Protected cell companies in Malta

MALTA FIRST enacted protected cell company (PCC) legislation in 2004 when Legal Notice 218 of 2004 introduced the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations (PCC regulations).

The PCC regulations, which are based on comparable legislation in other jurisdictions, provide for a PCC to be formed to carry on the business of insurance or for a company already carrying on the business of insurance to be converted into a PCC. The PCC may create one or more cells within itself for the purpose of segregating and protecting the cellular assets of the company.

The PCC regulations also provide for insurance brokers and insurance managers to be established in Malta as a PCC and thus create cells for ‘insurance brokers’ or ‘insurance managers’ with one corporate structure.

Soon after the PCC Regulations came into being, one domestic insurance company underwent conversion to become a PCC, making it the first PCC in Malta and one of the first within the European Union. This PCC has recently also created a cell to write business into the European Union.

Creating a cell
Provided it obtains the prior written approval of the Malta Financial Services Authority (MFSA), a PCC may create one or more cells by the issue of shares which are designated as cell shares.

Such cell shares may be ordinary or preference shares. While cells are ordinarily established as classes of preference shares issued to cellular shareholders, the PCC regulations themselves contain no restrictions in this regard. Every cell created by a PCC must have its own distinct name or designation but does not have a separate juridical personality from that of the PCC.

The memorandum and articles of association of a PCC should address all issues of relevance to cells and cell share rights, including:
- whether cell shareholders have a right to vote at general meetings;
- whether cell shareholders are entitled to organise shareholder meetings;
- whether cell shareholder meetings can be attended by the PCC;
- whether cellular dividends are to be paid in respect of a cell;
- whether cellular dividends, amongst other matters, are approved in cell meetings;
- and whether cell resolutions bind the PCC or are merely considered to constitute recommendations to the board of directors of the PCC.

Cell management
The board of directors of a PCC has ultimate responsibility for all cells and cellular assets. Cellular assets comprise the proceeds of cell share capital, reserves attributable to the cell (including retained earnings, capital reserves and share premiums) and any other asset attributable to the cell.

The board may delegate the management and administration of a cell, or parts thereof, to a third party insurance manager subject to its control and supervision, or to a committee which would report to and be accountable to it for its administration.

The directors of a PCC have a duty to keep cellular assets separate and separately identifiable from non-cellular assets and to keep cellular assets attributable to each cell separate and separately identifiable from cellular assets attributable to other cells.

They also have a duty to keep separate records, accounts, statements and other documents as may be necessary to evidence the assets and liabilities of each cell as distinct and separate from the assets and liabilities of other cells in the same PCC.

This duty is not breached by reason only that directors of a PCC cause or permit cellular assets or non-cellular assets, or a combination of both, to be collectively invested or collectively managed by an investment manager, provided that the assets in question remain separately identifiable.

Cell insulation and implied contract terms
Cellular assets attributable to a cell are only available to satisfy the liabilities of that cell and as a rule no recourse can be had to its assets by any creditor of another cell.

It is an implied term in every transaction of a PCC that no party shall seek, whether in proceedings or any other means whatsoever, to make or attempt to use cellular assets attributable to a cell to satisfy a liability not attributable to it.

Should any person somehow succeed in doing so, he will be liable to pay a sum equal to the value of the benefit so obtained to the PCC. That sum, less costs of recovery, will be employed by the PCC to compensate the affected cell.

Should an enforceable warrant be issued or enforced on assets attributable to a cell despite liability not being attributable to it and it is not possible to restore the assets or compensation, the PCC will have to re-allocate the affected cell the value lost from the cellular or non-cellular assets to which the liability was in fact attributable.

Creditors of a cell have a right of secondary recourse to the non-cellular assets of the PCC but this only arises once the assets of a cell to which the liability is attributable have been fully exhausted.

Non-recourse
Following recent amendments to the PCC regulations, introduced by Legal Notice 412 of 2007, the regulations now allow that provided certain conditions are satisfied, arrangements may be made so that only the cellular assets of a cell will be used to satisfy that same cell’s cellular liability, without recourse to any non-cellular assets.

Non-recourse arrangements must be specifically permitted by the memorandum and articles of association of the PCC. There must be a specific written agreement to give rise to non-recourse, the cell concerned must carry on exclusively business of affiliated insurance, or reinsurance and, where the business relates to compulsory insurance, then the PCC must establish to the satisfaction of the MFSA sufficient guarantees for the protection of insured persons, policy holders, creditors and other interested third parties.

Capital requirements
The capital of a PCC must be adequate for it to meet the minimum guarantee fund applicable to insurance companies. Both the core, if carrying on the business of insurance and the cells must satisfy applicable solvency requirements.

The MFSA has recently approved and licensed the first Maltese insurance company cell and it is reputed that a number of applications for licensing of new PCCs and of cells have been submitted to MFSA and are pending a licence.

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