

Barbados

Chamber of commerce:

Braemar Court
Deighton Road
St Michael
Barbados, WI
Tel: +1 246 620 4750
Fax: +1 246 620 2907
Email: bcci@bdscham.com
Web: www.bdscham.com

Segregated account and segregated cell companies

Melanie Jones
Lex Caribbean
Worthing

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 docu-

ments 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 Furness-Smith & Morgan
George Walton Payne & Co
Hanschell & Company
Yearwood & Boyce

Double-taxation treaties are the main attraction for the international investments flowing through Barbados. The island's own version of a special investment vehicle (SIV), the international business company (IBC), has made it a private investment platform for onshore treaty partners like Canada, China, the US and the UK. Investment to and from China, in particular, has seen significant increase since the tax agreement between Barbados and that country was signed in 2000.

Recent growth in legal services for onshore clients has furthered aspirations for Barbados and its legal community to compete with traditional offshore transaction centres like the Caymans or British Virgin Islands. Despite inroads into the financial sector, lawyers here reiterate the notion that Barbados is not attempting to be a premiere destination for hedge funds work.

However, the development of Barbados as an offshore transactional centre is forcing the island's law firms to adapt. A divide is forming between firms focused on wholly domestic matters and those that feel increasingly forced into handling international transactions. According to lawyers on the island, the influx of international clientele has created a shortage of firms capable of handling a demanding workflow from onshore agencies and investment banks. "International clients expect you to be a slave to their wishes," says one partner. "I have been flat-out the whole time. International business is booming."

The economic downturn has only hastened the process of change, with what Barbados lawyers describe as a drastic reduction in purely domestic work. Also, the new prime minister elected in 2008 has affirmed that international business development is a focus for the island's economic growth. "The government very early recognised that it was important to propose a new strategic plan for the liquidity crisis and the recession that followed," says one partner.

Despite the scarcity of local firms equipped, or even willing, to handle the grow-

ing international workflow, lawyers here don't predict any immediate influx of outside firms. The main reason for this is the strict qualifying standards for lawyers in Barbados. Any practitioner entering from foreign practice would be forced into the undesirable process of repeating his or her legal education and qualifying exams. This leaves Barbados's internationally-focused firms having to establish strategic partnerships with those onshore, struggling for the foreseeable future to keep up with the pace.

Chancery Chambers

Chancery Chambers has played a leading role in the development of the legal market in Barbados since 1977. Under the leadership of Trevor Carmichael, the firm has focused on cross-border work, building its corporate platform on representations for onshore insurance companies and financial institutions. Thanks to the island's favourable tax treaties, Chancery Chambers has seen an increase in work relating to Chinese transactions conducted through Barbados. Tax incentives have helped develop the firm's Latin-American client base as well.

Chancery Chambers specialises in all areas of corporate finance work, including banking, compliance issues and M&A.

Leading lawyers

Trevor Carmichael

Clarke Gittens Farmer

Formed in 2002, Clarke Gittens Farmer is Barbados's relative newcomer. But with the firm's ability to practise in Barbados, Jamaica, Trinidad and Tobago, as well as the eastern Caribbean, the firm has quickly moved to the top of the rankings with its emphasis on cross-border matters.

Gillian Clarke leads the firm's corporate department, focusing its activities on onshore work generated by the financial services sector. Recently, the firm has secured project finance representations on commodities projects and the development of industrial transport systems.

Leading lawyers

Gillian Clarke

Lex Caribbean

You can tell the quality of the work at Lex Caribbean by the company the firm keeps. Its broad expertise across capital markets, banking, M&A and restructuring has led to onshore relationships with firms like the UK's Allen & Overy and Slaughter and May, as well

as Fasken Martineau in Canada. Acting from offices in Barbados, Jamaica, and Trinidad and Tobago, Lex Caribbean has established itself as a regional presence and a committed partner in international transactions.

Melanie Jones, director of the firm's offshore practice, possesses a wealth of experience, including previous appointments at Freshfields Bruckhaus Deringer in London and Maples and Calder in the Cayman Islands.

Lex Caribbean was particularly active in the banking sector last year, and returning client Scotiabank hired the firm as local counsel in June 2009. In co-operation with Fasken Martineau, Lex Caribbean handled domestic aspects of a deal involving Minefinders Corporation, securing financing and the security of assets involving its Barbados subsidiary. Lex Caribbean again advised Scotiabank during Silver Wheaton's acquisition of Silverstone Resources.

Leading lawyers

Melanie Jones
Mary Mahabir
Garth Patterson