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GUIDE

Incorporated Cell Companies

Last reviewed: July 2021

Introduction

A cell company can be either a protected cell company (a **PCC**) or an incorporated cell company (an **ICC**). ICCs were introduced into Guernsey in 2006 and are provided for under Part XXVIII of the Companies (Guernsey) Law, 2008, as amended (the **Law**).

What is an ICC and what is it used for?

An ICC is a company with the ability to create its own incorporated cells as part of its corporate structure for the purpose of segregating and protecting the assets of the incorporated cells. An ICC is based on the same principles as a PCC in that an ICC may comprise any number of incorporated cells however, unlike a protected cell of a PCC, an incorporated cell has many of the attributes of a non-cellular company.

The incorporated cells of an ICC are each a company in their own right with separate legal identity and their own memorandum and articles of incorporation, albeit they form part of the ICC. An incorporated cell is not a subsidiary of its ICC. Since each incorporated cell is a separate legal entity governed by the provisions of the Law, each incorporated cell can contract with third parties and other incorporated cells in its own right.

An ICC cannot enter into transactions on behalf of its incorporated cells and the incorporated cells cannot enter into transactions on behalf of the ICC or other incorporated cells. The directors and officers of an ICC and its incorporated cells must ensure that, in respect of every transaction entered into by the ICC or incorporated cell, as appropriate, it is stated whether the transaction is being entered into by the ICC or by an incorporated cell and the name of that incorporated cell.

An incorporated cell may not itself be an incorporated cell company or a protected cell company and it cannot hold shares in its ICC. An incorporated cell may however hold shares in another incorporated cell of the same ICC, unless prohibited from doing so by its memorandum and articles of incorporation.

Each incorporated cell has its own board of directors. Any person may be a director of an incorporated cell provided that at least one of these directors of an incorporated cell is also a director of its ICC.

The ICC structure is an attractive and much used vehicle in the captive insurance, investment and structured finance markets. Amongst other uses, we are currently seeing ICCs used more regularly in the captive insurance industry where a cell company can act as a captive insurer to cover the risks of several unrelated sponsoring entities, without exposing the capital associated with any one such entity to liability in connection with another.

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 is, therefore, that each incorporated cell is a separate company as a matter of law whereas each protected cell is not a body corporate and has no separate legal identity.

Advantages of an ICC structure

- ICCs were designed to provide increased protection to creditors. As each incorporated cell is a separate legal entity, the segregation between assets and liabilities within the ICC is strengthened.
- ICCs enable a form of corporate group structure to be created involving lower administration costs than a traditional group of stand-alone non-cellular companies.

Since incorporated cells are separate legal entities, they are able to take advantage of Guernsey's migration and amalgamation legislation giving them the freedom to become registered in other jurisdictions and to amalgamate with other entities within and beyond Guernsey. This would not be possible with cells of a PCC because they are not separate legal entities.

Formation of an ICC

Any class or description of company can be incorporated as, or converted into, an ICC except for:

- a company which is a licensed institution within the meaning of the Banking Supervision (Bailiwick of Guernsey) Law, 1994;
- a company which is a licensed fiduciary within the meaning of the Regulation of Fiduciaries, Administration Businesses and Company Directors etc (Bailiwick of Guernsey) Law, 2000; or
- a company which is a licensee within the meaning of the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002.

In order to incorporate an ICC, it is necessary to obtain the written consent of the Guernsey Financial Services Commission (the **Commission**). The consent of the Commission is not required for the incorporation of an incorporated cell.

The letters 'ICC' or words 'Incorporated Cell Company' must be included in the ICC's name and the words 'Incorporated Cell' or the letters 'IC' must be included in the incorporated cell's name immediately before the word 'Limited'.

An incorporated cell of an ICC cannot be incorporated unless the members of the ICC have passed a special resolution authorising the application for the incorporation of one or more incorporated cells. The resolution must specify the memorandum and articles of incorporation in respect of each incorporated cell and an application to the Registry for the incorporation of the incorporated cell must be made within three months of the date on which the special resolution was passed.

Assets and liabilities of an ICC

The directors of an ICC and its incorporated cells have an obligation to keep the assets and liabilities of the ICC separate and separately identifiable from the assets and liabilities of each of its incorporated cells, and the assets and liabilities of each incorporated cell must be kept separate and separately identifiable from other incorporated cells.

The Law does however permit the assets of the ICC or its incorporated cells to be collectively invested or managed provided that they remain separately identifiable.

Administration of the incorporated cells

The ICC is responsible for keeping a register of the members or index of members (if necessary) of each of its incorporated cells at its registered office and each incorporated cell of an ICC must have the same registered office as its ICC.

The register of directors and register of secretaries of an ICC are deemed to constitute the register of directors and register of secretaries (as appropriate) for each of its incorporated cells. The ICC is also responsible for the completion and filing of its own annual validation and of each of its incorporated cells with the Registrar of Companies. It follows that the ICC should maintain all the minute books and records of its incorporated cells in addition to those of its own.

Accounts and auditors

The directors of the ICC are responsible for preparing accounts in respect of the ICC and the directors of the incorporated cell are responsible for preparing the accounts of that cell and for delivering accounts and reports to members.

There is no requirement under the Law to file accounts with the Registrar of Companies. If a member of an ICC or an incorporated cell requests a copy of a directors' report, accounts or auditors' report, the directors of the ICC or the incorporated cell must send them out within seven days after the date of the request (provided that they have not previously made such a request within that financial year). The directors of the ICC are responsible for ensuring that the ICC comply with these requirements and the directors of the incorporated cell are responsible for ensuring that the cell complies with these requirements.

Annual general meetings

An ICC must hold general meetings of its members unless the members waive the requirement to do so in accordance with the provisions of the Law. In the absence of any requirement in its memorandum and articles of incorporation or by a special resolution, an incorporated cell is not obliged to hold an annual general meeting.

Winding up an ICC

The principles applicable to the compulsory or voluntary winding up of a non-cellular company apply equally to ICCs and each incorporated cell. However, the winding up of an ICC must be carried out in such a way as not to prejudice the affairs, business and property of any of its incorporated cells. As a result, during the winding up, an ICC may continue to carry on business to the extent necessary for its incorporated cells to continue their business.

An ICC that is being wound up is not dissolved until each of its incorporated cells has ceased to exist as a cell of that ICC and the court may stay dissolution of the ICC on that basis. The appointment of a liquidator in respect of an ICC will not affect the position of the directors of an incorporated cell of the ICC unless the liquidator, the members of the incorporated cell concerned or the court so resolves in the course of the winding up.

Administration of an ICC

An application for an administration order may be made to the court by the company, its directors, any member or any creditor (including a contingent or prospective creditor) of the company, the Commission (if it is supervised or engaged in financial services business) or the liquidator (in the case of a company which is in the process of winding up). This applies equally to ICCs and their incorporated cells except that in the case of an ICC, any incorporated cell may make an application for the administration of its ICC and, in the case of an incorporated cell of an ICC, the ICC may make such an application.

The court may make an administration order in respect of an ICC or one of its incorporated cells if:

- it is satisfied that the ICC or its incorporated cells does not satisfy or is likely to become unable to satisfy the solvency test (as set out in the Law and essentially constituting a cash flow and a net assets test); and
- it considers that the making of an administration order may either:
  - achieve the survival of the ICC or incorporated cell in respect of which the order is being made and the whole or any part of its undertaking, as a going concern; or
  - achieve a more advantageous realisation of the assets of the ICC or its incorporated cells than would be effected on a winding up.

No resolution may be passed or order made for the ICC's winding up and no proceedings may be commenced or continued against the ICC except with the leave of the administrator or the leave of the court whilst an administration order is in force. The rights of set-off and secured interests and their rights of enforcement remain unaffected.

Taxation

As each incorporated cell of an ICC is a separate legal entity, each incorporated cell is treated as a separate entity for tax purposes.

Flexibility

A cell company structure is particularly suitable for repeat transactions in collective investment funds, securitisation programmes and insurance captives. Where a structure is required to be regulated, once the basic structure has been given regulatory consent, it is generally possible to add a new cell to the existing framework swiftly and with much reduced regulatory scrutiny. Additionally, the administrative benefits can be considerable.

Contacts

For further information, please get in touch with your usual Mourant contact or, alternatively, a list of contacts can be found here.