BRIEFING NOTE

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Distributions – Jersey Companies Offer Clarity and Flexibility

Intra-group guarantees and intra-group loans are common arrangements in corporate groups. Recent commentary by the Law Society of England and Wales and the City of London Law Society (the Law Societies) has revealed some uncertainty as to when these transactions amount to distributions under English law[1]. By contrast, the Companies (Jersey) Law 1991 (the Jersey Companies Law) is clear about the circumstances in which a guarantee or a loan will require the formalities for a distribution by a Jersey company to be observed. The debate in the UK affords a useful opportunity to examine the Jersey distribution regime, which is often said to be straightforward and flexible.

UK Debate

The Law Societies produced two notes, on Guarantees and Distributions and Intra-Group Loans and Distributions. The notes were written in response to a paper produced by the Institute of Chartered Accounts in England and Wales and the Institute of Chartered Accountants of Scotland containing Guidance on Realised and Distributed Profits under the Companies Act 2006 (Tech 02/17 BL)[2]. Tech 02/17 BL sets out a view as to the circumstances in which guarantees, and intra-group loans constitute distributions as a matter of law. The Law Societies' notes seek to clarify those circumstances and conclude that:

- a transaction in which, at the time the guarantee is given, the board of directors of the guarantor properly considers the financial position of the borrowing company and concludes, in good faith and on reasonable grounds, that it is likely to be able to repay or refinance the credit when due and therefore that a claim is unlikely to be made on the guarantee; and
- a loan made by a subsidiary to its parent company or to a fellow subsidiary that is repayable immediately on demand by the lender, where, at the time the loan is made, the board of directors of the subsidiary properly considers the borrower's financial position and concludes, in good faith and on reasonable grounds, that it is likely to be able to repay the loan when repayment is demanded, will not amount to a distribution.

Jersey Position

The Jersey Companies Law requires that the directors of a Jersey company who authorise a distribution make a solvency statement before the distribution is made. Where the company in question is not an open-ended investment company, the statement must state that the directors of the company who are to authorise the distribution have formed the opinion that:

- immediately following the date on which the distribution is proposed to be made, the company will be able to discharge its liabilities as they fall due; and
- having regard to (i) the prospects of the company and to the intentions of the directors with respect to the management of the company's business, and (ii) the amount and character of

the financial resources that will in their view be available to the company, the company will be able to (A) continue to carry on business, and (B) discharge its liabilities as they fall due, until the expiry of the period of 12 months immediately following the date on which the distribution is proposed to be made or until the company is dissolved, whichever first occurs.

However, a solvency statement is not required where the distribution does not reduce the net assets of the company, with any question as to whether a distribution reduces the net assets of the company being determined in accordance with generally accepted accounting practices. Therefore, when transacting with a parent or sister company, a solvency statement does not need to be given where a guarantee or an interest-free demand loan will not be reflected as a liability in a company's accounts, as there will be no reduction in the company's net assets. In practice, similar to the Law Societies' suggestion in the UK context, the directors should consider the likelihood of the guarantee being called or the loan being repaid at the board meeting approving entry into the transaction. Cross-guarantees and demand loans are common arrangements between group companies, so the clarity offered by the Jersey Companies Law here is welcome.

Flexibility

A Jersey company may debit a distribution to any account other than the capital redemption reserve or the nominal capital account. A distribution may be debited directly to the share premium account so there is no need for a capital reduction to be made for share premium to be accessed. There is no requirement for positive reserves on profit and loss account for a distribution to be lawfully made.

Conclusion

The Jersey Companies Law offers a clear and flexible distribution regime. The certainty that it gives around intra-group loans and intra-group guarantees is frequently useful in practice. And without significant 'dividend blocks' the Jersey Companies Law offers a flexible regime, with the requirement for a solvency statement affording protection to creditors.

[1] http://www.lawsociety.org.uk/news/stories/notes-on-intra-group-guarantees-and-intra-group-loans/

[2] tech-02-17bl-guidance-on-realised-and-distributable-profits-under-the-companies-act-2006.ashx (icaew.com)

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