British Virgin Islands

Distributions, share purchases and redemptions

This briefing examines the key aspects of distributions, share purchases and redemptions under the BVI Business Companies Act 2004 (the **Act**).

Distributions

A company's articles of association will contain provisions dealing with the payment of distributions. The Act imposes additional obligations relating to the payment of distributions.

What is a distribution?

Under the Act, a distribution is any transfer by a company of any of its assets (other than its shares), or the incurring by it of a debt, to or for the benefit of, a shareholder, whether made by:

- the purchase of any asset;
- the purchase, redemption or other acquisition of any of its shares;
- the transfer of any debt; or
- any other means.

A distribution includes a dividend but not an issue of bonus shares.

No maintenance of capital rules

There are no maintenance of capital rules under the Act so it is relatively simple for a company to make payments to its shareholders. Any asset of a company (including the consideration paid for its shares) can be distributed to its shareholders as long as its directors apply the solvency tests (see below).

Directors' duties

The directors of a company should only make a distribution or purchase or redeem shares at the option of the company if they believe that it is in the best interests, and for a proper purpose, of the company to do so. Otherwise they will be in breach of their statutory and common law duties to the company.

Solvency tests

The Act only allows the directors of a company to authorise a distribution if they are satisfied on reasonable grounds that the company will, immediately after the distribution is made, satisfy the following tests (the **solvency tests**):

- the value of its assets will exceed its liabilities; and
- it will be able to pay its debts as they fall due.

The solvency tests are generally included in a company's articles of association.

The resolution of directors authorising the distribution must contain a statement that in the directors' opinion the company will satisfy the solvency tests immediately after the distribution is made.

If, after a distribution has been authorised but before it is made, a director ceases to be satisfied on reasonable grounds that the company will satisfy the solvency tests immediately after the distribution is made, the distribution is taken not to have been authorised.

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Under certain circumstances where a company did not satisfy the solvency tests immediately after the distribution is made, the distribution may be recovered from the shareholder(s).

Directors are potentially liable to repay to the company any part of the distribution that is not recovered from the shareholder(s).

Share purchases and redemptions of a company's own shares

The vast majority of companies disapply the share purchase and redemption provisions in the Act in their articles of association. Typically, a company's articles of association will authorise the directors to purchase or redeem shares at any time, from any shareholder, for any price and on any terms, they think fit. Where a company has disapplied the share purchase and redemption provisions in the Act:

- unless its memorandum or articles of association specify otherwise, the company cannot purchase or redeem a shareholder's shares without the consent of the shareholder; and
- the company will normally purchase or redeem shares by sending the shareholder a short letter setting out the terms on which it proposes to buy or redeem the shareholder's shares. The shareholder will counter-sign the letter and return it to the company to signify the shareholder's consent.

Shares cancelled

Any shares that have been purchased or redeemed by a company are taken to be automatically cancelled unless they are to be held as treasury shares.

Treasury shares

If a company is not prohibited from doing so by its memorandum or articles of association and its directors decide to do so, a company may hold as treasury shares any shares that it purchases or redeems. The company may not hold as treasury shares more than 50 per cent of its shares in issue.

All rights and obligations attaching to a company's share are suspended and may not be exercised by or against the company while it holds the share as a treasury share.

For more information on any aspect of this briefing please contact any member of the Marbury team.