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Share-Capital Reductions in Ireland

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Overview

A common issue faced by Irish limited-liability companies is ensuring any return of capital to shareholders is carried out in accordance with Irish capital-maintenance rules. Directors of these companies must be mindful of the requirement for a company to have '*distributable reserves*' before distributing cash or assets to its shareholder(s) and the associated penalties for making an unlawful distribution.

Fortunately the Irish Companies Act 2014 provides for two methods of capital reduction, either of which may be used to, amongst other things, create distributable reserves and facilitate a return of surplus capital:

- the summary approval procedure or '*whitewash*' procedure ("SAP"); and
- approval by the Irish High Court.

Where the SAP is not permitted (PLCs cannot use the SAP) or appropriate, High Court approval is required.

Option 1: Summary Approval Procedure

The SAP is straightforward but must be strictly observed as otherwise it may be invalidated. The SAP requires all of the following:

- a meeting of the board of directors of the company is held at which a majority / all of the directors make a declaration in relation to a number of specified matters, including the solvency of the company for the 12-month period after the capital reduction has been put into effect. The board of the company must approve the declaration and use of the SAP at such meeting;
- the directors' declaration must be accompanied by a report from the auditor of the company, or a person qualified to hold such role, confirming that the opinion as to solvency expressed by the directors is not unreasonable;
- the company's members must pass a special resolution approving the capital reduction (by extraordinary general meeting or by a written resolution). There can be no more than 30 days between the date of the directors' meeting and the passing of the special resolution. The capital reduction will take effect once the board meeting is held and the special resolution is passed; and
- a copy of the directors' declaration must be filed at the Companies Registration Office in Dublin no later than 21 days after the date on which the capital reduction is put into effect.

Where a director makes the above declaration without reasonable grounds, certain parties (including creditors or liquidators) may apply to court to hold directors who made the declaration personally liable for all or any of the company's debts. If the company is wound up within 12 months of the declaration being made and its debts are not paid in full within 12 months of the winding-up commencing, it will be presumed, until the contrary is shown, that the declaration was not made on reasonable grounds. The onus will therefore be on the director to prove that s/he had reasonable grounds for giving the solvency opinion.

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Option 2: High Court Approval

Where the SAP is not, or cannot, be adopted, the company must apply to the Irish High Court to have the resolution approving the capital reduction confirmed.

Before applying to the High Court, notice of the passing of the special resolution approving the capital reduction must be:

- advertised in a daily newspaper circulating in the district of the registered office or principal place of business of the company; and
- notified by ordinary post to all creditors of the company residing outside of Ireland. This can be an onerous undertaking for PLCs or large private companies having numerous international creditors.

A capital-reduction application will be made before the High Court where a date and time for the hearing will be decided upon. While no further advertisement of the passing of the resolution is required, the High Court will typically require that the date and time of the final hearing be advertised so that interested parties (including creditors) can attend and object to the application. This might require advertising in international newspapers.

The High Court has discretion not to approve the reduction of capital even where there are no objecting creditors.

Conclusion

The SAP has become the most popular method to effect a capital reduction because it is more expedient and cost-efficient than the High Court process. An SAP may conceivably be completed within one day.

However, when carrying out an SAP, directors should understand the associated risks and the potential for facing personal liability if they are found not to have reasonable grounds for their solvency declaration. These risks can be mitigated and the directors should seek advice before giving any declaration of solvency.

Walkers can assist with all aspects of your capital reduction. Please get in touch if you have any queries in relation to this note or any other Irish corporate or commercial matters.

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