC where such cellular assets are insufficient) (§24). Under no circumstances will the receiver be remunerated from cellular assets attributable to any other cell.

d. Stay of Proceedings

The PCC Act provides that during the period of operation of a receivership order, no proceedings may be instituted or continued by or against the PCC in relation to the affected cell and no steps may be taken to enforce any security in respect of the business or cellular assets, in relation to the cell in respect of which the order was made, except with leave of the Court (§22(5)). The stay of

proceedings is meant to give the PCC and its receiver a “breathing space” during which the PCC and the receiver may consider their options.

e. Winding up

The provisions of section 260 of the Companies Act 1984 as to winding up apply equally to PCCs but, notwithstanding any statutory provision to the contrary, in the liquidation of a PCC the liquidator is under a duty, pursuant to the PCC Act (§18), to deal with both the cellular and non-cellular assets in the same fashion that a director is under a duty to deal with cellular and non-cellular assets (§5(2), and as described above at 5.a).

Accordingly, in the discharge of the claims of creditors of the PCC, the liquidator must apply the PCC’s assets to those entitled to have recourse thereto in conformity with the provisions of the PCC Act, ie the cellular assets and liabilities that are attributed to each cell may only be available and be used to meet liabilities to the creditors of the PCC who are creditors of that cell and shall not be available or be used to meet liabilities to, and shall absolutely be protected from, the creditors of the PCC who are not creditors in respect of that cell and who, accordingly, shall not be entitled to have recourse to the cellular assets attributable to that cell (§29(1)(b)).

8. Removal from the Register

The Registrar does not maintain a separate register of companies registered to operate protected cells. The general rules in the Companies Act with respect to removal of defunct companies from the Register apply equally to PCCs (see Part XXVI of the Companies Act).

9. Mutual Fund Provisions

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

10. General

The PCC Act contains a general and fairly standard provision enabling the Minister to make regulations in connection with the PCC Act. Regulations would deal with such things as fees payable under the PCC Act, provisions for sound management of the PCC, reporting obligations and offences.

CONCLUSION

The legislation pertaining to PCCs therefore 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, the PCC Act 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.

For more specific advice on Protected Cell Companies in Seychelles, please contact:

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