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Vincent OOI

Singapore Management University, vincentooi@smu.edu.sg

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A New Structuring Option for Funds: The Singapore Variable Capital Company

By

Vincent OOI¹

Abstract

The Singapore Variable Capital Company (“VCC”) offers a new structuring option for funds. This article considers the features of the VCC in terms of structure, operational aspects and commercial considerations, against the backdrop of similar structures in the BVI and Labuan. It submits that, with statutory modifications, opportunities exist to use the VCC for insurance, captive insurance and family offices.

A. Introduction

With a total of 787 registered and licensed fund managers controlling S\$3.4 trillion in Assets Under Management (“AUM”) as of 2018,² Singapore has a solid reputation as an Asian fund management hub. Almost 7 in every 10 dollars in AUM is being invested into the Asia-Pacific region,³ making Singapore an important gateway for global fund managers and investors to tap into the region’s growth opportunities. However, despite the country’s strong fund management capabilities, majority of funds operating in Singapore are domiciled in foreign jurisdictions such as Luxembourg, the Cayman Islands and Ireland.⁴ These jurisdictions share a common thread – each of them offers corporate structures that enable ring-fencing⁵ of particular parts (or “portfolios”) within the main entity.

¹ BA (Oxon), PhD Candidate (Cantab), Lecturer, School of Law, Singapore Management University. I would like to thank, for their insightful comments, Ow Kim Kit and the participants of the “Trends and Challenges in Corporate Law Conference” organised by Professor Lee Pey Woan at the Singapore Management University in 2019.

² Monetary Authority of Singapore (“MAS”), “2018 Singapore Asset Management Survey” (available at <https://www.mas.gov.sg/~media/MAS/News-and-Publications/Surveys/Asset-Management/SingaporeAsset-Management-Survey2018.pdf>) (accessed on 16 June 2020).

³ Indraneel Rajah, “Variable Capital Companies Bill (2018)” (available at <https://www.mas.gov.sg/news/speeches/2018/Variable-Capital-Companies-Bill-2018>) (accessed on 16 June 2020).

⁴ MAS, “2017 Singapore Asset Management Survey” (available at <http://www.mas.gov.sg/~media/MAS/News%20and%20Publications/Surveys/Asset%20Management/2017%20AM%20Survey%20Report.pdf>) (accessed on 16 June 2020). 78% of AUM were sourced from outside of Singapore in 2017.

⁵ “Ring-fencing” refers to the legal segregation of assets and liabilities within a single unit. This is most commonly achieved through the incorporation of a company, where the separate legal personality of the company means that all assets and liabilities of the company remain its own and are not mixed with that of its shareholders. Where particular parts within the main entity are accorded ring-fencing treatment, there is legal segregation of assets and liabilities between each of those parts, without the need for separate incorporation of individual companies for each of those parts.

In contrast with these structures on offer in these foreign jurisdictions, until recently, a Singapore investment fund could only be set up as a company, a limited partnership, or a unit trust. The lack of an equivalent entity capable of ring-fencing particular portfolios in Singapore may have dissuaded funds from being domiciled in Singapore. Despite this deficiency, Singapore has maintained its reputation as a premier Asian fund management hub. This is in no small part due to the fact that Singapore’s limited fund structures have been remedied overseas as investors use foreign structures to plug this gap. For ease of reference, such corporate entities will be referred to in this article as “Sub-Fund Structures” (“SFS”).

Proposed by the MAS, the Variable Capital Company (“VCC”) Bill was passed in parliament on 1 October 2018,⁶ creating a new flexible corporate legal vehicle in Singapore. The Act, drafted with reference to established international laws and practices, came into operation on 14 January 2020.⁷ The introduction of the VCC structure provides more structuring options and may increase the attractiveness of domiciling funds in Singapore.

B. Basic Features of the VCC

The VCC Act does not replace or change Singapore’s existing regulations for investment funds, which are largely contained in the Securities and Futures Act (“SFA”).⁸ Therefore, the existing regime for funds will apply to VCCs as well. The VCC Act instead creates a new form of corporate entity, the Variable Capital Company, with incorporations governed under the new VCC Act instead of the Companies Act (“CA”).⁹ The VCC Act is administered by the Accounting and Corporate Regulatory Authority (“ACRA”).¹⁰

Each VCC will have separate legal personality¹¹ and the structure can only be used for a Collective Investment Scheme (“CIS”).¹² Per the VCC Act, the sole object of a VCC is to be one or more collective investment schemes in the form of a body corporate¹³ and the VCC may

⁶ Rajah (n 2).

⁷ Variable Capital Companies Act 2018 (No. 44 of 2018) (“VCC Act”), s 1. Per s 1, the VCC Act came into force when the Minister made the Variable Capital Companies Act 2018 (Commencement) Notification 2020 in the *Gazette*.

⁸ Securities and Futures Act (Cap 289, 2006 Rev Ed). The establishment and operation of investment funds in Singapore are regulated under the SFA and rules and regulations made thereunder, including the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations.

⁹ Companies Act (Cap 50, 2006 Rev Ed) (“CA”).

¹⁰ VCC Act, s 8.

¹¹ VCC Act, s 32.

¹² VCC Act, s 2.

¹³ VCC Act, s 15(1).¹³

VCC Act, s 15(2).

not carry on any business inconsistent with its object.¹³ Authorised (for retail investors), restricted (for accredited investors)¹⁴ or exempted (for small offerings, private placement and investor schemes)¹⁵ funds can be incorporated as VCCs in Singapore. In essence, the VCC Act draws on the previous legal structures available, allowing investment funds to utilise the benefits of incorporation, but subjecting the corporate entity to a new set of regulations designed specifically for its purpose.

Structure of a VCC

Under the VCC Act, a VCC can be established as a standalone fund,¹⁶ or as an umbrella fund with multiple sub-funds.¹⁷ Within the single umbrella structure, each sub-fund will form separate “cells”. Each cell will be registered with the ACRA,¹⁸ but will not have an independent legal personality.¹⁹ The entire umbrella structure, as a single VCC, will constitute an individual legal person. Even so, the VCC may still sue or be sued in respect of a sub-fund, and exercise any rights of set-off between its sub-funds as if each fund were a separate legal person itself.²⁰

Since an umbrella fund is a single VCC, cells within an umbrella fund can share a common board of directors and use the same service providers, including the same fund manager, custodian, auditor and administrative agent. This means that a single fund manager can group different funds together, such as an Asian bond fund with a European equities fund, under a single umbrella VCC.²⁰

Each cell will have segregated assets and liabilities.²¹ Therefore, the assets of one subfund cannot be used to discharge the liabilities of another sub-fund, which will safeguard against the risk of commingling of assets. Any agreement to use the assets of one sub-fund to

¹⁴ MAS, “Practitioner’s Guide to the Collective Investment Schemes Regime under the Securities and Futures Act (Cap 289)”, (available at <http://www.mas.gov.sg/~media/MAS/Regulations%20and%20Financial%20Stability/Regulations%20Guidance%20and%20Licensing/Securities%20Futures%20and%20Fund%20Management/Regulations%20Guidance%20and%20Licensing/CIS%20Related/CIS%20practitioners%20guide.pdf>) (accessed on 16 June 2020).

¹⁵ SFA, s 2.

¹⁶ VCC Act, s 2, which defines a “non-umbrella VCC” as “a VCC that is not an umbrella VCC”.

¹⁷ VCC Act, s 2, defined as “a VCC the constitution of which 30 provides that it consists of, or is to consist of, 2 or more collective investment schemes, or words to that effect;”.

¹⁸ VCC Act, s 27.

¹⁹ VCC Act, s 32(1).²⁰

VCC Act, s 32(1).

²⁰ Singapore Parliamentary Debates, Official Report (1 October 2018) vol 94 at Session 1 (Ms Indranee Rajah, Second Minister for Finance) (“**Parliament Session 1**”).

²¹ VCC Act, s 29(1).

discharge the liabilities of the umbrella fund is void.²² In the event of insolvency, each subfund will have to be wound up separately,²³ which ensures ring-fencing of each sub-fund's assets and liabilities. The VCC Act retains the relevant provisions for winding up under the CA.²⁵

Operational Aspects

A VCC cannot be its own manager,²⁴ and will have to be managed by a licensed, regulated or a specified exempted fund management company.²⁵ The VCC must also have its registered office in Singapore.²⁶ Generally, the VCC will have shareholders, a Board responsible for its governance,²⁷ a Singapore-based company secretary,²⁸ a fund manager and a Custodian of assets.²⁹ It will be observed that many of these structural requirements are similar to those required for companies, allowing us to infer that the VCC is very much an evolution from the private limited company, designed specifically for investment funds.

The fund manager appointed by the VCC has to be regulated by MAS to manage its investments.³⁰ This will facilitate supervisory oversight on the use of the VCC, such as to prevent the VCC from being abused for unlawful purposes and to help ensure that it is not used as an offshore vehicle without actual investment management activities conducted in Singapore.³¹

²² VCC Act, s 29(1)(b).

²³ VCC Act, s 33(1). ²⁵

VCC Act, s 130.

²⁴ VCC Act, s 46(3).

²⁵ VCC Act, s 46(2). The manager of a VCC has to be (a) a holder of a capital markets services licence for fund management under the SFA; (b) a Registered Fund Management Company; (b) a person mentioned under section 99(1)(a), (b), (c) or (d) of the SFA; or (d) such person, or a person within such class of persons, as may be prescribed.

²⁶ VCC Act, s 45, read with CA, s 142(1).

²⁷ This VCC board is the equivalent of the board of directors in a company incorporated under the CA. The VCC board of directors will likewise be required to be fit and proper persons and owe fiduciary duties to the VCC to act in its best interests. Provisions in the VCC Act regulating directors fall under Part 6, Division 3 of the VCC Act.

²⁸ VCC Act, s 69, read with CA, s 171.

²⁹ A Custodian of assets is required for funds offered to certain type of investors (e.g. retail investors in Authorised schemes and accredited investors in restricted schemes).

³⁰ VCC Act, s 46(2).

³¹ Singapore Parliamentary Debates, Official Report (1 October 2018) vol 94 at Session 2 (Indranee Rajah, Second Minister for Finance).

Commercial Considerations

The VCC can be used for open-ended³² or closed-ended funds,³³ for both traditional funds and alternative funds,³⁴ providing a suitable corporate structure for both traditional³⁷ and alternative strategies.³⁸ It also has several key characteristics designed to make it attractive to funds.

Capital

The share capital of a VCC will always be equal to its net assets, thereby providing flexibility in the use of its capital in a number of ways. First, a VCC can issue³⁵ and redeem³⁶ shares without seeking shareholder's approval. This makes it easier for investors to enter into and exit from their investments in the fund when they wish to. Second, a VCC can also pay dividends using its capital, not only out of profits.³⁷ This allows investment funds to meet dividend payment obligations, an important consideration for investors. The fund's directors also do not have to make solvency statements prior to the repayment of capital.³⁸ In order to safeguard the interest of creditors, VCC shares must generally be issued and redeemed at their net asset value.

Privacy

In contrast with private limited companies, there is no requirement under the VCC Act for the register of VCC shareholders to be disclosed to the public, which affords shareholders increased privacy and anonymity.³⁹ However, upon request, this register still has to be disclosed to public authorities for regulatory, supervisory and law enforcement purposes. This is in line with keeping VCCs subject and supervised for anti-money laundering and countering the financing of terrorism requirements.⁴⁰

³² Open-ended funds are funds where investors can exit their investments by redeeming their investment units or shares in the fund.

³³ Closed-ended funds are funds with a fixed number of shares that cannot be redeemed at the election of shareholders, except in limited circumstances where permitted by the fund.

³⁴ Alternative funds, such as private equity and real estate funds, are typically structured as closed-end funds.

³⁷ Traditional funds are often structured as open-ended funds. ³⁸ Parliament Session 1 (n 21).

³⁵ VCC Act, s 34.

³⁶ VCC Act, s 35.

³⁷ VCC Act, s 22(13)(d) and (e).

³⁸ In the CA, s 70(4) requires companies incorporated under the CA to prepare solvency statements in the proposed redemption of preference shares by a company out of its capital. There is no corresponding statutory requirement in the VCC Act.

³⁹ Parliament Session 1 (n 21).

⁴⁰ *ibid.*

Accounting

VCCs are required to appoint an accounting entity to audit accounts on an annual basis⁴¹ and prepare financial statements that have to be audited. Catering to the needs of global investors, a VCC is given a choice between using either Singapore or other international accounting standards (such as the International Reporting Standards, US Generally Accepted Accounting Principles) in preparing its financial statements.⁴² This means that funds that are set up or redomiciled in Singapore can choose to continue with the accounting standards that they are already familiar with.

Tax

Tax-wise, the tax treatments of a standalone VCC will remain the same as that of a Singapore company. There are three main relevant tax incentive schemes: 1) Onshore Fund Tax Exemption Scheme (s 13R);⁴³ 2) Enhanced Tier Fund Tax exemption scheme (s 13X);⁴⁴ and 3) Financial Sector Incentive – Fund Management Scheme (s 43Q).⁴⁵ The first two schemes would be applicable directly to the VCCs, whereas the Financial Sector Incentive – Fund Management Scheme will be extended to fund managers managing incentivised VCCs. Basically, the s 13R and s 13X schemes exempt the income of the fund from taxation in Singapore, while the Financial Sector Incentive – Fund Management Scheme allows fund managers a concessionary tax rate of 10% on their income from managing the fund.

For an umbrella VCC, the economic conditions under the s 13R and s 13X schemes will apply to the VCC, and not to each sub-fund. For example, under the s 13R scheme, the business spend requirement of at least S\$200,000 will be applied to the VCC as a whole. Therefore, if a VCC has four sub-funds, the requirement will be S\$200,000 and not S\$600,000. This makes it easier for fund managers to meet the requirements under s 13R and s 13X schemes to obtain significant tax benefits.

Along the same lines, the investment objective of an umbrella VCC has to be satisfied at the VCC level, and not at a sub-fund by sub-fund level). This brings about two main consequences. Firstly, if there is a breach in the investment objective of the VCC by one subfund, it will adversely impact the entire VCC and even the other sub-funds would be negatively affected. This breach could occur when the sub-fund invests outside of the VCC's investment objective as approved under the s 13R and s 13X schemes. Secondly, if a new sub-

⁴¹ VCC Act, s 14.

⁴² Parliament Session 1 (n 21).

⁴³ Income Tax Act (Cap. 134, 2014 Rev Ed) (“ITA”), s 13R.

⁴⁴ ITA, s 13X.

⁴⁵ ITA, s 43Q.

fund added to the VCC has a different investment objective from what was approved, the VCC will have to update its investment objective under the s 13R and s 13X schemes and obtain approval from the relevant authorities. If new sub-funds that do not alter the investment scope are added to the VCC, there will be no need to seek approval from or inform the authorities.

For VCCs approved under the s 13R and s 13X schemes, the current GST remission, Singapore Certificate of Residence, current withholding tax exemptions available to funds approved, 10% concessionary tax rate under the Financial Sector Incentive – Fund Management Scheme will apply. The applicability of the aforementioned tax exemptions are, of course, still premised on the VCC fulfilling the requisite statutory requirements. The investment objective of the fund will also not be allowed to change, other than in certain situations and subject to approval of the authorities.

Re-domiciliation

The re-domiciliation of equivalent foreign VCCs is permitted,⁴⁶ and can be done through a simple registration process.⁴⁷ This process allows a foreign investment fund to retain its corporate history and identity⁴⁸ and allows funds to benefit from Singapore’s extensive DTA network. Previously, the Companies regime only allowed for funds structured as in a manner recognised by the Companies Act to be re-domiciled to Singapore. However, the requirement for these funds to be larger than a small company was inherently difficult for an investment

⁴⁶ VCC Act, Part 12 (comprising clauses 131 to 141) of the VCC Act deals with the redomiciliation of a foreign corporate entity as a VCC registered under the Act.

⁴⁷ VCC Act, s 135.

⁴⁸ Indranee Rajah, “The VCC: A Game-Changer for Singapore’s Funds Industry” (available at <http://www.mas.gov.sg/~media/MAS/News%20and%20Publications/Press%20Releases/Note%20by%20Second%20Minister%20for%20Finance%20Indranee%20Rajah%20on%20the%20Variable%20Capital%20Companies%20Bill.pdf>) (accessed on 16 June 2020).

vehicle to satisfy because the size and scale of many funds are smaller than a trading company.⁴⁹ The VCC Act essentially removes the need for funds to satisfy the small company requirements, making it easier for funds to be transferred to Singapore.

C. The VCC and its International Counterparts

In the creation of the VCC, Singapore is following in the footsteps of a number of successful jurisdictions. This article will focus on comparing various features of the VCC in Singapore with the Segregated Portfolio Company (“SPC”), available in the BVI,⁵⁰ and the Protected Cell Company (“PCC”), which is available in Labuan. As noted above, collectively, these structures will be referred to as “SFS”. The segregated portfolios (BVI), sub-funds (Singapore) and cells (Labuan) will be referred to as “sub-funds” accordingly.

Uses of the Various Kinds of SFS

Singapore

Under the VCC Act, the purpose of a VCC is to be one or more collective investment schemes (“CIS”) in the form of a body corporate.⁵¹ A collective investment scheme is defined as an arrangement where investors pool their assets and do not have day-to-day managing powers over said asset as they are managed by a manager.⁵² This does limit some structuring options and the purposes for which a VCC can be used for.

BVI

Similar to the VCC, the SPC structure enables a BVI company to legally segregate assets and liabilities between individual segregated portfolios (“ring-fencing”) within the same legal entity. There are four types of companies which may be incorporated as SPCs. First, if the company is licensed as an insurer under the Insurance Act 1994.⁵³ Secondly, if the company is recognised as a professional private fund or registered as a public fund under the Mutual Funds Act 1996.⁵⁴ Thirdly, if the description of the company falls within the ambit of regulations of

⁴⁹ *ibid.*

⁵⁰ The SPC structure is also available in Bermuda and Cayman Islands.

⁵¹ VCC Act, s 15(1).

⁵² SFA, s 2.

⁵³ BVI Business Companies Act 2004 (No.16 of 2004) (“BBCA”), s 135(2)(a).

⁵⁴ BBCA, s 135(2)(b).⁵⁹
135(2)(d).

BBCA, s

SPCs made under s 159 of the BVI Business Companies Act.⁵⁹ Section 159 gives the Cabinet the discretion to make regulations regarding the SPC structure. The BVI also allows other forms of companies to convert into the above types of SPCs.

The last category of company is residual in nature. If a company is not an investment business company, an insurance manager or insurance intermediary, or a company that carries on activities regulated under certain existing legislations, then it is allowed to be incorporated as an SPC.⁵⁵ This residual category was only introduced recently by the BVI Business Companies (Amendment) Act in 2018. Historically, the ability to incorporate a company as an SPC has been restricted to open-ended funds. As such, most collective investment funds incorporated in BVI did not fall under the first three types of companies as they are closed-ended funds.⁵⁶ The residual category of company now allows closed-ended funds to fall within its ambit and use the SPC structure.

Labuan

A PCC can only conduct Labuan insurance business or Labuan captive insurance business on terms provided under the Labuan Financial Services and Securities Act 2010, or conducting business of a mutual fund under the Labuan Financial Services and Securities Act 2010.⁵⁷ The definition of “mutual fund” here refers to an incorporated vehicle that pools funds for the purpose of collective investment and issues interests in the fund which entitles the holder to redeem his investments. It includes the umbrella fund which may have multiple cells.⁵⁸ Thus, “mutual fund” has a wide ambit and includes both open and closed-ended funds.

Differences between the Uses of the Various SFS

As seen from the above, these SFS structures in the above jurisdictions are catered to specific forms of investment schemes which mainly consists of investment of pools of funds managed by a body corporate with special features. BVI’s expansion of its SPC structure has resulted in all three jurisdictions to have largely similar requirements to incorporate an SFS. However,

⁵⁵ BVI Business Companies (Amendment) Act 2018, s 2.

⁵⁶ Martin Litwak, “Funds governance in the British Virgin Islands: legal duties and liabilities of hedge funds directors” (2006) J.I.B.L.R., 21(6), 362-366.

⁵⁷ Labuan Companies Act 1990 (Act 441) (Labuan) (“LCA”), s 130O.

⁵⁸ Labuan Financial Services and Securities Act 2010 (Act 704) (Labuan) s 2.
BBCA, s

unlike in BVI⁵⁹ and Labuan,⁶⁰ the availability of the VCC structure has not been extended to insurance companies in Singapore.⁶¹

Issues of Separate Legal Personality

BVI

Under the BVI Business Companies Act, a SPC is a separate legal entity, but the segregated portfolio under the SPC is not.⁶² Dealings are done by the SPC on the behalf of the portfolio and the counter-party must be informed on the portfolio he is dealing with.⁶³ In this sense, it does not have a separate legal personality as it cannot make transactions on its own behalf, but can only have transactions accredited to it via dealings through the SPC as a separate legal entity. However, segregated portfolios have characteristics of a separate legal entity such as power to issue its own shares⁶⁴, pay its own dividends⁶⁵ and having its own limited liability.⁶⁶

Singapore

Similarly, VCC is a separate legal entity but the sub-funds created under the VCC are not separate legal entities. The VCC may be sued with respect to its sub-fund, but the sub-fund may not be sued.⁶⁷ Dealings are done by the umbrella VCC on the behalf of the sub-fund, and counter-party must be informed on the sub-fund that he is dealing with.⁶⁸ Similar to the BVI SPC, sub-funds under a VCC have features that treats them as if they are a separate legal entity such as its own limited liability⁶⁹ and the ability to issue its own shares.⁷⁰

Labuan

Likewise, the Labuan PCC is a separate legal entity but the cells created under the PCC are not separate legal entities.⁷¹ Dealings are done by the umbrella PCC on the behalf of the portfolio

⁵⁹ BBCA, s 135(2)(a).

⁶⁰ LCA, s1300.

⁶¹ VCC Act, s 15(1).

⁶² 138(2).

⁶³ BBCA, s 142.

⁶⁴ BBCA, s 139(1).

⁶⁵ BBCA, s 141(1).

⁶⁶ BBCA, s 145.

⁶⁷ VCC Act, s 32.

⁶⁸ VCC Act, s 30.

⁶⁹ VCC Act, s 29(1).

⁷⁰ VCC Act, s 34.

⁷¹ LCA, s 1300(3).

BBCA, s

where the counter-party must be informed on the cell that he is dealing with.⁷² As with the SPC in the BVI, each cell has characteristics of a separate legal entity, such as the power to issue its own shares,⁷³ pay its own dividends⁷⁴ and its own limited liability.⁷⁵

Comparing Issues of Separate Legal Personality Across Jurisdictions

The cells in the SFS structure in the various jurisdictions as seen from above largely have the same crucial characteristics of a conventional company as separate legal entities even though it is statutorily explicit that they are not separate legal entities.⁷⁶ All three jurisdictions share a weakness in the ring-fencing of the assets under the SFS when dealing internationally with other jurisdictions without the SFS structure is concerned. Foreign jurisdictions without the SFS structure may not recognise the principles underlying the asset segregation under the SFS, as such a SFS may be treated as an orthodox company and its cells would not enjoy protection

⁷² LCA, s 130Y(1).

⁷³ LCA, s 130T(1).

⁷⁴ LCA, s 130T(3).

⁷⁵ LCA, s 130X(1).

⁷⁶ 138(2); VCC Act, s 32; LCA, s 130O(3).

BBCA, s

of its assets unlike in their home jurisdictions.⁷⁷ This may render the ring-fencing measures, which are the main purpose of incorporating as a SFS moot. However, this is a problem that is well-known in international fund structuring and there is considerable confidence in the market that such structures will be recognised.

Share Issuance, Share Structure and Dividends

BVI

A SPC may issue both general and class shares in the SPC and shares in a segregated portfolio. Proceeds of shares issued with respect to a segregated portfolio shall be included in the portfolio assets of that segregated portfolio.⁷⁸ They are regarded as separate and distinct from the proceeds from issuance of shares of the SPC, which are included in the general company's assets.⁷⁹ With regards to distribution of dividends, conventional companies will have to satisfy the solvency test before distributing dividends to its shareholders under the BBCA.⁸⁰ In contrast, SPCs can distribute dividends out of the assets and liabilities of the segregated portfolios⁸¹ under the SPC where the ring-fencing principle is upheld without being required to satisfy the solvency test.⁸²

Singapore

The VCC Act allows for issuance for shares with respect to specific sub-funds under the VCC, and shares of the umbrella VCC.⁸³ The interpretation of "shares" under this act include shares issued to subscribers of the constitution of a VCC as well as ownership of units in a collective investment scheme under the VCC.⁸⁴ Unlike a company incorporated under the CA,⁸⁵ a VCC is not statutorily barred from distributing dividends when it does not make a profit.

⁷⁷ Hui Ling McCarthy, "Protected cell companies and the Taxation of Chargeable Gains Act 1992 section 13", (2009) P.C.B., 5, 316-325, 318.

⁷⁸ BBCA, s 139(1) and (2).

⁷⁹ BBCA, s 140.

⁸⁰ BBCA, s 57.

⁸¹ BBCA, s 141(1).

⁸² BBCA, s 141(2). Regulations made under s 159 of the BBCA may impose a solvency test requirement for distribution of dividends, but no regulations regarding this matter has been imposed for now.

⁸³ VCC Act, s 34.

⁸⁴ VCC Act, s 2 (definition of "shares" read with "sub-funds").

⁸⁵ CA, s 403.

Distributions made to shareholders would be at the discretion of the VCC in accordance to provisions made in the constitution.⁸⁶

Labuan

A PCC in respect of any of its cells, may issue cell shares and the proceeds will go to the assets of the cell which issued the cell shares.⁹² If the shares is issued by the umbrella PCC instead of the cell, proceeds will be included in the general assets of the PCC.⁸⁷ This position is similar to the BBCA for SPCs. The statutory policy for distribution of dividends for a PCC is similar to those in Singapore and BVI where the discretion to distribute dividends is not dependent on the profitability of the PCC. As such, the only requirement for distribution of dividends is that the dividends of the cell is paid out of its own assets and liabilities.⁸⁸

Comparison of the Share Structures

There seems to be a slight difference between the share structure in BVI and Labuan, and the share structure in Singapore. In BVI and Labuan, the cells seem to have the ability to issue units in a collective investment scheme under the cell without having to issue shares in the cell as there is no statutory equation of units in a fund to shares. Moreover, issuance of cell shares seems to be a discretionary decision by the cell.⁸⁹ This may create two general classes of investors with respect to the cells; shareholders and contractual-investors. Singapore on the other hand considers units issued in a collective investment scheme to be a share in the VCC and the sub-fund, which means that there is only one general class of investors in a VCC.⁹⁰ An investor cannot buy a unit in a scheme without becoming a shareholder in the VCC.

Solvency Requirements

BVI

The BBCA does not set out the minimum solvency requirements for SPCs nor does it set out the minimum solvency requirements for the segregated portfolios under the SPCs.⁹¹ However, the solvency requirements may be found in the various legislation that governs the types of

⁸⁶ VCC Act, s 34(4).⁹²

LCA, s 130T(1).

⁸⁷ LCA, s 130T(2).

⁸⁸ LCA, s 130T(3).

⁸⁹ BBCA, s 139(1); LCA, s 130T(1).

⁹⁰ VCC Act, s 2 (definition of “shares” read with “sub-funds”).

⁹¹ BBCA.

businesses that may use the SPC structure as a vehicle. If the SPC is used for an insurance business, the Insolvency Act stipulates that the insurance company is deemed to be insolvent if the total value of its assets does not exceed the total amount of its liabilities by at least the minimum margin of solvency required to be maintained by the insurer prescribed in respect of the company in the Insurance Regulations 1995.⁹² This minimum margin of solvency defers according to different types of insurers. As the Insolvency Act and its regulations do not cater to how solvency margins are to be determined for a SPC, whether it is to be determined on a portfolio by portfolio basis or on the SPC as a single entity is still unclear. As for mutual funds, there are no minimum solvency requirements set out in legislations and regulations regarding mutual funds, the BBFA or the Insolvency Act.

Singapore

At this point, there is no minimum solvency requirements for a VCC set out in the VCC Act. Winding up procedures under the CA Part X applies to VCCs with the necessary modifications.⁹³ In relation to winding up of a sub-fund, Part X of the CA is also applied with necessary modifications set out in the First Schedule of the VCC Act.⁹⁴

Labuan

Labuan regulations only provide solvency requirements for PCCs conducting insurance and captive insurance business; there are no solvency requirements for PCCs managing mutual funds. For such insurance related PCCs, the minimum margin of solvency of a PCC is to be calculated on a cell by cell basis to determine whether the PCC as a whole meets its solvency requirements.⁹⁵ The solvency requirement of an insurance PCC is such that the realisable value of its assets exceeds the amount of its liabilities by a margin in such an amount or calculated in such manner as may be specified in writing by the Authority from time to time.⁹⁶ Specific requirements for solvency of different types of insurance businesses are laid out in regulations.⁹⁷

⁹² BVI Insolvency Act (No.5 of 2003) (BVI), s 240(2).

⁹³ VCC Act, s 130.

⁹⁴ VCC Act, s 33.

⁹⁵ Labuan FSA, “Guidelines on Captive Insurance Business in Labuan International Business and Financial Centre”, (available at https://www.labuanibfc.com/clients/Labuan_IBFC_78C2FF81-703A-4CAA-8926A348A3C91057/contentms/img/Downloads/guideline/insurance/guidelines-on-captive-insurance-businessin-labuan-international-business.pdf?1538092800) (accessed on 16 June 2020).

⁹⁶ Labuan Financial Services and Securities Act 2010 (Act 704) (Labuan) s 109.

⁹⁷ Labuan FSA, “Application for Licence – Labuan Insurance and Insurance-related Activities”, (available at https://www.labuanibfc.com/clients/Labuan_IBFC_78C2FF81-703A-4CAA-8926-

As for a captive insurance PCC, it is required to maintain at all times a surplus of assets over liabilities, which is equivalent to, or more than the amount of its working fund OR 20% of the net premium income for the preceding year in respect of the general insurance business, or 3% of the actual valuation of the liabilities for life insurance business as at the last valuation date in respect of the life insurance business.¹⁰⁴

Comparison of Solvency Requirements

As seen from the above, none of the jurisdictions dictates any solvency requirements for mutual funds, although Labuan regulations dictate minimum solvency requirements for PCCs in the insurance business. This could be due to the need to protect holders of insurance policies from the risks that the PCCs incurs from their investments.

D. Opportunities Moving Forward

Compared to the PCC structure in BVI and Labuan, the Singapore VCC structure is more restricted as to what businesses it can carry out. This section explores how the scope of the VCC may be expanded to accommodate for a wider variety of purposes as a special purpose vehicle or even as corporate structure for businesses.

Insurance

The key difference between the SFCs in BVI and Labuan and the VCC in Singapore is that the SFCs may be used as a vehicle to carry out an insurance business. With the aggressive growth of the insurance industry over the past few years,⁹⁸ it may be conducive for the industry if the VCC structure has been extended to be a vehicle for insurance businesses. This structure can act as a safety net for both policy holders and the insurer. Classes of policy holders would be shielded from the risks of the other classes of policy holders as each class may only claim from the cell that issues the policies. The insurer would also be less likely to face solvency issues in the case of major events where the claim of one class of policy holders is colossal, due to the

[A348A3C91057/contentms/img/Downloads/guideline/insurance/guidelines-on-application-for-licencelabuan-insurance-and-activities.pdf?1538092800](https://www.mas.gov.sg/-/media/MAS/resource/data_room/insurance_stat/2018/Annual-2018/Insurance-Statistics-2018-PDF.pdf?la=en&hash=22FF417720FBA209A595FBFFDB9C87B394766526) (accessed on 16 June 2020).¹⁰⁴ Labuan FSA (n 101).

⁹⁸ MAS, "Insurance Statistics 2018", (available at https://www.mas.gov.sg/-/media/MAS/resource/data_room/insurance_stat/2018/Annual-2018/Insurance-Statistics-2018-PDF.pdf?la=en&hash=22FF417720FBA209A595FBFFDB9C87B394766526) (accessed on 16 June 2020).

fact that the issuing cell may only be able to make payments out of its own assets.⁹⁹ In such a scenario, the worst case would be the winding up of the cell that do not have sufficient assets to fulfil the insurance claims.¹⁰⁷

Captive Insurance

Captive insurance differs from the conventional insurance mentioned in the preceding paragraph such that captive insurance companies are wholly owned by its insured parties.¹⁰⁰ Conventionally, captive insurance companies are set up by large corporations to insure themselves against risks, but such is not available to smaller corporations as wholly owning an insurance company can be too expensive.¹⁰¹ The VCC structure if expanded to allow for captive insurance would open the doors of captive insurance to small and medium enterprises which constitutes 99% of all enterprises in Singapore.¹⁰²

The cell structure would allow smaller companies to collectively establish a captive insurance company where they would enjoy advantages over conventional insurance provided by insurance companies. Such include a wider range of claims, and flexibility over the premiums paid.¹⁰³ There is no concern for other participants in the captive insurance claiming excessively as each participant would have its own pool of assets, protected by the cell structure, to make their insurance claims against.

Family Offices

In view that the VCC structure has been made available to collective investment schemes, there is a possibility that this structure could be made available to family offices for family wealth

⁹⁹ VCC Act, s 29(1).¹⁰⁷

VCC Act, s 33(1).

¹⁰⁰ Stewart McCulloch, "Captive Insurance Companies: Do They Provide Insurance", (1996) 26 Victoria U. Wellington L. Rev. 751.

¹⁰¹ James A. McConvill, "Of Turquoise Waters and Captivating Dreams: The Cook Islands as an International Captive Insurance Center", (2015) 14 J. Int'l Bus. & L. 1.

¹⁰² Department of Statistics Singapore, "Singapore Economy 2019", (available at https://www.singstat.gov.sg/modules/infographics/-/media/Files/visualising_data/infographics/Economy/singapore-economy21052020.pdf) (accessed on 16 June 2020).

¹⁰³ McCulloch (n 108).

management. Such entities are established by wealthy families to serve their financial needs such as tax planning, wealth creation and inter-generation wealth transfer.

Allowing for family offices to use the VCC structure as a corporate vehicle would allow them to enjoy the same benefit that mutual funds enjoy, the segregation of assets to employ different investment strategies. With respect to the function of family offices being a vehicle for wealth creation, it is not so different from the concept of a collective investment scheme. The key difference is that it manages the wealth of the members of a wealthy family instead of investors that may not have family relations.

E. Conclusion

The VCC presents certain advantages over the previous structuring alternatives, providing a way to overcome the previous limitations. It has certainly boosted the attractiveness of Singapore as a global fund management hub in an increasingly competitive market for mobile global funds. One potential issue to take note is that while considerable progress has been made with the VCC, Singapore may consider moving forward with it shortly, and expanding the use of the VCC beyond CISs. Other jurisdictions have already taken this step, most notably in the insurance industry. It is suggested that with proper safeguards, the VCC could be a massive bonus to the insurance industry and for family offices if so extended in the future. This would again boost Singapore's competitiveness vis-à-vis other jurisdictions which have already extended their SFS structures to include such uses.