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New company law for Guernsey: The Companies (Guernsey) Law, 2008

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Introduction

The Companies (Guernsey) Law, 2008 came into force on 1st July 2008.

The main legislation was the Companies (Guernsey) Law, 1994. Since then various changes were brought in to make Guernsey companies more flexible and versatile including the creation of special types of companies such as the Protected Cell Company (Guernsey was the first to have this legislation) and the Incorporated Cell Company. This considerably assisted the funds and insurance industries. In addition there has been, for several years, the ability to migrate a company to Guernsey, to emigrate a company from Guernsey and to amalgamate one or more companies.

The main changes are:

New types of companies

Two new types of company are introduced – “Unlimited” Companies (where the liability of the members is unlimited) and “Mixed” Liability Companies (which can have shares, unlimited liability members and guarantee members).

The incorporation and filing processes for companies

The incorporation of companies has ceased to be a judicial or court process. Formerly, the consent of the Crown Officers the Guernsey Financial Services Commission (GFSC) and court sanction were required before a company could be registered. The incorporation process is now controlled by the new Company Registry discussed below.

Incorporations may be done online, with the ability to select the required service levels. A fast-track service (15 minutes, provided that all documentation is in order) is offered.

There is also a facility for online filing of Annual Validation certificates (which replace companies’ Annual Returns) and notification of changes to the Registrar of Companies. Searches may be conducted online.

Standardised Articles of Incorporation

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Standard Articles of Incorporation are now prescribed which will automatically be adopted, unless otherwise indicated on incorporation.

Corporate capacity

Unless a company's memorandum of incorporation specifies its objects are unrestricted.

This should in future avoid any issues being raised as to whether a particular act or transaction is within the company's powers.

Arrangements and reconstructions

The new law facilitates compromises and arrangements between a company and its creditors (or any class of them) or its members (or any class of them).

Subject to agreement of a 75% majority of the creditors or members, the Royal Court may sanction the compromise or arrangement. This should assist in insolvency or possible insolvency situations. Previously, despite a proposal being supported, for example by the vast majority of creditors, a minority could block a proposal.

Company takeovers

Squeeze-out provisions will allow a proposed purchaser with 90% acceptances to compulsorily acquire the remaining shares.

Dividends and distributions

Previously, the repayment of share capital or the payment of dividends to shareholders were subject to complex rules, particularly the accounts from which payments can be made or profits distributed, and in some cases (for example, a reduction of capital) the sanction of the Court.

The new regime does away with these rules. As a general principle, distributions can be made or paid provided that any requirements set out in the company's memorandum and articles are fulfilled and the company satisfies a solvency test.

The directors must issue a certificate stating that in their opinion the company will, immediately after the distribution, satisfy the solvency test and the grounds for that opinion.

A distribution made at a time when the company did not satisfy the solvency test can be recovered, subject to certain exceptions.

In addition, the directors may be personally liable to repay to the company amounts which are not recoverable from the members.

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The effect of these provisions will be a much more flexible regime both for repayment of capital and distributions to the shareholders. However, the onus is on the board of directors to ensure that payment can properly be made.

Solvency test

A new solvency test is now applicable to a number of company actions including:

- Migrations
- Amalgamations
- Making distributions (including dividends)
- Reduction of share capital
- Financial assistance for the acquisition of a company's own shares
- Certain payments connected with the acquisition of shares by a company
- Redemptions

Under the new provision, a company satisfied the solvency test if:

- The company is able to pay its debts as they become due
- The value of the company's assets is greater than the value of its liabilities
- In the case of a supervised company, it satisfies the various requirements laid down in other applicable laws

The new test adds certainty and consistency to the process involved.

Electronic communication

The law permits documents to be sent electronically to shareholders by the company if such means of communication is agreed by the shareholder.

Companies Registry

In tandem with these developments in Guernsey's Company Law, a new Companies Registry was launched and is operational.

There was established a new office of the Registrar of Companies who took over the role undertaken by HM Greffier and his staff.

Conclusion

A modern, flexible company law underpins Guernsey as both a finance centre and as an entrepreneurial jurisdiction. This progressive company law should enable Guernsey to attract further business.

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