

# Barbados

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## Segregated account and segregated cell companies

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After a decade that has seen the dramatic collapse of major financial institutions and corporations and the dismal failure of various collective investment vehicles, solid asset protection structures are in high demand all over the world. In response, Barbados has developed legislation to enhance its corporate law and to innovate, especially in the area of investment vehicles.

Among such innovations were amendments to the Companies Act, Cap 308 (the Act) which made provision for the incorporation of segregated cell companies (SCCs) and companies with segregated accounts (CSAs). The Act also provides for the continuation of companies into Barbados under any of these structures. The core provisions are set out in Divisions F and G (sections 356.15 to 356.51) of the Act.

The essential characteristic common to both a CSA structure and an SCC is the segregation of multiple accounts or cells, as applicable, so that assets and liabilities designated or attributable to a particular account or cell can be kept separate from those designated to any other account or cell and from the general assets of the company. As a result, investors can benefit from having one or more companies within a company - a structure that can afford significant advantages in the context of insurance, capital markets and collective investment business.

### A company with segregated accounts

#### *Authorisation of separate accounts*

Division F of the Act applies only to companies engaged in insurance business. Its provisions allow, where a company's articles of

incorporation authorise it, the establishment of one or more separate accounts in respect of any contract liability of the CSA. The rights and interests of any person in such an account are determined by the contract in relation to which the account has been established. Specific assets owned by the CSA will be allocated and credited to specific accounts, in each case along with all income and interest made and all gains, expenses and losses incurred relative to the relevant assets under the terms of the relevant contract. The company must maintain separate record books for each account in order to fulfil financial and audit requirements.

The designation, restrictions, conditions and rights attaching to each separate account must be specified in the CSA's articles of incorporation, which must cover, at least:

- (i) the investment powers of the company in respect of assets held in each separate account;
- (ii) the allocation and apportionment of gains and losses in respect of any dealing with assets held in a separate account;
- (iii) the auditing of and method for settlement of accounts;
- (iv) the liquidation of any separate account and any disposition of the assets allocated to the separate account;
- (v) the charging of fees, expenses and liabilities against any separate account;
- (vi) the right to transfer, assign or otherwise negotiate any interest under or in respect of any separate account; and
- (vii) any other relevant matter including any matter required under the relevant contract that is related to a separate account, or that is necessary or proper to define the rights of the company or the interests of persons in any separate account.

The CSA is empowered by the legislation to invest and deal with the assets of each separate account in accordance with the terms of the relevant contract.

### *Assets and liabilities*

The Act makes it clear that the assets of any separate account will be maintained segregated and independent from those of any other separate account and from the general assets of the company. Further, separate account assets will not be chargeable with any liability arising from any business of the company conducted in respect of assets kept outside of the relevant account. The CSA's liability under any dealing in respect of the separate account assets is limited to the net value of the relevant account. In addition, the legislation provides that each relevant contract is deemed to incorporate a provision to the effect that, unless expressly stated in the contract, no claim under it may be paid from the general assets of the CSA or from the assets of another account unrelated to the relevant contract.

### Segregated cell companies

#### *Establishment*

Under Division G of the Act, the SCC structure is available for companies engaged in financial services such as mutual-funds activity, insurance or banking, as well as any other non-financial activity that is approved by the regulator.

An SCC can be formed through: (i) the incorporation of a company as an SCC; (ii) converting an existing Barbados company into an SCC; (iii) registering a foreign company (external company) as an SCC in Barbados; or (iv) continuing an external company into Barbados as an SCC.

### *Assets and liabilities*

The legislation provides for an SCC to create one or more cells for segregation and protection of the assets (cellular assets) attributed to each cell. It also provides that an SCC may hold cellular assets and non-cellular assets (general assets) and that the SCC's directors must keep the cellular assets of each cell separate and separately identifiable from those of each other cell and from the general assets.

Under the Act, an SCC may issue cell shares in respect of any cell and may pay cellular dividends in respect of such shares. For each cell, such dividends may be paid by reference only to the cellular assets and liabilities attributable to such cell.

As to segregation of liabilities, an SCC may provide, either in its constitutive documents or in a shareholders' agreement, that only the cellular assets of a particular cell will be fixed with liability attributable to the cell. In this way, recourse of a creditor in respect of any such cellular liability can be strictly confined to the relevant cellular assets. However, if the SCC does not expressly segregate liability and limit recourse in this way, the Act provides in respect of cellular liability that a creditor will have recourse first to the relevant cellular assets and then, if these have been exhausted, to the general assets.

The Act also provides that in the absence of any express provision, where the liability of an SCC to a person arises other than from a transaction attributable to a particular cell, the liability will extend only to the SCC's general assets and the person's recourse will be correspondingly limited to such assets.

There are also detailed provisions based around the implication (unless excluded in writing) into every transaction entered into by an SCC that no party will succeed in fixing any cellular assets with any liability not properly attributable to the relevant cell.

#### Innovative uses and benefits

The fundamental advantage of using either a CSA or an SCC is that a single legal entity can be used for multiple investments, but with the facility to ring-fence each investment as to underlying assets, income and exposure to liability. This provides a safer investment environment but keeps costs down (as compared with the method of ring-fencing investments by putting each one into a separate vehicle). These structures are therefore ideal for asset pooling in insurance business, as well as for multi-series securitisation and collective investment business.

#### Regulatory postscript

It should be noted that any SCC or CSA that is intended to be engaged in banking, investment, fiduciary or insurance business, as applicable, will require a licence from the particular authority that regulates their activity in Barbados.

## Financial and corporate

### Recommended firms

#### Tier 1

Chancery Chambers  
Clarke Gittens Farmer  
Lex Caribbean

#### Tier 2

Carrington & Sealy  
Cottle Catford & Co  
Fitzwilliam Stone & Alcazar  
George Walton Payne & Co  
Hanschell & Company  
Yearwood & Boyce

Much of the talk in the market this year was about the establishment of the Caribbean Exchange Network (CXN) - a high-speed common trading platform for Barbados, Jamaica and Trinidad and Tobago. When it eventually opens, CXN will provide investors with an integrated capital markets system, with the advantage of being able to buy and sell stock via local brokers, with the long-term goal of creating a single Caribbean securities marketplace.

The network should have been ready and operating from April 1 2007, but there are still a few problems which need to be ironed out to please the regulators. There are still unanswered questions such as whether the CXN will take over from the existing domestic markets, or whether the jurisdictions taking part in the common market have strong enough laws to tackle insider trading effectively.

Barbados is quietly manoeuvring itself as the jurisdiction of choice for emerging-market companies to base their offshore companies, with Brazilian, Middle Eastern and Chinese entities all mandating local firms on everything from real-estate acquisition to Islamic finance transactions.

### Chancery Chambers

Chancery Chambers is headed by Trevor Carmichael, who is highly regarded by clients and competitors for his insurance and charity work. The firm's client base includes large corporates, banks, insurance companies and a number of national governments.

The firm was one of the first to advise on financial transactions between Barbados and China, and is now opening the same doors in developing jurisdictions such as Brazil and Venezuela. In the last 12 months, the firm has provided varying forms of advice to clients in the shipping industry, and acted as an adviser to individuals in Venezuela and Brazil looking to minimise their tax exposure.

#### Leading lawyers

Trevor Carmichael  
Andrew Ferreira

### Clarke Gittens Farmer

Clarke Gittens Farmer is a commercial law firm which has been in the market for six years, advising both domestic and international clients.

The firm is highly praised by the market for its work with corporate clients, but Gillian Clarke takes most of the credit from clients and rivals for his solid international work. The firm is also a member of the Lex Mundi network, giving it access to wide referrals.

While much of Clarke Gittens' work is confidential, the firm has been busy advising a number of international banking clients on securities-related matters.

#### Leading lawyers

Gillian Clarke

### Lex Caribbean

Lex Caribbean appointed Garth Patterson as its managing partner in July 2007, and remains a busy practice, advising on a range of corporate and commercial transactions. Clients and competitors single out Mary Mahabir for praise, particularly for her work in real-estate and capital markets transactions.

One of the firm's most notable deals was advising the FirstCaribbean International Bank in the \$34 million financing of the acquisition of Fairmont Royal Pavilion in Barbados by Westmont Group in February 2008.

In September 2007, the team acted for Goldman Sachs Finance on the \$31.5 million sale of a restricted-liability company which held investments in China.

The firm also advised Citibank on various restructurings within the \$1.4 billion Digicel Group between May and December 2007, which included bringing in subsidiaries in new jurisdictions, and increasing the overall debt of the company.

In another notable deal, the firm acted for Bear Stearns on the establishment of a Barbadian international business company, which was added as an issuer to a \$30 billion EMTN programme. This is one of the first times a Barbadian company has been the originator of notes of this type.

The firm also advised Citigroup Global Markets on the financing of the Columbus Communication Group's Jamaican cable operations through local- and US-currency loans.

**Leading lawyers**

Mary Mahabir  
Garth Patterson

**Other notable firms**

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Philip Nicholls of **Cottle Catford & Co** is highly praised by the market for his work with corporate clients. The boutique firm is recognised by the market for its real-estate work, although it also works with several important clients in the banking and finance areas.

**George Walton Payne & Co** has also well known corporate practice. The firm specialises in corporate and commercial law, and has extensive experience advising on the creation of securities in Barbados.

The family firm **Hanschell & Company** is one of the oldest firms in the jurisdiction. The firm provides the full range of legal services, but is particularly recommended by the market for its real-estate work.