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Wednesday, 29 July 2009

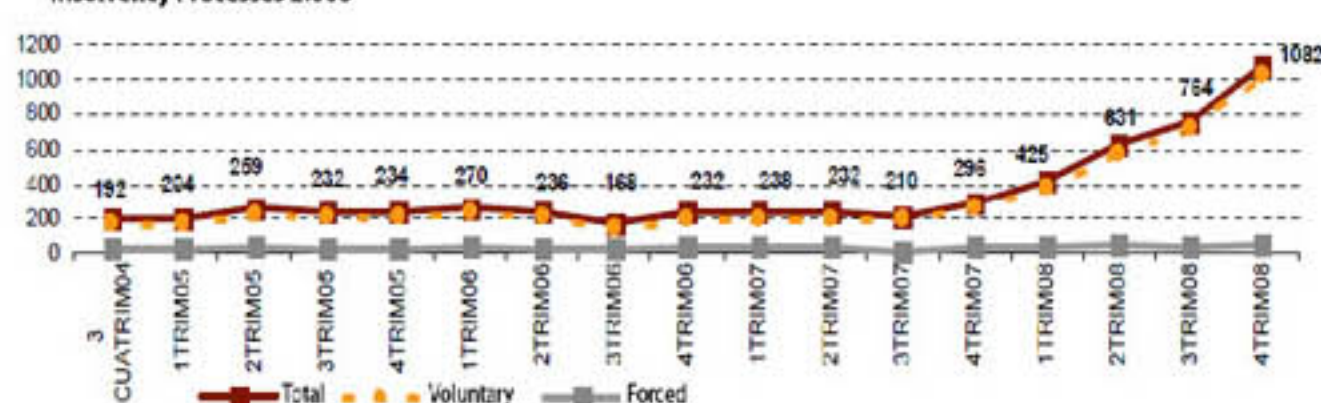
What is my liability as a Company Director?

Limited Liability companies in Spain



In Spain all stock companies are considered to be limited liability companies with S.L. and S.A. companies being the most frequent stock companies. This means that, in principle, the company's potential liability is limited to its own assets and this is irrespective of, and distinct from, its shareholders' and directors' assets. This limited liability is the primary reason for a businessman to operate under these kind of companies: to limit the risk of potential failure of the business and protect his personal wealth, his dwelling, his car and all the assets accumulated with a whole life of hard work, to preserve his life and the life of his loved ones at the end of it. Nevertheless, regarding the liability of the directors' assets in relation to the company's debt, there are various exceptions arising from insolvency situations that are frequently overlooked and which could lead not only to the financial ruin of the company, but to the financial and personal ruin of the director and his family.

This article has the intention to create awareness of this liability system amongst the directors trying to promote preventive advice which easily avoids situations of personal liability in regards to the company's debts. This awareness shall lead directors to perform all their obligations more carefully than at the present moment and shall avoid personal liability of the companies' debts before it is too late.

Insolvency Processes 2.008

Liability of the Directors

The Corporate and Criminal regulations along with the Insolvency Act, 22/2003, regulates the widest and most severe liability system ever for directors in Spanish legal history, and sets forth very serious sanctions. Insolvency situations have increased dramatically in the last year and the number of sanctions and director's liability is increasing enormously day by day.

The situations of personal liability of the directors are more common than they should be basically because of lack of insolvency practitioners specialized in this matter and the lack of diligence of the directors at the time of getting appropriate advice. Directors need to speak to a corporate lawyer or an insolvency practitioner when the company cannot generate enough revenue on its own to pay all its creditors. The directors or the partners should not have the obligation to pay the company's debt from their own pockets as long as they fulfill all their legal obligations.

Amongst the different obligations that will generate a personal liability if breached, is the obligation to apply for voluntary administration before the Mercantile Courts (concurso voluntario) within two months of the awareness of the insolvency in the company. Failure to do so shall give way to the obligation of the Director on a personal basis to pay the balance of unsatisfied debts after the liquidation.

There are also other kinds of personal liabilities for Directors of companies with debts in a situation of insolvency, such as infra capitalization (articles 104 LSRL and 260 LSA) and operations of the Directors against Spanish Law or against the By Laws of the company damaging a third party (articles 133 LSA). Along with these personal liabilities there are other common criminal liabilities related to certain situations of company insolvency (article 257 and following of Spanish Penal Code).

Directors will not be released from such liability by simply dismissing and appointing a new director, as directors of the last two years may also be liable. Even "shadow directors" or "de facto" directors will be found liable along with the formal director registered in the Mercantile Registry.

In order to avoid these liabilities it is essential to obtain specialized professional advice in order to comply with all directors legal obligations and ensure, first, a complete discharge of liabilities of the Directors of the business and therefore protect their private wealth from the company's debts and, second, also ensure that all the advantages of the Insolvency Law have been effectively used and as much as possible has been done to facilitate the survival of the business.

It is a fact that directors put themselves into the above described situations very often without being aware of it. If you are the director of a company under an actual or imminent insolvency situation, this article intends to let you know that you urgently need advice on how to best discharge your liabilities with immediate effect. If you are a creditor of a company which may be in an insolvency situation, you have an urgent need to look for professional advice on how to best claim these personal liabilities to the directors and obtain full satisfaction of your credit, interests and damages arising from the breach of the obligation to pay.

If you wish to know more about this issue, please contact Dimas Cuesta. Lawyer - Partner of Lexland Abogados. Tel. 952 77 88 99. dcuesta@lexland.es or visit www.foroconcursoacreedores.com

Dimas has vast experience on commercial law and insolvency proceedings and advises UK owned groups of companies in relation to multijurisdictional commercial and insolvency issues. He is included on the list of Judicial Insolvency Practitioners of the Spanish Bar and is part of the Creditors' Rights and Insolvency Proceedings Section of the International Bar Association.

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