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ARTICLE

Dividends by BVI Business Companies

Thinking of paying dividends from your British Virgin Islands ("BVI") company? Subject to compliance with the applicable statutory solvency test and any restrictions contained in a company's memorandum and articles of association, directors can authorise dividends at any time and for any amount. However, directors should consider the following before doing so:

(a) **The Solvency Test:** A company cannot lawfully declare or pay a dividend where it does not satisfy the statutory solvency test applicable to the company. The applicable statutory solvency test is not the same for all BVI companies.

For a company that was incorporated before the BVI Business Companies Act (As Revised) (the "BC Act") was enacted and which has never adopted memorandum and articles disapplying certain statutory transitional provisions, a somewhat more cumbersome form of statutory solvency test applies. For such a company, the directors must determine that, immediately after the payment of the dividend: (i) the company will be able to satisfy its liabilities as they become due in the ordinary course of its business; and (b) the realisable value of the assets of company will not be less than the sum of its total liabilities, other than deferred taxes, as shown in its books of account, and its capital.

For every other company, the modern statutory solvency test instead applies. It requires that the directors must be satisfied, on reasonable grounds, that immediately after the payment of the dividend: (i) the value of the company's assets will exceed its liabilities; and (ii) the company will be able to pay its debts as they fall due.

(b) **Memorandum and Articles of Association:** Directors should also check whether there are any provisions in the company's memorandum and articles of association that may impact when or how dividends can be paid. Additionally, if the solvency test applicable to the company is not the simplified, modern solvency test, amending the memorandum and articles to modernize and simplify them may warrant consideration.

(c) **Recovery of a Dividend:** A dividend paid to a shareholder at a time when the company did not, immediately after the payment thereof, satisfy the appropriate solvency test may, in certain limited circumstances, be recovered by the company from the shareholder. Any ability to recover a dividend paid would depend on the specific fact matrix in each case (including whether the modern statutory solvency test applies to the company) and specific advice should be sought.

(d) **Potential Liability for Directors:** If after a dividend has been authorised, but before it has been paid, the directors cease to believe on reasonable grounds that the company will, immediately after the dividend is paid, satisfy the appropriate solvency test, the dividend is deemed no longer authorised. Any director who in this situation fails to take reasonable steps to prevent the dividend from being paid is personally liable to the company to repay it any sum that is unable to be recovered from shareholders. This position differs slightly for those companies whose applicable solvency test is not modern statutory solvency test and specific advice should be sought in such cases.

(e) **Good Corporate Governance:** Always ensure your financial position is robust and your board resolutions clearly document the basis for any dividend decision.

For more detailed guidance, please reach out to our team. We can help with all your corporate governance needs.

British Virgin Islands

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