

Snapshot: Distributions under BVI law

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BVI business companies are one of the most commonly used offshore vehicles and our expert team frequently advises on distributions by BVI companies. In this snapshot, partner Marie-Claire Fudge addresses a number of the most common questions asked about distributions.

What is a "distribution" for the purposes of BVI law?

Under Section 56(b) of the BVI Business Companies Act 2004 (as amended) (the **BCA**), a distribution is defined fairly widely to be:

"(i) the direct or indirect transfer of an asset, other than the company's own shares, to or for the benefit of the member, or

"(ii) the incurring of a debt to or for the benefit of a member

"in relation to shares held by a shareholder, or the entitlements to distributions of a member who is not a shareholder, and whether by means of the purchase of an asset, the purchase, redemption or other acquisition of shares, a transfer of indebtedness or otherwise, and includes a dividend."

Does the definition of "distribution" capture anything other than dividends?

Given the width of the definition of "distribution" under the BCA, it will catch not only the payment of dividends by a BVI company, but can also catch other transactions such as a compulsory redemption of shares or an upstream guarantee.

What is the process for a BVI business company to make a distribution?

Subject to a BVI company's memorandum and articles of association (**M&A**), the directors of a company may, by resolution, authorise a distribution by the company to members at such time and of such amount as they think fit, so long as they are satisfied on reasonable grounds, that the company will immediately after the distribution, satisfy the Solvency Test.

For these purposes, the Solvency Test is that, immediately after the distribution (i) the company's assets exceed its liabilities; and (ii) the company is able to pay its debts as they fall due.

Is there a concept of distributable reserves under BVI law?

There is no concept of distributable reserves under the BCA. Subject to the BVI Solvency Test and a company's M&A, a BVI business company can make distributions from any source.

Is there any distinction under BVI law between a dividend and a distribution?

BVI law does not distinguish between dividends and other distributions, but the definition of distribution (as set out above) does specifically say that it includes a dividend.

What happens if a company ceases to satisfy the Solvency Test before the distribution is made?

If, after a distribution is authorised but before it is made, the directors cease to be satisfied on reasonable grounds that the company will satisfy the Solvency Test immediately after the distribution, then any distribution made by the company is deemed not to have been authorised.

Is member approval required for a BVI company to authorise a distribution?

No, subject to a company's M&A, the directors of a BVI company can authorise a distribution without obtaining member approval to do so.

Are the rules on distributions different for a "former IBC"?

A "former IBC" is a term used to describe a BVI company which was incorporated under the old BVI companies act, the International Business Companies Act. There are transitional provisions in Part IV of Schedule 2 of the BCA (the **Transitional Provisions**) which apply to former IBC companies, which includes the directors passing a different solvency test and that dividends can only be declared and paid out of surplus. It is possible for a "former IBC" to take steps to disapply the Transitional Provisions, but if this has not been done, then different rules may apply to those set out above.

For more information on this topic, please contact our BVI corporate team.

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