Collas Crill explains... Payment of dividends and distributions by a Guernsey company

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This is part of a series of guides in which we examine areas of Guernsey law that frequently arise in practice. Further guides will be released weekly; click here to subscribe to receive Collas Crill news and insights by email.

This guide looks at the key things you need to know about returning value to stakeholders by way of payment of dividends or distributions.

Dividends and distributions

Unlike many other offshore jurisdictions whose companies laws are modelled after English company law (which among other things, require the maintenance of an authorised share capital and the payment of dividends only out of available profits) Guernsey has adopted a more flexible approach to how companies can operate in this regard. The 'maintenance of capital' rule is significantly relaxed in Guernsey, allowing for dividends and distributions to be paid from a far wider range of sources.

What is a distribution?

The **Law** defines a 'distribution', in relation to a distribution by a company to a member, as:

- the direct or indirect transfer of money or property, other than the company's own shares, to or for the benefit of the member, or
- the incurring of a debt to or for the benefit of the member, in respect of the member's interests, whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means.

What is a dividend?

Under the **Law**, 'dividend' means every distribution of a company's assets to its members except distributions by way of:

- an issue of shares as fully or partly paid bonus shares;
- a redemption or acquisition of any of the company's own shares or financial assistance for an acquisition of the company's own shares;
- a reduction of share capital;
- a distribution of assets to members during and for the purposes of its winding up;

- a distribution of assets to members during and for the purposes of an administration order;
- a distribution of assets to members of a cell of a protected cell company during and for the purposes of a receivership order; and
- a distribution of assets to members of a cell of a protected cell company during and for the purposes of the termination of the cell.

A dividend may be in the form of money or other property.

Requirements of the Law

The **Law** is not prescriptive and allows a company considerable flexibility to make dividends and distributions, provided that the company can satisfy the statutory solvency test immediately following that dividend or distribution.

Solvency test

When confirming that the company satisfies (and will satisfy) the statutory solvency test, the directors must certify this confirmation in writing. Most commonly this will take the form of a solvency certificate, or a certification recorded directly into the board minutes of the company.

For the purposes of the **Law** a company satisfies the solvency test if:

- the company is able to pay its debts as they become due; or
- the value of the company's assets is greater than the value of its liabilities.

Constitutional documents

General

In addition to the requirements in the **Law**, a company's **M&A** will normally contain provisions relating to the payment of dividends and distributions. The directors of the company must make sure they are familiar with these provisions and comply with them in addition to the requirements of the **Law**.

Sometimes the dividend/distribution provisions in the company's **M&A** will be more restrictive than the requirements of the **Law**, especially if the **M&A** have not kept pace with changes to the **Law**. Where this is the case, the directors may want to amend these provisions so the company can enjoy the flexibility allowed by the **Law**.

Potential liability of directors

A director who makes a solvency certification without having reasonable grounds for the opinion expressed within it maybe guilty of an offence and, upon conviction, is liable to a fine, imprisonment for up to two years, or both.

Breach of duty

A director may be liable for any damage suffered by the **company** after a director authorises a dividend or distribution;

- the company subsequently becomes insolvent; and
- the Guernsey court finds that the director breached the director's duties to act in the best interests of the company and to exercise the necessary care, diligence and skill when approving such dividend/distribution.

Relief

If an action is brought against a director alleging a breach of the director's duties to the company, the director may apply to the Guernsey court to be relieved from such liability.

The **Law** allows the court to relieve the director (in whole or part) from liability for negligence, default or breach of duty or trust on any terms the court thinks fit if it appears to the court that:

- the director acted honestly; and
- having regard to all the circumstances, the director ought fairly to be excused from liability.

In practice, however, the court is only likely to exercise these powers in favour of a director in rare cases.

Recovery from shareholders

A company can recover a distribution made to a shareholder when the company did not, immediately after the distribution, satisfy the solvency test, within a period of two years beginning immediately after the distribution, except to the extent that:

- the member received the distribution in good faith and without knowledge of the company's failure to satisfy the solvency test;
- the member has altered his position in reliance on the validity of the distribution; and
- it would be unfair to require repayment in full or at all.

Terms used

Law - the Companies (Guernsey) Law 2008

M&A - a company's memorandum and articles of incorporation

About this guide

This guide gives a general overview of this topic. It is not legal advice and you may not rely on it. If you would like legal advice on this topic, please get in touch with one of the authors or your usual Collas Crill contacts.

About Collas Crill

We are a leading offshore law firm. We are easy to do business with and give practical advice to overcome tough challenges. Through our network of offices, we practise British Virgin Islands, Cayman Islands, Guernsey and Jersey law.

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