

Offshore SPVs in structured finance transactions: Jersey

Resource type: **Article: know-how**

Status: **Law stated as at 22-May-2009**

Jurisdiction: **Channel Islands: Jersey**

This article considers: the types of transactions for which Jersey SPVs are used; the reasons for using Jersey SPVs; and the main types of entities used for SPVs, including incorporation, on-going corporate and regulatory requirements, tax considerations and methods of dissolution.

This article forms part of a series, covering Cayman Islands, Ireland, British Virgin Islands and Jersey.

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Jersey's leading reputation as a sophisticated offshore jurisdiction is based on its robust legal and regulatory system, zero tax regime, political stability and experienced financial services industry, supported by a very accomplished professional infrastructure. Jersey's close links to the UK and mainland Europe make it a convenient jurisdiction for international transactions.

This article considers:

- The types of transactions for which Jersey Special Purpose Vehicles (SPVs) are used.
- The reasons for using Jersey SPVs.
- The main types of entities used for SPVs and their key features.
- Establishing a Jersey SPV.
- Ongoing corporate and regulatory obligations.
- Taxation.
- Methods of dissolution.

Jersey SPVs normally take the form of companies, but can also be limited partnerships or trusts, including unit trusts. This article mainly deals with corporate SPVs.

Types of transactions for which Jersey SPVs are used

Jersey SPVs are used for a wide variety of international transactions and purposes, including:

- Acquisition and holding of investments and other assets.

- Group holding.
- Assets **securitisation** (see *Glossary*).
- **Repackaging** of financial instruments.
- Listing of securities.
- Financing transactions with a tax element, for example repurchase transactions.
- Credit linked transactions, for example **Collateralised Loan Obligations (CLOs)**, or the issue of **Constant Proportion Portfolio Insurance (CPPI)** notes.
- Investment fund financing.
- Tier 1 capital raising.
- **Cashbox transactions**.
- Convertible bonds.
- **Special purpose acquisition vehicles (SPACs)**.
- Special purpose private bidding vehicles.

Reasons for using Jersey SPVs

Jersey SPVs are widely used in international transactions because the jurisdiction offers the following advantages:

- Ease and low cost of incorporation (see *below, Incorporation of Jersey SPVs, Incorporation time and fees*), with the possibility of tailoring the company constitutional documents to the requirements of individual transactions.
- Tax neutrality (see *below, Taxation*).
- A practical and innovative legal framework.
- A responsive regulator, the Jersey Financial Services Commission (JFSC).
- Compliance with international money laundering standards.
- An internationally recognised local stock exchange, the Channel Islands Stock Exchange (CISX).

- Easy to access, close to London and mainland Europe, in the same time zone, with excellent communications.
- Ease and speed of company mergers, restructurings and migrations in and out of the jurisdiction.
- A high quality professional infrastructure, with expert knowledge of City of London standards.
- Company law principles broadly similar to those under UK law (but more practical), so they can easily be understood by investors and counterparties.

Legal framework

The Companies (Jersey) Law 1991, as amended (the Companies Law) is the main corporate legislation in Jersey. It provides robust rules for the protection of creditors and shareholders, and offers significant practicality in key areas for structured finance transactions, for example in relation to distributions, redemptions, share buy-backs, no par value shares, accounting requirements and flexible constitution. The Companies Law is also regularly updated to ensure that it meets the needs of Jersey's international client base.

Industry regulator

The JFSC is primarily responsible for the regulation, supervision and progression of the financial services industry in Jersey. The Director General of the JFSC is also the Registrar of Companies (the Registrar). The Registrar maintains the register of companies incorporated in Jersey (the Register), and performs the corresponding functions for limited partnerships.

The JFSC is also responsible for supervising compliance with anti-money laundering regulations, and the regulations countering the financing of terrorism. It is sensitive to the requirements of the financial services industry in Jersey, ensuring among other things that response times are tailored to meet demanding transaction timetables.

It is possible to approach the JFSC directly for guidance on a "no names" basis.

The CISX

The CISX's mission is to be the premier offshore stock exchange in the European time zone, and the exchange of choice for the offshore listing of investment funds, debt instruments and company shares. The increasing number of international recognitions demonstrates that it is fulfilling its mission.

Jersey SPVs are often used to list equities or debt securities on the CISX. The CISX listing process is simple and straightforward, and application and admission to the Official List of the CISX can, after preparatory submissions, take place on the same day.

One of the main advantages of using an SPV in a debt listing is that it is not required to produce accounts to the CISX. The CISX requirements are as follows:

- There must be a clearing and settlement system acceptable to the CISX, for example Euroclear or Clearstream (exceptions are allowed in appropriate cases).
- There must be a trustee or other appropriate independent party representing the interests of the holders of asset-backed debt securities with the right to access information relating to the assets (exceptions are allowed in appropriate cases).
- The securities must be freely transferable.
- The issuer must produce a listing document that is compliant with the CISX listing rules.

Company mergers, restructurings and migrations

The Companies Law provides for two or more limited Jersey companies to merge and continue as a single entity under a simple merger procedure, particularly if the merging entities are either parent and subsidiary or sister companies.

Clear procedures for reduction of capital and schemes of arrangement requiring court sanction are also available. Share redemptions and buy-backs do not need court sanction, but do require solvency statements from the directors authorising the transaction. Again, the procedures set out in the Companies Law are practical and to the point.

Under the Companies Law, a body corporate incorporated outside of Jersey can migrate and continue as a Jersey registered company within Jersey, and likewise a Jersey company can migrate and continue overseas, subject to certain restrictions and in accordance with set procedures including those designed to safeguard creditors' interests. In each case an application must be made to the JFSC and a £500 fee paid.

Main entities used

The Companies Law provides for the following entities:

- Private limited liability companies limited by either par or no par value shares.
- Private limited liability companies limited by guarantee.
- Private unlimited liability companies.
- Public companies (which can also be of any of the above four categories).
- Incorporated cell companies (which can be private or public, par or no par value, guarantee or unlimited liability).
- Protected cell companies (with the same full range of types as for incorporated cell companies.)

Usually Jersey SPVs are companies, however, there is no reason in principle why the SPV could not take the form of a limited partnership issuing interests, or a trust issuing units or other trust interests.

The securities issued by a corporate SPV can take the form of redeemable share capital rather than debt, but a Jersey company cannot only have redeemable shares.

Public companies

The memorandum of association of a Jersey company must state whether it is a public or a private company. A Jersey company is treated as a public company if it circulates a prospectus to the public, or (subject to a specific exception) where there are more than 30 registered shareholders. A Jersey public company must have a suitably qualified company secretary, at least two directors and two shareholders. The directors do not need to be resident in Jersey, but this may be necessary or desirable for tax reasons.

If there are no tax considerations, it may nevertheless be prudent to ensure that at least some of the board members are Jersey residents, or have experience as a director of a Jersey company (*see below, Directors and directors' duties*).

Cell companies

There are two types of cell companies, Protected Cell Companies (PCCs) and Incorporated Cell Companies (ICCs), with protected cells and incorporated cells respectively. The cells enable the structures to segregate or ring fence assets and liabilities. This means that cellular assets are only available to the creditors and shareholders of that cell. Cell companies were recently introduced and are widely used because they offer a range of benefits (*see below*).

PCCs. PCCs create protected cells which do not have separate legal identity but are treated as such for the purposes of the Companies Law and, importantly, for the purposes of the relevant Jersey insolvency legislation.

ICCs. ICCs create incorporated cells, which are separate companies with their own legal identity. They may hold assets, sue and be sued in their own name. It is considered that this feature will enable ICCs to gain international recognition in jurisdictions where cell companies do not exist.

An ICC is normally owned by a financial institution structuring an investment product, and the cells by the investors.

Cell company advantages. Some of the benefits of using Jersey cell companies are:

- Once a cell company structure is in place, repeat transactions can be completed in a much reduced timescale, for example for collective investment funds and securitisations.
- The cell company can easily constitute new cells for any future transaction by passing a special resolution.

- Reduced regulatory framework and costs. Functionary agreements and regulatory consents are agreed and obtained in advance, and new cells can be added quickly and economically.
- The distinction between the cell company and its cells enables to have different directors for different cells, so that directors with appropriate expertise can deal with different pools of assets.
- There is no statutory limitation on uses of cell companies.
- The overall Jersey regime, including ICCs, addresses issues arising in the cell company regimes of other jurisdictions.

Incorporation of Jersey SPVs

Incorporation time and fees

A Jersey SPV can be incorporated very quickly (on a same day basis). A fee of £200 is payable to the JFSC for a standard company incorporation, which takes a few working days. The urgent incorporation service, which allows a company to be incorporated on the same day, costs a further £200. On incorporation, the JFSC will provide the SPV with a certificate of incorporation and consent to issue its initial authorised share capital.

A Jersey SPV can be tailored to the individual client's needs, and the memorandum and articles of association can be created or amended to reflect this. Shares can be issued in any currency and divided into different classes.

Required approvals

A new company requires the following approvals of the JFSC:

- Choice of company name. There are certain limitations on what names can be used, although these are relatively few and most companies are able to reserve the chosen name.
- To be incorporated.
- To issue any securities (including shares in the company or debt securities) under the Control of Borrowing (Jersey) Order, 1958, as amended (COBO).
- Compliance of a prospectus or other offer document with the Companies (General Provisions) (Jersey) Order 2002 (CGPO).

COBO consents. It is normal for the JFSC to place certain light conditions on COBO consents.

Conditions for an SPV can include:

- A stated maximum aggregate principal amount for the entire issue (for securities programmes).

- An expiry date for the consent.

- Notification to and consent of the JFSC for:
 - a change in any of the principal parties to the securities programme;

 - a change in the (beneficial) ownership of the SPV or any other material change associated with the SPV; and

 - prior consent of the JFSC to the SPV circulating a prospectus or other offer document.

In the case of a securities programme with two or more issues, it is possible to obtain a waiver from the JFSC confirming that supplements to the original offering documentation can be issued without a requirement for further prior consent, provided that the supplemental documentation does not substantively alter what the JFSC's consent has previously been given for, and that it is delivered to the JFSC.

Before commencing a securities programme it is usual to obtain the "in principle" consent of the JFSC. This can be obtained very quickly after the JFSC has been provided with an outline of the securities programme.

Generally, the JFSC must satisfy itself as to the reputation of the promoter and of the ultimate beneficial ownership of the SPV issuer or, where there is a trustee, that it has adequate resources and a tangible presence in Jersey. The JFSC may also require that two resident Jersey directors be appointed to the board of the SPV, and that the financial statements of the SPV be subject to audit.

CGPO consents. If a Jersey company intends to circulate, or procure the circulation of, a prospectus it must obtain the consent of the Registrar at the JFSC. Other entities must also obtain the JFSC's consent to circulate a prospectus. Certain information must be included in the prospectus, but it is likely that this would be contained in the document in any event.

Directors and directors' duties

The business of the SPV will be carried on by its directors, subject to any limitations imposed by the memorandum or articles of association. There must be at least one director for a private company, and at least two for a public company.

Jersey companies can have corporate directors provided that both:

- The body corporate is a company that is permitted under the terms of its registration under the Financial Services (Jersey) Law 1998 to act as, or fulfil the requirements of, a director.

- The body corporate has itself no director that is a body corporate.

Directors' duties under the Companies Law include:

- The duty to act honestly and in good faith with a view to the best interests of the company.
- The duty to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- The duty to disclose their interests, if actually or potentially materially conflicting with those of the company.

There is a statutory sanction process in relation to directors' duties such that there will not be a breach of the first and second duty above, if all the shareholders authorise the particular act or omission, and the company remains solvent. This enables Jersey companies to enter into transactions where the corporate benefit may be in question without the directors being in breach of duty. In some cases it will be necessary to analyse whether the proposed transaction amounts to a distribution and should be authorised as such.

With regard to the third duty, the articles of association of a Jersey company will commonly allow a director to participate in and vote at a meeting notwithstanding the director's interest in such a transaction, if he has disclosed that interest. Alternatively, there is a special resolution procedure to excuse a breach of the duty to disclose interests.

The Companies Law has abolished the (external) *ultra vires* rule. Under the Companies Law, the capacity of a Jersey company is not limited by anything in its memorandum or articles of association or by any act of its members, but any failure of the directors to adhere to restrictions in the memorandum or articles will give rise to internal *ultra vires* issues, requiring shareholder sanction.

Share capital and distributions

No minimum capital. There is no minimum share capital requirement for a Jersey company.

Distributions. Recent amendments to the Companies Law have relaxed the capital maintenance regime for Jersey companies. Save for limited exceptions, a distribution under the Companies Law covers every type of the distribution of a company's assets to its members. Distributions can be made at any time, subject only to the directors who authorise the distribution making a solvency statement before they authorise the distribution. In this the directors state that in their opinion the company will be able to meet its liabilities as they fall due immediately after the proposed distribution, and to continue its business and meet its liabilities as they fall due for the next 12 months.

The distribution can be debited to any account of the company, except for the capital redemption reserve (if any) or the nominal share capital account in the case of par value companies. Importantly, distributions can be made without reference to distributable reserves.

A shareholder who has knowingly received an unlawful distribution (made in breach of the above requirements) may be liable to repay the whole or part of the distribution, or its equivalent value.

Redemptions and buy backs. Redeemable shares of a Jersey company can be redeemed from

any source provided they are fully paid up. This also applies to share buy backs. The rule provides flexibility for making capital reductions without requiring a formal court sanction process, although the directors must make a solvency statement, as above.

Financial assistance rules

Jersey companies are no longer prohibited from giving financial assistance, but if financial assistance raises questions of directors' duties, or amounts to a distribution, the relevant statutory procedures must be complied with.

Treasury shares

Limited shares redeemed or bought back can now be held as treasury shares, provided that the shareholders have passed the relevant resolution and the company's memorandum and articles do not contain a specific prohibition against it.

Ongoing corporate and regulatory obligations

Continuing obligations

The Companies Law sets out a number of continuing obligations applicable to Jersey companies. These are considered below. Some of the obligations, or corresponding ones (except for any obligation to deliver accounts to the Registrar/the JFSC) also apply to limited partnerships and trusts.

Filings with the JFSC. A Jersey company must make an annual return and pay an annual filing fee (currently £150 if paid on time) to the Registrar before the end of February each year. The annual return must contain certain share capital and shareholder information, and, in the case of public companies and their subsidiaries, details of directors. Public companies are also required to file annual audited accounts.

Other mandatory filings include those related to any change in the company's registered office, conversion to a public/private company, mergers, special resolutions, acts of court relating to the company, and applications to migrate the company out of Jersey. The statutory time limit for filing a special resolution is 21 days.

Registered office and documents. A Jersey company must have a registered office in Jersey, and this address must be displayed on all business stationery and notified to the JFSC on incorporation.

Company registers. A Jersey company must keep a register of shareholders (maintained in Jersey) and a register of its directors and secretaries. There is no requirement to keep a register of mortgages or charges.

Accounts. Jersey companies must maintain accounting records. A private company is not required to audit or file its accounts. However, in certain cases where an SPV that is a private company issues debt securities, the JFSC may require the SPV to produce audited accounts. Accounts of a

Jersey company are not available for public inspection unless the company is a public company.

Statutory company meetings: All Jersey companies (public and private) can dispense with the requirement to hold annual general meetings.

Taxation

Jersey SPVs fall within one of the following categories for taxation purposes:

- **Zero rate company.** A general zero rate of income tax for companies (assuming no Jersey property income) applies to most companies incorporated in Jersey, but not to a restricted sector of local financial services companies and local utility companies.
- **Foreign tax resident company.** A company incorporated in Jersey but whose business is centrally managed and controlled outside Jersey will not be considered to be resident in Jersey for tax purposes if:
 - the company's business is centrally managed and controlled in a country or territory where the highest rate at which any company can be taxed on any part of its income is 20% or higher; and
 - the company is tax resident in that country or territory.

A company that satisfies these requirements is not liable to tax in Jersey (assuming no Jersey source income). This is important in certain transactions, for example to ensure that the SPV is not treated as a dual resident investment company for the purposes of the UK Income and Corporation Taxes Act 1988.

In addition to the benefits above, Jersey SPVs also have the advantage of the following extremely favourable conditions:

- There are no capital gains taxes.
- There is no capital duty payable on the issue of either shares or debt securities.
- There is no stamp duty, save in relation to Jersey real property and Jersey grants of probate and letters of administration, which will generally be required for the transfer of shares or debt securities issued by a Jersey company on the death of a holder of such shares or debt securities.
- There is no withholding for or on account of Jersey tax on interest or dividend payments made by a Jersey company.

Methods of dissolution

A Jersey company can be dissolved in the following ways:

- Voluntary winding up.
- Creditors' winding up.
- Dissolution at the conclusion of *désastre* under the Bankruptcy (Désastre)(Jersey) Law 1990 (the Désastre Law).
- Winding up by the court on just and equitable grounds.
- Struck off the Register for not filing an annual return.

The Jersey limited partnership legislation has provisions on the dissolution of limited partnerships.

Voluntary winding up

A Jersey company can be wound up summarily, provided that all the directors make a solvency statement. Within 28 days of the signing of the solvency statement the shareholders of the company pass a special resolution summarily to wind up the company. A liquidator can be appointed by special resolution, although this is not necessary and the directors can conduct the liquidation if desired. The special resolution and the directors' statement are then filed with the Registrar.

If the company has no assets or liabilities, it is dissolved once the Registrar has received and registered the statement. If the company has assets and liabilities, the company's powers are then limited to realising its assets, discharging its liabilities and distributing its assets.

If a liquidator is appointed, the directors will cease to be authorised to exercise their powers. A further solvency statement will be made by the directors or the liquidator once all of the liabilities are discharged and the assets are distributed. Again, the company is dissolved once the Registrar has received and registered the statement.

Creditors' winding up

A Jersey company can pass a special resolution for a creditor's (insolvent) winding up, and must give notice to its creditors by advertisement in the Jersey gazette. The directors must make a statement as to the affairs of the company. A liquidator or liquidation committee can also be nominated or appointed at the creditors' meeting. If a liquidator is nominated by both the company and the creditors it is the one nominated by the creditors who is appointed, subject to any contrary court order.

The liquidator will account for the company's property once its affairs are fully wound up, and call a final meeting to explain and account for his acts in dealing with the winding up. The liquidator will then make a return to the Registrar. At the end of three months after the return is submitted to the Registrar the company is dissolved.

Désastre Law proceedings

A Jersey company unable to pay its debts as they fall due may be subject to a declaration of “*en désastre*” in respect of its property, on application of the company itself, a creditor with a claim of not less than £3,000, or the JFSC.

If the court grants the declaration, the property and powers of the debtor company vest in the Jersey Viscount, who is responsible for getting in assets and dealing with the claims of creditors. The company is dissolved when the Registrar is notified by the Viscount of the payment of the final dividend.

Company transactions in insolvency

The following apply to transactions that have been entered into by a company subject to insolvency proceedings:

- Specific statutory rules deal with transactions at an undervalue, preferences and onerous property.
- Security is respected, as long as the transaction cannot be challenged, for example, as a transaction at an undervalue or a preference.
- Contractual set-off, netting, subordination and non-petition provisions survive bankruptcy by virtue of statute.
- Wording to achieve limited recourse is effective.

Strike off and re-instatement

If a Jersey company fails to submit an annual return by 1 October in any year (*see above, Ongoing corporate and regulatory obligations*) the Registrar has the power under the Companies Law to strike that company off the Register. This effectively puts the company into dissolution, except that the powers of the company cannot be exercised at all (including the power to transfer or realise assets and settle liabilities).

The company can, however, be re-instated within ten years, using procedures set out in the Companies Law. The company must make any outstanding filings and payments to the JFSC and the Comptroller of Income Tax to obtain their consent before submitting a representation for re-instatement to the Royal Court in Jersey. Once an Act of Court has been granted rendering the dissolution of the company void, the company is re-instated on the Register.

Glossary

Cash box transactions. Transactions entered into by a UK listed Plc to raise funds by placing

securities in consideration for acquiring preference shares in a Jersey special purpose vehicle (SPV), where the Plc does not need to carry out a rights issue per pre-emption rights.

Collateralised Loan Obligations (CLOs). An asset backed security normally involving corporate loans.

Constant Proportion Portfolio Insurance (CPPI). A capital guarantee derivative security aimed at achieving a fixed minimum return.

Repackaging. Repackagings usually involve the sale of underlying assets to an off balance sheet special purpose vehicle (SPV), which simultaneously issues new securities or interests to fund the purchase price of the underlying assets. Principal and interest received by the SPV on the underlying assets are paid to a swap counterparty under an interest rate and/or currency swap agreement in return for amounts equal to the principal and interest on the new interests issued by the SPV as and when they fall due. The underlying assets and the benefit of the swap agreement are typically charged to the notes trustee for the benefit of the holders of the new securities to secure the SPV's obligations. It is possible for the SPV to issue preference shares or total return swap participations with the same economics to suit investor preference.

Securitisation. A structured finance technique typically characterised by the following:

- ❑ A SPV is established to raise funds by issuing debt securities (typically bonds) to investors.
- ❑ The proceeds of the securities issued are used by the SPV to purchase receivables. These are rights in respect of financial obligations arising from the obligation of a debtor to pay his creditor amounts in respect of a debt. Receivables may arise from payments owed on loans, monies owed for the purchase of goods or services, or any other circumstance creating a financial obligation.
- ❑ Before their sale to the SPV, the receivables are generated and/or owned by an established business entity (typically a financial institution or a large company) (originator).
- ❑ The SPV's obligations to the investors under the securities are limited to the proceeds of, and secured by a security interest created by the SPV over, the receivables purchased by the SPV from the originator.
- ❑ When amounts payable in respect of the receivables are received by the SPV, they are used to fund the payment obligations of the SPV under the issued securities, and to meet any other costs in the structure.

As a result:

- ❑ The originator manages to obtain funding without incurring a liability by selling the

receivables to the SPV.

- The investors receive a return on their investment which is funded and secured by the receivables acquired by the SPV.

Special Purpose Acquisition Vehicle (SPAC). A shelf company that has no operating history, formed for the sole purpose of raising capital in an IPO. The proceeds of the SPAC's IPO will then be used to fund a business combination with a company (by way of a merger, asset or share purchase) that has an established operating business, normally within a specified industry type or geographical area.

Resource information

Resource ID: 4-386-4432

Law stated date: 22-May-2009

Products: PLC Law Department, PLC Cross-border

Series: Features(www.practicallaw.com/ 2-103-2221)

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