Jersey Protected Cell Companies and Incorporated Cell Companies

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Introduction

A cell company is a company that has the ability to create one or more cells with assets and liabilities that are distinct from the assets and liabilities of other cells and the cell company itself. These cells can be used to carry out separate and distinct businesses.

Legislation permitting the incorporation of cell companies has been in force in Jersey since February 2006. Additional changes to the Companies (Jersey) Law 1991 (the Law) brought into force in 2008 increased the flexibility of the cell company regime by, for example, removing the requirement for a cell company and each of its cells to have the same directors. Taking account of the changes to the Law, this briefing is intended to provide a general guide as to when cell companies can be used, the benefits of using a cell company and issues to be considered when incorporating and using a cell company. Specific advice should be sought to ensure that any cell company complies with the Law and is appropriate for the particular transaction.

Overview

Two types of cell companies are available under Jersey law:

- the Incorporated Cell Company (ICC), each cell of which being an incorporated cell (IC); and
- the Protected Cell Company, each cell of which being a protected cell (PC).

ICCs	PCCs

An innovative concept in structuring introduced first in Jersey	Similar to protected cell structures or segregated portfolio companies elsewhere
IC is a separate legal entity	PC is required to be treated as though a separate legal entity
Liability limited by structure (separate legal personality)	Liability limited by procedural rules Provisions preventing cellular creditors claiming non-cellular assets provide enhanced protection
Can convert to PCC or to general company	Can convert to ICC or to general company
IC has power to contract because of separate legal personality	Special provisions allow the PC to contract
Each IC is a separate legal entity. Claims limited as a substantive matter of law to assets of that IC	Directors obliged to properly separate cellular assets and to notify and record when contracting for PC

What are cell companies and when are they used?

A cell company is a company that has the ability to create one or more cells with assets and liabilities that are distinct from the assets and liabilities of other cells and the cell company itself. For instance:

- Each cell has a separate memorandum and articles and its own members and can be used to carry out separate business activities.
- Members of the cell company need not be members of a cell, and vice versa.
- A cell company may be a public or private company, a par value or no par value company, or a guarantee company, and can be a limited or an unlimited company.
- Individual cells can be dissolved or wound up without impacting other cells or the cell company itself.

A feature of the Jersey legislation is that neither an IC nor PC is a subsidiary of the relevant cell company from which it derived solely as a result of the cellular dependency. A cell may invest in any other cell of the company, subject to its articles of association, although a cell may not invest in the cell company itself.

Historically, the concept of a cell company was developed for use in relation to umbrella investment funds and to assist in the management of investment pools supporting separate lines of insurance business. However, Jersey cell companies have been used for a wider range of applications in financial services businesses and structured finance activities.

What is the difference between an ICC and a PCC?

An ICC adopts a fundamentally different approach to cells. The ICC incorporates each cell as a separate legal entity without the cell company needing to have any shareholder relationship with the relevant cell.

The principal difference therefore is that each IC is a separate company as a matter of law whereas each PC is not a body corporate and has no separate legal identity.

Why did Jersey introduce ICCs?

The concept of the incorporated cell was developed in response to concerns regarding the effectiveness of the ring-fencing and liability segregation provisions in relation to the ‘traditional’ protected cell structures established in other jurisdictions, including:

- Protected cell structures established outside Jersey may not provide adequate asset protection where there is a risk of involuntary cross-default across cells whether because of a disparity in risk profile between cells or ultimate performance of the business being conducted by the different cells.
- Foreign courts may not recognise the provisions directing the segregation of the asset pools attributable to different PCs and which provide for the appropriation of those specific pools to satisfy the cellular liabilities on the basis that. Such provisions could be viewed as procedural only (rather than substantive), and as such foreign court could be less inclined to enforce them as a matter of private international law.
- Protected cell structures established outside Jersey can permit a creditor or shareholder of a single cell to have all the other protected cells placed into an administrative moratorium or "Chapter 11" type proceeding, which would be likely to defeat the expectations of investors or counterparties regarding timely payment or performance of obligations. This feature has also previously rendered non-Jersey PCCs unacceptable to rating agencies for rated transactions.

The ICC, however, creates each IC as a separately incorporated Jersey company. Incorporation is a substantive provision of law that is expected to be recognised by foreign courts in the same way as that of the limited liability of a traditional stand-alone company.

How do you create a cell company?

A cell company is created in the same way as any other Jersey company but its memorandum must state that it is an ICC or a PCC. The company name must include either the identifying words (or initials) Incorporated Cell Company (ICC) or Protected Cell Company (PCC), as applicable. For a cell company to create a cell a special resolution is required which must assign a distinctive name to the cell distinguishing it from other cells and which must include the words (or initials) Incorporated Cell (IC) or Protected Cell (PC), as appropriate.

The cell company then files the special resolution and the cell is created when the registrar of companies (the 'Registrar') issues a certificate of incorporation (for an IC) or a certificate of recognition (for a PC). Each cell must have the same secretary and registered office as the constitutive cell company.

What has to be included in a special resolution creating a cell?

The special resolution must adopt a memorandum and articles in relation to the cell and may provide for the dissolution or winding up of the cell in various circumstances such as bankruptcy, resignation of members, the expiry of a fixed period of time or for other specified reasons.

Who controls the board of a cell?

The first directors of a cell are appointed by the cell company. However, although cells and the cell company may have the same directors, there is no requirement that a cell must share the same board as the cell company and directors of a cell can be removed and replaced in the manner provided for in the cell's articles of association.

What are the accounting requirements of a cell?

The directors of a cell are responsible for preparing accounts in respect of that cell in accordance with the Law.

A cell company is required to keep a separate record of members for each cell and to submit an annual return for each cell.

Can cells be transferred? Can cell companies have different types of cells?

Subject to complying with the specific requirements of the Law, cells of ICCs can be transferred to PCCs and vice versa.

All cells of an ICC must, however, be ICs and all cells of a PCC must be PCs. On transfer, therefore, the cell will have to adopt the form applicable to the cell company to which it is transferred.

Can non-cell companies be converted to cells or cell companies?

The Law provides facilitating provisions that allow a non-cell company to be converted to a cell of a cell company or to a cell company.

In addition, a body incorporated outside Jersey can, with the approval of the Jersey Financial Services Commission and subject to the laws of the original jurisdiction of incorporation, re-domicile itself as a Jersey company and then change its status to a Jersey ICC or a PCC by following the conversion process set out in the Law.

What are the directors' obligations?

Directors of cell companies and cells have the same duties and responsibilities as directors of non-cell companies. Importantly, however, a director of a cell does not, by virtue only being a cell director, owe any duties or liabilities in respect of the cell company or any other cell and is not entitled to obtain any information in respect of the cell company or any other cell. In addition, directors of a PCC must ensure that:

- cellular assets and liabilities attributable to each PC are kept separate and are separately identifiable from the non-cellular assets and liabilities attributable to the PCC;
- the cellular assets and liabilities attributable to each PC cell of the company are kept separate and are separately identifiable from the cellular assets and liabilities attributable to other PCs of the PCC; and
- when a PCC enters into an agreement in respect of a PC, the directors are required to ensure that the other party to the transaction knows or ought reasonably to know that the PCC is acting in respect of a particular PC.

Failure to comply with such duties is an offence. Whilst there is no directly applicable personal liability upon directors in these circumstances, the general provisions of the Law to protect against fraudulent or wrongful trading could in appropriate cases be brought into play, potentially making directors in default personally liable for the cell's liabilities.

How are the assets and liabilities of ICC and PCC cells protected and isolated?

The assets and liabilities of an IC are protected and isolated because the incorporated cell is, under the Law, a separately incorporated company.

The position with PCs (which are not separate legal entities), is different and various provisions have been included to provide protection for the assets and isolation of the liabilities of a PC.

In summary, the Law differentiates between 'Cellular Transactions' and 'Cellular Liabilities' which are transactions in relation to, or liabilities incurred in respect of, the activity or assets of a particular PC of the PCC and 'Non Cellular Transactions' and 'Non-Cellular Liabilities' which relate to the PCC in its own right.

Claims in relation to cellular transactions and cellular liabilities extend only to cellular assets. Claims in relation to non-cellular transactions and non-cellular liabilities extend only to non-cellular assets.

When can a PCCs cellular assets be used to meet cellular liabilities?

A PCC may not meet cellular liabilities from cellular assets, except where prescribed requirements have been met. In particular, the PCC or the relevant PC must be permitted to do so under its articles, and the directors must make a statement that, having made full enquiry into the affairs and prospects of the PCC (or the particular PC), they have formed the opinion that:

- immediately after meeting the liability, the PCC (or the PC) will be able to discharge its liabilities as they fall due; and
- taking into account the future intentions of the directors with respect to the PCC (or the PC) and the amount and character of the financial resources in their opinion available to the PCC (or the PC), it will be able to continue to carry on business and be able to discharge its liabilities as they fall due for one year following the date on which the liability is to be met.

What protections are afforded to protect cellular assets from creditors’ claims?

There are specific provisions to protect cellular assets from creditors’ claims. In particular, creditors with claims arising from cellular transactions are only entitled to claim against the cellular assets of that cell and, if their claim does not arise from a cellular transaction, they will not be entitled to claim against cellular assets.

The Law provides specifically that creditors have no right to make claims against cellular assets (if their claim arises from a non-cellular transaction) or against non-cellular assets or the cellular assets of another cell if their claim arises from a cellular transaction of a particular cell.

Other provisions make a creditor who succeeds in obtaining cellular or non-cellular assets to which he or she is not entitled liable to repay to the PC or PCC as applicable an amount equal to the benefit improperly obtained. Where a creditor successfully sells, realises or obtains title to cellular or non-cellular assets to which he is not entitled, the creditor must hold those assets or the proceeds on trust separated and identifiable as trust property.

What is the effect of a cell being declared insolvent?

In the event of the insolvency of a cell, this will not (in the absence of any special provisions in the articles of association subjecting the non-cellular assets to the liabilities of an insolvent cell) lead to the insolvency of the cell company, whether an ICC or a PCC. This results, in the case of an ICC, from the separate incorporation of each IC and, in the case of a PCC, from the express provisions of the Law restricting creditor claims to the relevant cellular assets and denying access to non-cellular assets. This is likely to reduce administrative inconvenience and cost arising for cells not otherwise affected by the insolvency of another cell of the cell company.

Summary

The Jersey legislation provides a solution to the underlying problems that exist for cell companies in many other jurisdictions. The ICC, in particular, introduces a truly innovative corporate structure that combines robust ring fencing provisions with flexibility and convenience.

Representative Ogier Cell Company transactions
Ogier has acted on a range of cell company transactions since the introduction of the concept in 2006, including the following:

- Acting for Société Générale in establishing the first ICC to be set up in Jersey. This was selected as the most efficient structure in a complex asset financing transaction in order to facilitate ring fencing the assets and liabilities attributable to different portions of the financing.
- Instructed by Nordea Bank in relation to the conversion of a purchasing company into an ICC to enable cells to accede to the Viking £2 billion multi-currency asset-backed commercial paper programme.
- Maxima Alpha Strategy Funds PCC - acted on the conversion of a fund of hedge funds structured as an umbrella fund into a PCC with a number of PCs.
- Acting for Ashburton upon the conversion of two umbrella funds into PCCs with a number of PCs, combined with a Court approved scheme to combine into a single PCC structure.
- Creation of cell structures where the separation of economic ownership from control has benefits.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

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Regulatory information can be found under Legal Notice

Key Contacts

Raulin Amy

Partner

Jersey

E: raulin.amy@ogier.com

T: +44 1534 514239

Matthew Shaxson

Group Partner, Ogier Legal L.P.

Jersey

E: matthew.shaxson@ogier.com

T: +44 1534 514064

Katrina Edge

Partner

Jersey

E: katrina.edge@ogier.com

T: +44 1534 514192

Niamh Lalor

Partner

Jersey

E: niamh.lalor@ogier.com

T: +44 1534 514210

Nathan Powell

Partner □□□

Hong Kong

E: nathan.powell@ogier.com

T: +852 3656 6054