

## **The Protected Cell Companies (Amendment) Ordinance, 1998**

**THE STATES**, in pursuance of their Resolution of the 27<sup>th</sup> day of May, 1998<sup>a</sup>, and in exercise of the powers conferred upon them by section 1 of the Companies (Enabling Provisions) (Guernsey) Law, 1996<sup>b</sup>, hereby order:-

### **Amendment of Ordinance of 1997.**

1. The Protected Cell Companies Ordinance, 1997<sup>c</sup> shall be amended in accordance with the following provisions of this Ordinance.

2. After section 3(6) insert the following subsections -

"(7) Notwithstanding the provisions of subsection (2), the directors of a protected cell company may cause or permit cellular assets and non-cellular assets to be held -

(a) by or through a nominee; or

(b) by a company the shares and capital interests of which may be cellular assets or non-cellular assets, or a combination of both.

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<sup>a</sup> Article V of Billet d'État No. X of 1998.

<sup>b</sup> Order in Council No. XII of 1996.

<sup>c</sup> Order in Council No. XII of 1996.

(8) The duty imposed by subsection (2) is not breached by reason only that the directors of a protected cell company 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 in accordance with subsection (2)."

3. For section 4 substitute the following sections -

**"Position of creditors.**

4. (1) The rights of creditors of a protected cell company shall correspond with the liabilities provided for in section 10.

(2) No such creditor shall have any rights other than the rights referred to in this section and in sections 4A and 10.

(3) There shall be implied (except in so far as the same is expressly excluded in writing) in every transaction entered into by a protected cell company the following terms -

(a) that no party shall seek, whether in any proceedings or by any other means whatsoever or wheresoever, to make or attempt to make liable any cellular assets attributable to any cell of the company in respect of a liability not attributable to that cell;

(b) that if any party shall succeed by any means whatsoever or wheresoever in making liable any cellular assets attributable to any cell of the

company in respect of a liability not attributable to that cell, that party shall be liable to the company to pay a sum equal to the value of the benefit thereby obtained by him; and

- (c) that if any party shall succeed in seizing or attaching by any means or otherwise levying execution against any cellular assets attributable to any cell of the company in respect of a liability not attributable to that cell, that party shall hold those assets or their proceeds on trust for the company and shall keep those assets or proceeds separate and identifiable as such trust property.

(4) All sums recovered by a protected cell company as a result of any such trust as is described in subsection (3)(c) shall be credited against any concurrent liability imposed pursuant to the implied term set out in subsection (3)(b).

(5) Any asset or sum recovered by a protected cell company pursuant to the implied term set out in subsection (3)(b) or (3)(c) or by any other means whatsoever or wheresoever in the events referred to in those subsections shall, after the deduction or payment of any costs of recovery, be applied by the company so as to compensate the cell affected.

(6) In the event of any cellular assets attributable to a cell of a protected cell company being taken in execution in respect of a liability not

attributable to that cell, and in so far as such assets or compensation in respect thereof cannot otherwise be restored to the cell affected, the company shall -

- (a) cause or procure its auditor, acting as expert and not as arbitrator, to certify the value of the assets lost to the cell affected; and
- (b) transfer or pay, from the cellular or non-cellular assets to which the liability was attributable to the cell affected, assets or sums sufficient to restore to the cell affected the value of the assets lost.

(7) Where under subsection (6)(b) a protected cell company is obliged to make a transfer or payment from cellular assets attributable to a cell of the company, and those assets are insufficient, the company shall so far as possible make up the deficiency from its non-cellular assets.

(8) This section shall have extra-territorial application.

**Recourse to cellular assets by creditors.**

**4A.** Without prejudice to the provisions of sections 4 and 10, cellular assets attributable to a cell of a protected cell company -

- (a) shall only be available to the creditors of the company who are creditors in respect of that cell and who shall thereby be entitled, in conformity with the provisions of this Ordinance, to have recourse to the cellular assets attributable to that cell;

- (b) shall be absolutely protected from the creditors of the company who are not creditors in respect of that cell and who accordingly shall not be entitled to have recourse to the cellular assets attributable to that cell."

4. For section 5(4) substitute the following subsection -

"(4) Cellular dividends may be paid in respect of cell shares by reference only to the cellular assets and liabilities, or the profits, attributable to the cell in respect of which the cell shares were issued; and accordingly, in determining for the purposes of section 33 of the 1994 Law whether or not profits are available for the purpose of paying a cellular dividend, no account need be taken of -

- (a) the profits and losses, or the assets and liabilities, attributable to any other cell of the company; or
- (b) non-cellular profits and losses, or assets and liabilities."

5. After section 5 insert the following section -

**"Reduction of cell share capital.**

**5A.** (1) A protected cell company or a holder of cell shares in a cell of a protected cell company may apply to the Court for an order authorising the company to reduce the cell share capital -

- (a) where the applicant is the company, of any of the company's cells; or
- (b) where the applicant is the holder of cell shares, of the cell in which the cell shares are held;

and no reduction of cell share capital may be made except under the authority of, and in accordance with the terms and conditions of, an order of the Court under this section.

(2) In particular, and without prejudice to the generality of subsection (1), the Court may by order authorise the protected cell company -

- (a) to extinguish or reduce the liability on any cell shares in respect of cell share capital not paid up; or
- (b) with or without extinguishing or reducing any liability on any cell shares -
  - (i) to cancel any paid-up cell share capital which is lost or unrepresented by available cellular assets; or
  - (ii) to pay off any paid-up cell share capital which exceeds the company's wants;

and the company may, so far as is necessary, alter its memorandum accordingly.

(3) The Court shall not make an order authorising the reduction of cell share capital unless it is satisfied -

(a) that the creditors of the company entitled to have recourse to the cellular assets attributable to the cell in question consent to the reduction;  
or

(b) that those creditors would not be unfairly prejudiced by the reduction.

(4) The Court may dispense with the consent of a creditor upon the company securing payment of its liability to the creditor in such form and manner as the Court may direct.

(5) Notice of an application to the Court for an order authorising the reduction of cell share capital shall, before the application is made, be placed in La Gazette Officielle on two successive weekly occasions setting out the terms of the application and the date, time and place of the hearing.

(6) Notice of an application to the Court for an order authorising the reduction of cell share capital shall be given to -

(a) the protected cell company (except where the company is itself the applicant);

(b) the receiver (if any) of the cell;

(c) the liquidator (if any) of the company;

- (d) the administrator (if any) of the cell or the company;
- (e) the Commission;
- (f) all holders of cell shares of the cell (other than the applicant, in cases where the applicant is the holder of such shares); and
- (g) such other persons as the Court may direct;

who shall each be given an opportunity of making representations to the Court before the order is made.

(7) The Court may dispense with the requirement to give notice to any person or body mentioned in subsection (6).

(8) The Court, on hearing an application for an order authorising the reduction of cell share capital, may make an interim order, or adjourn the hearing, conditionally or unconditionally.

(9) An order of the Court authorising the reduction of cell share capital -

- (a) shall be deemed to be substituted for the corresponding part of the protected cell company's memorandum; and
- (b) shall have effect as if originally contained therein;

but without prejudice to anything done in accordance with the provisions of the memorandum before the date of the order.

(10) If a protected cell company's cell share capital is reduced, no past or present holder of cell shares of the cell in question shall (subject to the following provisions of this section) be liable in respect of any cell share to any call or contribution exceeding the amount of the difference (if any) between the following amounts -

- (a) the amount of the cell share as fixed by the order of the Court authorising the reduction of cell share capital; and
- (b) the amount paid on the cell share or (if appropriate) the reduced amount deemed to have been paid on it.

(11) Subsections (12) and (13) apply if -

- (a) a creditor whose consent is required under this section to the reduction of cell share capital has not, without neglect or default on his part, been given written notice by the company that his consent to the reduction is required; and
- (b) after the reduction of cell share capital, the cellular assets attributable to the cell in question (when account is taken of the company's non-cellular assets, unless there are

no creditors in respect of that cell entitled to have recourse to the company's non-cellular assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that cell.

(12) Every person who, at the date of the order of the Court authorising the reduction of cell share capital, was a holder of cell shares of the cell in question shall be liable to contribute, towards payment of the liability in question, an amount not exceeding that which he would have been liable to contribute if the winding up of the company had commenced on the day before that date.

(13) If the protected cell company is wound up, or if a receivership order is made in respect of the cell of the company in relation to which the order of the Court authorising the reduction of cell share capital was made, the Court, on the application of the creditor in question and upon proof of the matters set out in subsection (11)(a), may if it thinks fit settle a list of persons accordingly so liable to contribute, and may make and enforce calls and orders against the contributories settled on the list as if they were ordinary contributories in a winding up.

(14) Nothing in subsections (11), (12) or (13) shall affect the rights of the contributories among themselves.

(15) Any officer of a protected cell company who -

- (a) wilfully conceals the name of a creditor whose consent is required under this section to the reduction of the company's cell share capital;

- (b) wilfully misrepresents the nature or amount of the debt or claim of any such creditor; or
- (c) aids, abets, connives in or is privy to any such concealment or misrepresentation as is described in paragraph (a) or (b);

is guilty of an offence and liable -

- (i) on summary conviction, to a fine not exceeding level 5 on the uniform scale, imprisonment for a term not exceeding 3 months or both;
- (ii) on conviction on indictment, to a fine, imprisonment for a term not exceeding 2 years or both."

6. For section 10 substitute the following sections -

**"Liability of cellular assets.**

**10.** (1) Subject to the provisions of subsection (2), and save to the extent that the company may have agreed that a liability shall be the liability solely of the company's non-cellular assets or of the cellular assets attributable to a particular cell of the company, where any liability arises which is attributable to a particular cell of a protected cell company -

- (a) the cellular assets attributable to that cell shall be primarily liable;

- (b) the company's non-cellular assets shall be secondarily liable, provided that the cellular assets attributable to the relevant cell have been exhausted; and
- (c) the liability shall not be a liability of any cellular assets not attributable to the relevant cell.

(2) In the case of loss or damage which is attributable to a particular cell of a protected cell company and which is caused by fraud, the loss or damage shall be the liability solely of the company's non-cellular assets, without prejudice to any liability of any person other than the company:

Provided that the fraud referred to in this subsection does not include the fraud of any person making a claim against the company or any of its assets or of that person's servants, employees, officers or agents.

(3) Any liability not attributable to a particular cell of a protected cell company shall be the liability solely of the company's non-cellular assets.

(4) Notwithstanding the above provisions of this section -

- (a) the liabilities under subsection (1)(a) of the cellular assets attributable to a particular cell of a protected cell company shall abate rateably until the value of the aggregate liabilities equals the value of those assets:

Provided that the provisions of this paragraph shall be disregarded in assessing the existence and extent of any secondary liability under subsection (1)(b);

- (b) the liabilities of the company's non-cellular assets shall abate rateably until the value of the aggregate liabilities equals the value of those assets:

Provided that the provisions of this paragraph shall not apply in any situation in which any of the liabilities of the company's non-cellular assets arises from fraud or by reason of a special agreement such as is referred to in subsection (1).

- (5) This section shall have extra-territorial application.

**Disputes as to liability attributable to cells.**

**10A.** (1) In the event of any dispute as to -

- (a) whether any right is or is not in respect of a particular cell;
- (b) whether any creditor is or is not a creditor in respect of a particular cell;

- (c) whether any liability is or is not attributable to a particular cell;
- (d) the amount to which any liability is limited;

the Court, on the application of the protected cell company, and without prejudice to any other right or remedy of any person, may issue a declaration in respect of the matter in dispute.

(2) The Court, on hearing an application for a declaration under subsection (1) -

- (a) may direct that any person shall be heard on the application;
- (b) may make an interim declaration, or adjourn the hearing, conditionally or unconditionally;
- (c) may make the declaration subject to such terms and conditions as it thinks fit;
- (d) may direct that the declaration shall be binding upon such persons as may be specified."

7. In section 14(8) after "make payments" insert "or transfers".

8. After section 14(8) insert the following subsection -

"(9) For the avoidance of doubt, a protected cell company shall not require a cell transfer order to invest, and change investment of, cellular

assets or otherwise to make payments or transfers from cellular assets in the ordinary course of the company's business."

9. After section 18(4) insert the following subsections -

"(5) Subject to the provisions of -

- (a) this Ordinance and any rule of law as to preferential payments; and
- (b) any agreement between the protected cell company and any creditor thereof as to the subordination of the debts due to that creditor to the debts due to the company's other creditors;

the company's cellular assets attributable to any cell of the company in relation to which a receivership order has been made shall, in the winding up of the business of or attributable to that cell pursuant to the provisions of this Part of this Ordinance, be realised and applied in satisfaction of the company's liabilities attributable to that cell *pari passu*.

(6) Any surplus shall thereafter be distributed (unless the memorandum or articles provide otherwise) -

- (a) among the holders of the cell shares or the persons otherwise entitled to the surplus; or

- (b) where there are no cell shares and no such persons, among the holders of the non-cellular shares;

in each case according to their respective rights and interests in or against the company.

(7) The Court may, upon discharging a receivership order in respect of a cell of a protected cell company, direct that the cell shall be dissolved on such date as the Court may specify.

(8) Immediately upon the dissolution of a cell of a protected cell company, the company may not undertake business or incur liabilities in respect of that cell."

**Regulation-making powers.**

10. In section 26(3)(b), after the words "necessary or expedient" insert "including provision amending this Ordinance".

**Retrospective effect.**

11. This Ordinance shall be deemed to have come into force on the 1<sup>st</sup> February, 1997.

**Citation.**

12. This Ordinance may be cited as the Protected Cell Companies (Amendment) Ordinance, 1998.