Insurance Companies formed as (or converted to) Protected Cell Companies (PCCs) may establish “Cells” within their own corporate entity and write risk through those Cells with the assets and liabilities of each Cell completely segregated from the other Cells and the non-cellular part of the PCC (also known as the “Core”). At the same time the administrative and regulatory costs can be shared among the various Cells and the Core, which makes Cells particularly attractive as an alternative for smaller corporate groups wishing to establish their own insurance vehicle, providing them with easier and more affordable access to the Captive Insurance market. Malta is the only full EU Member State that offers PCC legislation and is currently home to 3 PCCs (and 10 Cells between them) carrying on insurance business.

The underlying principle of a PCC is the ‘insulation’ of assets and liabilities within a Cell. Cellular assets attributable to one Cell are only available to satisfy the liabilities of that particular Cell. This creates the concept of cellular creditors where any creditors contracting with the PCC in respect of a particular Cell only have a right of recourse against the assets of that Cell.

Generally however, creditors of a Cell also have a right of secondary recourse to Core assets of the PCC but only once cellular assets of that particular Cell to which the liability is attributable have been fully exhausted. Creditors of the Core, on the other hand which are not creditors (i.e. non-cellular creditors) of a particular Cell only have a right of recourse against Core (non-cellular) assets.

This right to secondary recourse stems from the need to protect policyholders. EU Insurance Directives dictate that insurance companies operating within the EU are required to keep a minimum guarantee fund at all times, the amount of which depends on the class of insurance business carried on.

Although each Cell is required to maintain a solvency margin as if it were a separate insurance company, Cells are not required to maintain the minimum ‘own funds’ capital requirement (which is held by the Core) thereby allowing Cells to carry on insurance business without the need to be fully capitalised as a standalone insurance company. Policyholders of a Cell are however entitled to believe that at the very least they always have recourse to the Core which is subject to such ‘own funds’ requirements unlike the Cells.

That said, although the cellular creditors may have recourse to the Core if the cellular assets prove insufficient it is important to keep in mind that there is still complete segregation between Cells as the creditors of one Cell may never have recourse to the assets of other Cells. Furthermore, secondary recourse does not detract from the key benefit of the PCC model, that a promoter may write insurance business through a Cell without having to comply with the onerous own funds requirements set out by the EU Directives by effectively utilising the Core capital as its own.

Despite the above, international practice in other PCC jurisdictions has developed the concept of non-recourse agreements being entered into between the PCC in respect of a particular Cell and its policyholders whereby the latter would agree that only the cellular assets would be used to satisfy the liability of the Cell, with no right of secondary recourse to the PCC’s non-cellular assets. There were a number of concerns regarding the validity of such agreements particularly where policyholders were ordinary consumers who might be unfairly prejudiced by such an arrangement as they would in all probability not be aware of the detail and implications of dealing with a Cell without secondary recourse to the Core.

In its most recent amendments to the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations the Maltese legislator opted to grant the industry greater certainty by formally recognising the validity of such non-recourse agreements subject to certain conditions being met, namely that the Cells must engage exclusively in either affiliated (Captive) insurance or reinsurance and such non-recourse agreements must be specifically permitted by the memorandum and article of association of the PCC. Furthermore, where the PCC’s business relates to compulsory insurance, the MFSA must be satisfied that sufficient guarantees are in place to protect insured persons, policyholders, creditors and other interested third parties before such limitations can be agreed.

It was recognised that the particular nature of both affiliated insurance and reinsurance, in contrast to direct writing, did not
create any unfair prejudice in respect of the policyholder.
Captive insurance Cells write the risks of their parent (or related
group entities) creating a scenario where the policyholder (the
insured parent) effectively provides his own insurance cover.
Similarly, a reinsurance Cell provides another atypical situation
where the insurer ceding the risk to the reinsurer is deemed to
have sufficient professional knowledge to assess the solvency
of a Cell and thus the cover and guarantees afforded by such
Cell.

About Ganado & Associates (G&A)

G&A has extensive legal expertise in the insurance and
reinsurance fields both in the international market and locally
and is well positioned to assist your company whether in relation
to a start-up (re)insurance operation or ongoing legal support.

Dr. David Borg Carbott and Dr. Nicholas Curmi are members of
the Insurance Law and Pensions Law Department at G&A and
have extensive experience in both the establishment and
redomiciliation of PCCs in Malta and offer specialist legal advice
on all legislative and regulatory requirements for PCCs.

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