

# Introduction

Grant Jones

0



Grant Jones LL.M., Partner, Cooper Parry LLP  
Chartered Accountant, Solicitor, New York Attorney, Licensed Insolvency Practitioner &  
Honorary Professor of Laws, Nottingham University  
email [grantj@cooperparry.com](mailto:grantj@cooperparry.com) & [gmjones@gmjones.org](mailto:gmjones@gmjones.org)



# The purpose of this presentation

I have little time: so this will be fast. I will introduce the notion of a protected cell company (PCC); insurance practitioners will be aware of PCC, but to ADR practitioners, the concept may appear bizarre. PCCs are known by different names in different jurisdictions: dedicated cell companies, segregated cell companies, portfolio companies, segregated portfolio company, et al: but they share the same vital characteristic, like the Holy Trinity, oneness and multiplicity.

I will explain the potential ADR PCC problems and issues. I'm happy after the seminar to discuss the solutions, there are solutions.

PCCs were created by insurance practitioners to gain the benefits of mutuality without its downside.

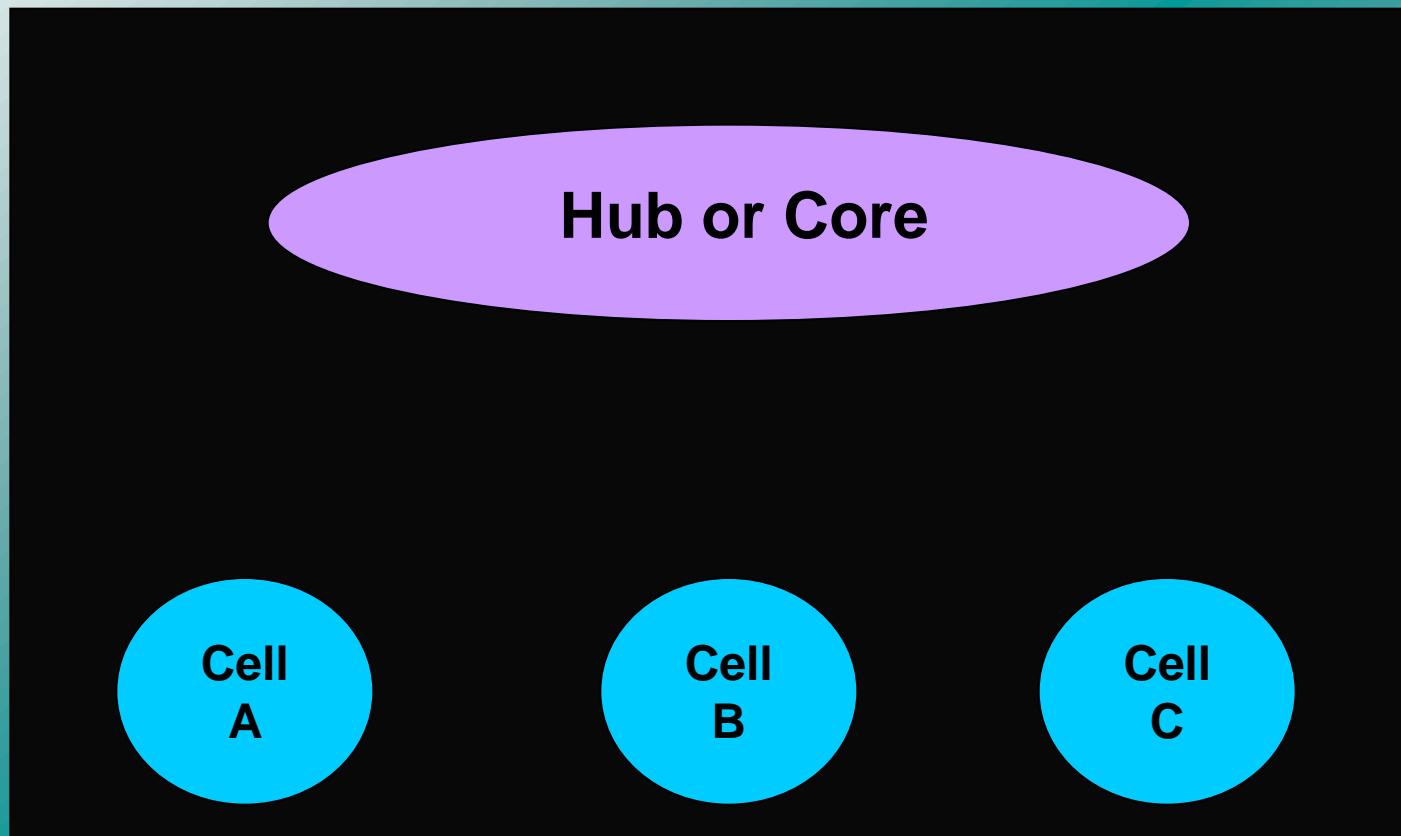
The majority of US states now have PCC legislation, all offshore centres, many Gulf nations and several EU countries. Their use has expanded outside of insurance, to all forms of finance and even to turnkey contracts.

Some commentators claim that PCC's will soon be holding 1% of the World's wealth. They are the fastest growing form of insurance company.



# EXAMPLE PCC LTD

Single Legal Entity

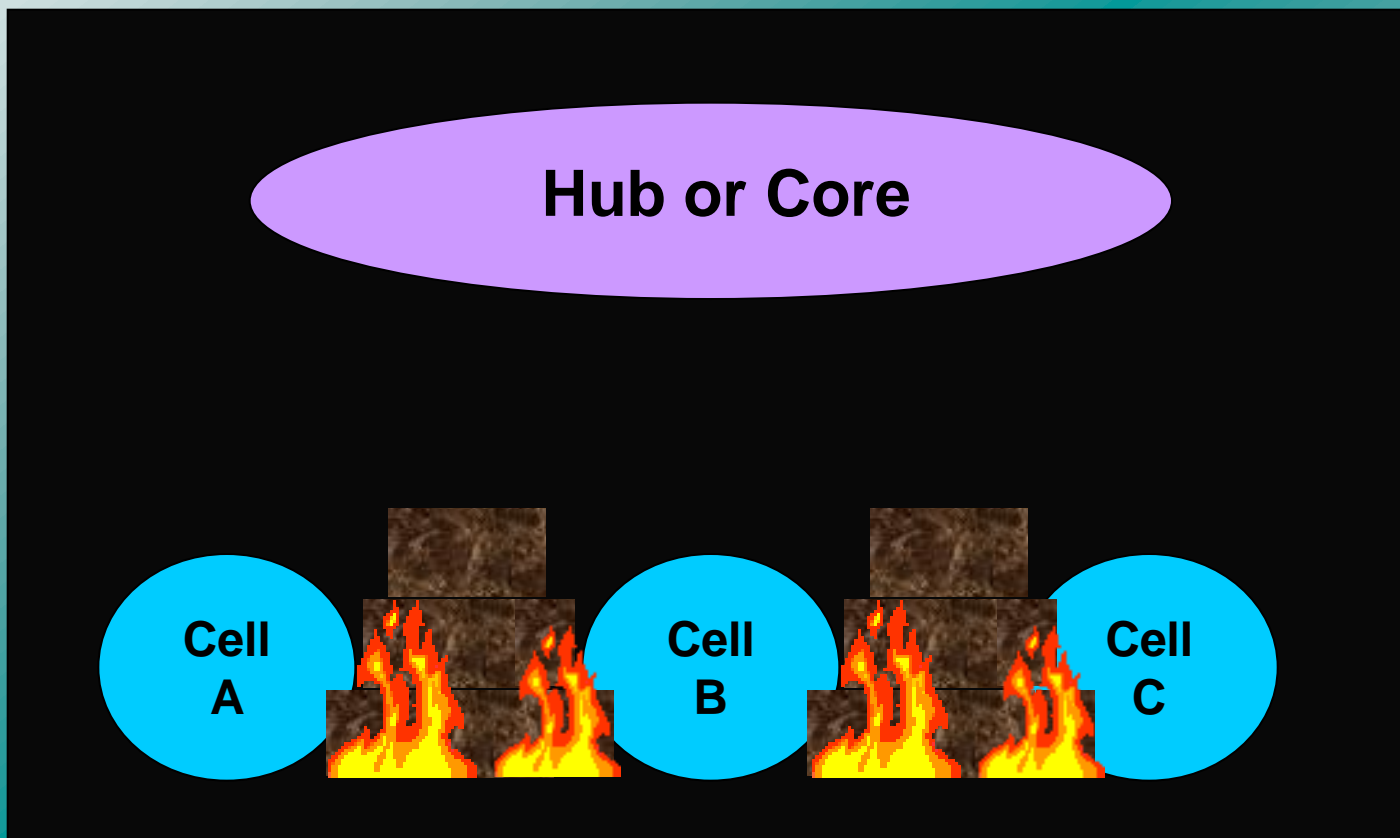


Single Legal Entity



# Example PCC Ltd

Single Legal Entity



# Key Concepts; PCC Basics

4

## Single Legal Entity

A ‘single legal entity’, thus it is the PCC and not the hub or cells which contract.  
*"[The] Fundamental nature of a...[PCC] (1) A... [PCC] is a single legal person (2) the creation by a.. [PCC] of a cell does not create, in respect of that cell, a legal person separate from the company".* Manx PCC Act 2004 section 2.



# Key Concepts; PCC Basics

5

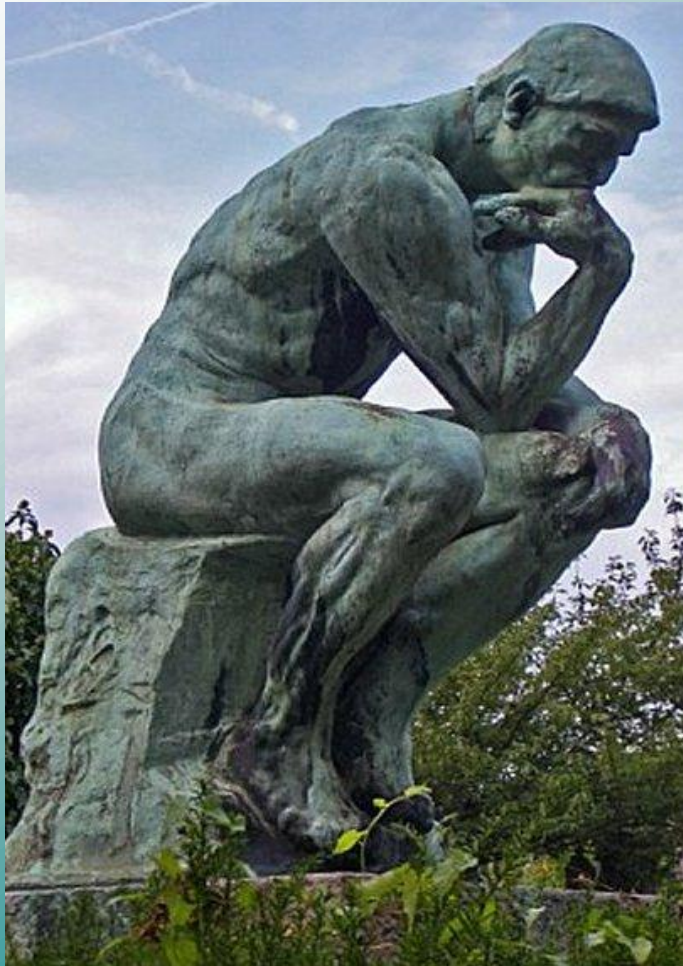
## Attribution

- Attribution’ of hub and cellular assets and liabilities. Assets and liabilities are internally ascribed to the hub or specific cells.
- For example, the South Carolina Insurance Code, Title 38, definition section: -

*“(9) “Protected cell assets” means all assets, contract rights, and general intangibles, identified with and attributable to a specific protected cell of a protected cell company... (12) “Protected cell liabilities” means all liabilities and other obligations identified with and attributable to a specific protected cell of a protected cell company.”*



# The Problems



Which bit of me is arguing with someone else?

- Courts & declarations
- Expert determination
- Mediation work?
- Memorandum & articles of association
- Regulatory decision

## 3<sup>rd</sup> Party ADR

- Is it a multi-multi party dispute?
- Mediation: has it worked?
- Arbitration: the position of the cell
- If ADR is truly more flexible, surely it can meet the PCC opportunity.



## Expert determination

“Expert determination is a historically accepted form of ADR invoked when there isn't a *formulated dispute* in which the parties have defined positions that need to be subjected to arbitration; but rather both parties are in agreement that there is a need for an evaluation.” Wikipedia.

A classic case is where the auditors fix the value of privately owned company shares. Expert determination is about valuation, not about a dispute proper.

If: (a) the existence of parties is a pre-requisite of a formulated dispute and a cell does not constitute a legal party, &/or (b) the cellular issues to be resolved, revolve around attribution of cellular assets and liabilities, in other words a valuation; then expert determination must be the preferred PCC ADR?



# BVI Companies Act 2004: statutory endorsement of ADR, especially expert determination

8

PCC statutes are modern. Modern statutes like ADR. ADR sections are everywhere. This is a standard worldwide expert ADR section.

“144 (6) In the event of any...[PCC] assets attributable to a...cell of a...[PCC] 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**, [my emphasis] to certify the value of the assets lost to the segregated portfolio [BVI uses the term ‘segregated portfolio company’] affected; and (b) transfer or pay...the liability was attributable to the...[cell] affected, assets or sums sufficient to restore to the...[cell] affected the value of the assets lost.”



# 1958 Convention On The Recognition And Enforcement Of Foreign Arbitral Awards

9

## “Article I

This Convention shall apply to the recognition and enforcement of arbitral awards ... where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether **physical or legal** [my emphasis].”

So arbitration requires two parties, ergo, like mediation, it cannot apply to intra-PCC (i.e. intercellular) disputes?



# Bermuda Segregated Accounts Companies Act 2000

“Internal transactions

10

17A...Notwithstanding any enactment or rule of law to the contrary -

where a manager or officer of or other person on behalf of a...[PCC] company or a...[cell] is also acting in respect of the...[hub] and one or more of the...[cells] which are entering into a transaction,

he may so act notwithstanding **any material interests or conflicts...** [my emphasis].

Any dispute which arises in connection with a transaction under subsection (1)- as between the company in respect of a given...[cell] and the company in respect of any one or more other...[cells]; or as between the company in respect of the...[hub] and the company in respect of one or more...[cells]; may (notwithstanding any submission to the governing law of choice otherwise provided for in this Act or otherwise) be referred to the court or may be submitted to arbitration under the Bermuda International Conciliation and Arbitration Act 1993 and (if the matter is submitted to arbitration) **as if the arbitration were an international commercial arbitration.** [my emphasis].

**If the managers, officers, legal advisers or others representing the company in respect of the separate interests of the affected accounts cannot agree on whether a particular matter should be referred to court or to arbitration, then that matter shall be referred to arbitration.** [my emphasis].”



# Mediation may work

“**C&W poised to settle £40m case as counsel walks out:** Cable & Wireless and captive insurer Pender Insurance launched a claim in March 2004 against 17 defendants, including Pender's Isle of Man manager, insurance company Willis and law firm... The claimants alleged that the defendants were involved in siphoning off a total of £80m in reinsurance premiums from Pender to Guernsey-based protected cell company Messenger.

A court-ordered mediation failed last year and the case came before the High Court in October 2005. It is understood that negotiations continued simultaneously with the trial and that preliminary agreements were reached with a number of parties...in late December.”

Mediation can work with multi-party PCC disputes.

11



# “Protected Cell Companies (“PCCs”) & Alternative Dispute Resolution (“ADR”)

12

