

THE VARIABLE CAPITAL COMPANIES ACT 2022

A briefing by **YKJ Legal**

BACKGROUND

In a bid to enhance the attractiveness of Mauritius as an International Financial Centre and to give a boost to the fund services industry in Mauritius, the Mauritian Government has enacted The Variable Capital Companies Act 2022 (the "Act"). The Act was passed in the Mauritius National Assembly on 12 April 2022 and received the assent of the President of the Republic on 14 April 2022. The Act is awaiting proclamation.

The Variable Capital Company ("VCC") is a legal form entity which can be used for traditional and alternative strategies for both open-ended and closed-end funds. A VCC can be used as a stand-alone entity or as an umbrella entity with multiple sub-funds.

SALIENT FEATURES OF A VCC

- A VCC can comprise sub-funds and special purpose vehicles ("SPV") within the same VCC entity;
- A sub-fund or SPV may elect to have a legal personality that is distinct from a VCC;
- A sub-fund or an SPV of a VCC may subject to its constitution invest in assets of another sub-fund or SPV of the VCC;
- A sub-fund or SPV is entitled to have a distinct name from that of the VCC;
- A VCC must at all times have a written constitution;
- A sub-fund or SPV incorporated under the Act is not a subsidiary of the VCC;
- The directors of the SPV or the sub-fund may if the constitution of the VCC so provide be distinct;
- Flexibility for the increase and reduction of capital;
- The assets of a sub-fund or an SPV of a VCC shall not be used to discharge the liability of the VCC or any sub-fund or SPV of the VCC including during the winding up, administration or receivership of the SPV, sub-fund or the VCC;
- The assets of a sub-fund or VCC shall be available only to the creditors of the company who are creditors in respect of the sub-fund or of the SPV;
- A sub-fund of a VCC may invest in another sub-fund or SPV but such sub-fund or SPV of the VCC shall not invest in another sub-fund or SPV that has already invested in it;
- In a legal proceeding against any sub-fund or SPV, an order or judgment shall be restricted to that sub-fund or SPV;
- A VCC may issue shares of varying amounts and/or issue shares for payment of calls as agreed between its shareholders;
- A VCC allows for flexibility regarding the distribution of dividend and the solvency test as applicable under the Companies Act does not apply to VCC in a similar manner;
- The winding-up of the individual sub-funds does not automatically initiate the winding-up of the entire VCC.

SETTING UP A VCC

Whist the Act establishes the VCC, such a company can be incorporated under the Companies Act 2001. It must be noted that a company incorporated in Mauritius can be converted into a VCC and that a company established in a jurisdiction other than Mauritius may be registered in Mauritius by way of continuation as a VCC.

The name of a VCC must include the words " Variable Capital Company" or "VCC" after its name. The VCC must have a constitution which shall comply with the Companies Act 2001 and must specify the following:

- that the primary object of the company is to operate as a fund;
- that the assets and liabilities of the company shall be measured on a fair value basis;
- the rights attached to each category of shares of the company;
- provision for redemption of shares at a price equal to the proportion of the net asset value of the sub-fund represented by the share;
- the policy of the company behind setting up a sub-fund or a SPV.

A company can only operate as a VCC if it is authorized by the Financial Services Commission (the "FSC").

A VCC may create one or more sub-funds in accordance with the Act and its constitution.

A sub-fund or SPV cannot be created without the prior approval of the FSC.

It is important to note that an SPV shall not operate as a sub-fund.

The name of an incorporated sub-fund or SPV shall include the expression "incorporated VCC sub-fund" or "incorporated VCC special purpose vehicle".

REPORTING OBLIGATIONS

A VCC has the statutory obligations to adhere to the record keeping requirements of the Companies Act 2001 and in addition must :

- keep separate records of the VCC and each sub-fund and SPVs setting out sufficient explanations of the transactions of the VCC and its sub-funds and SPVs necessary for the preparation of the true and fair financial statements thereof;
- establish and maintain adequate internal accounting controls to ensure that the assets of the VCC and its sub-funds or SPVs are safeguarded against loss from unauthorised use or disposition;
- that the transactions of the VCC or its sub-funds or SPVs are duly authorised.

TAXATION

The Act has amended The Income Tax 1995 to include a variable capital company, its sub-fund or SPV in the definition of "company". The implication of this amended definition of "company" is that a VCC, its sub-fund or SPV must file a tax return with the Mauritius Revenue Authority. The filing of a tax return will depend very much on whether each sub-fund or SPV has elected to have a separate legal personality. In such a situation, each sub-fund or SPV must file a separate return. It is relevant to note that the tax liability of one sub-fund or SPV shall not affect the other sub-funds or SPVs. On the other hand if a VCC under an umbrella structure intends to file a consolidated Financial Statement, then a single tax return would be appropriate.

WINDING UP

A sub-fund or an SPV can only be wound up voluntarily if it has a plan for such winding up approved by the FSC. In giving its approval, the FSC shall ensure that the interests of the participants of the sub-fund or the SPV are protected. Once the FSC approves the plan, the provisions relating to the voluntary winding up under the Insolvency Act 2009 apply if the sub-fund or the SPV has a distinct legal personality .

The court may also make an order for the winding up of a sub-fund or an SPV where an application is made by the FSC, a creditor, a CIS Manager or the board of the VCC or any of its sub-funds.

SANCTIONS

The Act provides for criminal sanctions and any person who contravenes the Act shall upon conviction be liable to a fine of up to MUR 500,000 and a term of imprisonment for a term of up to 5 years.

ABOUT YKJ LEGAL

YKJ Legal is a law firm authorised by the Attorney General's office. We are a team of experienced lawyers and have acted as legal counsels to many high net worth individuals, international corporates and banks.

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