

RAVENS CROFT & SCHMIERER

Solicitors Notary Rechtsanwälte

What to Do as a Director if your Company is in Financial Difficulties

Responsibilities and liabilities of directors come from various sources, including the Articles of Association of the company, case law and statute law. Non-compliance may expose directors to civil or even criminal proceedings and disqualification.

1. Do not walk away from problems

As soon as directors become aware of their company's financial difficulties, they should seek professional advice, especially from the company's auditors.

To make appropriate decisions, directors require access to and review the latest management accounts and paper trails. The paper trail shall include the preparation and approval of detailed board minutes, which prove that directors have taken appropriate steps, i.e. participated in board meetings and considered relevant information and potential steps to take.

Directors should also seek professional advice from the company's lawyers and a licensed insolvency practitioner. It is rarely advisable for directors of companies in financial difficulties to resign. Generally, remaining on the board allows

directors to discharge their duties rather than being seen to walk away from problems.

2. Maintain records and keep paying wages

Directors shall meet the following requirements:

- Take all reasonable steps to ensure the company keeps proper accounting records,
- Pay MPF contributions, and
- Pay wages to employees

There are various situations following which company directors will be held liable for offences on behalf of the company. Directors may commit offences (thereby risking fines and imprisonment) when failing to keep accounting records or pay MPF contributions and wages.

3. Personal guarantees risk liability

Directors of closely held smaller companies often give personal guarantees in respect of banking facilities. When making decisions on whether the going concern basis of accounting is appropriate, directors should consult the Hong Kong Institute of Certified Public Accountants (HKICPA) guidance.ⁱ

When a limited company with an unknown creditworthiness enters into a business transaction, the seller may require the shareholders or directors of the buyer to sign some form of guarantee of payment due to the buyer's limited liability.

Signing this guarantee holds shareholders or directors (the guarantors) personally liable for the debt or compensation if the company fails to pay.

If directors sign a personal guarantee, they may only avoid liability if they can prove that they were misled or forced to sign the document, which is not easy to establish.

Before directors sign any document of guarantee, they must scrutinize all the terms and conditions, and, if possible, seek legal advice.

Whilst every effort has been made to ensure the accuracy of this article it is general in nature and does not constitute legal advice of any kind. You should seek your own personal legal advice before taking legal action. We accept no liability whatsoever for loss arising out of the use or misuse of this article.

RAVENS CROFT & SCHMIERER

Solicitors Notary Rechtsanwälte

Ravenscroft & Schmierer

22/F, Bupa Centre, 141 Connaught Road West, Hong Kong

Tel: +852 2388 3899
Fax: +852 2385 2696
Email: teams@rs-lawyers.com.hk

ⁱ <https://www.hkicpa.org.hk/en/About-us/Advocacy-and-representation/Best-practice-guidance/Insolvency-Guidance-Note>