

**PROTECTED CELL COMPANIES IN MALTA –
Insurance Companies, Insurance Brokers
& Insurance Managers**

Dr. Matthew Bianchi
**Ganado & Associates – Advocates,
Valletta**

mbianchi@jmganado.com

18th October, 2004

The use protected cell companies (PCC) is certainly one of the most significant developments in the field of corporate finance, and this is particularly true in the world of insurance and captive insurance - but it is wrong to assume that the PCC model is exclusive to captive insurance companies.

Maltese law has recently introduced regulations which allow the PCC model to be adopted by regular **Insurance Companies, Insurance Brokers and Insurance Managers** alike.

The **Companies Act (Cell Companies Carrying on Business of Insurance) Regulations, 2004ⁱ** ('PCC Regulations') provide that any insurance company, insurance broker or insurance manager licenced by the Malta Financial Services Authority may be either constituted or converted into a 'Cell Company' provided the necessary regulatory approvals are sought and the relevant statutory requirements are observed by the company.

In terms of the PCC regulations a 'Cell Company' is a company constituted or converted into a cell company having within itself one or more 'cells' for the purposes of segregating and protecting the cellular assets of the company in accordance with the Regulations. A cell company is a single legal person.ⁱⁱ

A 'Cell' is in turn a class of shares within a cell company designated as a cell and created for the purpose of segregating and protecting cellular assets belonging to the company in the manner provided by the Regulations. A cell is not bestowed with separate legal personality.

Applicability of PCC Regulations

The Regulations are applicable to all licenced;

- Insurance Companies (including captive insurance and re-insurance companies);
- Insurance Brokers; and
- Insurance Managers.

A prospective insurance company, broker or manager wishing to be constituted as a protected cell company or an existing company wishing to be converted into a PCC must, prior to its formation or conversion, apply to the MFSA for its approval to be so formed or converted. The MFSA should grant its approval to any companies which when formed or converted will be licenced insurance companies, insurance brokers or insurance managers.

Nature & Features of Protected Cell Companies

A protected cell company is, in broad terms, a company that operates in two parts – (i) the company core (the non-cellular part) and (ii) any number of cells (distinct classes of shares in the company) formed for the purpose of segregating and protecting cellular assets.

The core part comprises all non-cellular assets including the company's core share capital, investments, liabilities and so forth. The extent of the company's 'core' varies largely and depends on the structure promoted by the company's sponsors.

For instance, the core share capital may be the minimum required at law or it may be much larger – as is often the case when a regular insurance company, broker or managers converts from an ordinary company to a protected cell company. In the process of conversion the company will ordinarily retain all its share capital and its assets and liabilities all of which will comprise the cell company's core assets and liabilities.

A cell company may have any number of 'cells'. Cells are represented by a class of shares in the company. These are termed 'cell shares' in the Regulations and they subscribed to by the shareholders of the particular cell (or class of shares). The 'cell share capital' is accordingly the amount of the proceeds of the issue of the cell shares to the cell shareholder/s. A cell's share capital constitutes the initial cellular assets attributable to the cell.

Profits earned by a cell or capital reserves belonging to it may be distributed to its shareholders by the cell company as 'cellular dividends'. Such dividends may be paid in respect of cell shares by reference only from the profits attributable to the cell and only by reference to the cellular assets and liabilities of the cell in respect of which the cell shares were issued. When distributing cellular dividends no account will be taken of any non cellular profits or losses, or to any profits or losses attributable to any other cell of the company.

Statutory Requirements

- **Memorandum & Articles**

The name of a cell company must include the words “Protected Cell Company” or “PCC”, and the memorandum of association of the company must state unequivocally that the company is a cell company. Each cell in a cell company must be given its own distinct name or designation. The memorandum and articles of the company should indicate the name of each cell besides the number of shares in each cell and the names of the subscribers thereto.

- **MFSA Approval**

A company may not be formed or constituted as, or converted into a cell company unless it has previously sought and obtained written approval of the MFSA. The same rule applies to the creation of new cells in an existent cell company.

A copy of the cell company’s Memorandum and Articles of Association (or a copy of resolution amending the company’s M&A in case of a conversion) must be delivered to the Registrar of Companies for registration of the company together with evidence of the MFSA’s approval.

- **PCC Transacting with Third Parties**

A cell company must inform all persons who it transacts business with that is a cell company and if the third party is transacting with a particular cell, the cell company must also identify and specify the ‘cell’ in its dealings.

- **Segregation & Insulation**

The Regulations make it the duty of directors of a cell company to keep cellular assets ‘separate and separately identifiable’ from all core assets and from the assets belonging to other cells in the company. The company is to maintain separate records, accounts and statements as may be necessary to evidence the assets and liabilities of each cell as distinct and separate from those of other cells and of the company.

Creditor & Third Party Rights

The legislator was steadfast in its efforts to insulate the assets and liabilities of a cell from those of other cell in a cell company. The Regulations provide that a creditor of a cell company ‘*shall not have any rights other than the rights*’ referred to in Regulations 12, 13 and 14 of the PCC Regulations.

The relevant provisions of these regulations articulate the following principles and limitations:

1. *Creditor Recourse to Cellular Assets*

- The Regulations states categorically that:
 - cellular assets attributable to a particular cell are only available to creditors of that particular cell, and that
 - no recourse may be made by a creditor a particular cell to assets of another cell of the same cell company.

2. *Liability of Cellular Assets*

- The cellular assets attributable to a particular cell are *primarily* liable to satisfy all its cellular liabilities.
- The cell company's core/non-cellular assets may be *secondarily* liable to satisfy any cellular liability of one of its cells in the event that the cellular assets attributable to the particular cell have been exhausted.
- Cellular assets which are attributable to a particular cell *may not* be used to satisfy the liability of another cell in the same cell company.

3. *Liability of Non-Cellular Assets*

- The company's core/non-cellular assets will be liable for all liabilities of the cell company which are not attributable to a particular cell.
- As outlined above, the company's non-cellular assets may also be *secondarily* liable for cellular liabilities - if the particular cell is exhausted of cellular assets.

3. *Implied Contract Terms*

- Unless expressly excluded in writing there is implied in every transaction entered into by a cell company that –
 - no party to the transaction may seek to make or attempt to use any cellular assets attributable to any cell of the company to satisfy a liability not attributable to that particular cell, and
 - if any party succeeds by any means whatsoever in using assets attributable in using cellular assets attributable to any cell of the company to satisfy a liability not attributable to that cell, that party will be liable to the company to pay a sum equal to the value of the benefit thereby obtained. This payment will be attributed to the cell concerned.

- Where an executive warrant has been issued or enforced against assets of a cell for liabilities not attributable to that cell, and for any reason such assets may not be restored or otherwise compensated for, the cell company will itself be liable transfer to the cell enough assets to restore or compensate the cell the value of the assets lost.

Transfer of Cellular Assets

The Regulations allow cell companies to transfer cellular assets to third parties, including other cell companies, provided the transfer has been approved by the MFSA.

The MFSA will approve the transfer of cellular assets provided that creditors of the cell who may have a right to recourse against the cellular assets being transferred have been informed of the transfer and consent to it.

The Regulations do not hinder the payment of sums due by the cell company for liabilities of a cell. The Regulations provide that the cell company need not request MFSA's approval to invest or re-invest any assets of a cell or otherwise make any payments or transfers from cellular assets in the ordinary course of the company's business.

Conclusions

The PCC Regulations coupled with the new insurance law and regulations relating to captive insurance companiesⁱⁱⁱ in Malta and the recent insurance business continuance regulations^{iv}, represent a bold attempt by our legislator and our regulatory authorities to provide insurance managers, insurance brokers and insurance companies (including captive companies) with a comprehensive legislative framework to allow these companies to set up and operate in or from Malta within a regulatory environment which is consistent with that found in most other modern jurisdictions.

ⁱ Companies Act (Cell Companies Carrying on Business of Insurance) Regulations, 2004; Legal Notice 218 2004

ⁱⁱ PCC Regulations; Article 2(1)

ⁱⁱⁱ Insurance Business (Companies Carrying on Business of Afilliated Insurance) Regulations, 2003; LN 334 2003.

^{iv} Insurance Business (Continuance of Companies Carrying on Business of Afilliated Insurance) Regulations, 2003; LN 335 2003

Disclaimer: This memorandum is not intended to impart advice; readers are advised to seek confirmation of statements made herein before acting upon them; specialist advice should always be sought on specific issues.