Shielding Directors

Navigating Personal Liability in Times of Financial Turmoil and Insolvency

A Practical Guide for Foreign Directors of Polish Companies

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About This Guide

This guide is written for one reader in particular: the foreign executive who has accepted, or is about to accept, a seat on the management board of a Polish company, and whose legal instincts were formed somewhere else — in Delaware, in London, in Frankfurt, or in any jurisdiction where "limited liability" means roughly what it says.

In Poland, it does not. Or rather: it means what it says for shareholders, and considerably less for the people who manage the company on their behalf. Polish law contains a mechanism — unusual in Europe and nearly unthinkable in the United States — by which the unpaid debts of a limited liability company migrate, more or less automatically, onto the personal assets of its management board members. The mechanism does not ask whether you managed well or badly. It asks one question only: when the company became insolvent, did you file for bankruptcy within thirty days?

Most foreign directors learn this after the fact, in the least pleasant way available. This guide exists so that you can learn it beforehand.

Three notes on method. First, every statutory provision and every judgment cited here has been verified against primary sources and leading Polish commentaries (including the commentaries to Article 299 of the Commercial Companies Code, Article 116 of the Tax Ordinance, and Article 11 of the Bankruptcy Law). Where the law is settled, we say so; where courts and scholars disagree, we say that too; and where a development is recent enough that its final shape remains uncertain — notably the EU's insolvency harmonisation agenda — we flag the uncertainty explicitly rather than paper over it. Second, this is a map, not legal advice: your situation will have features no general text can anticipate. Third, the comparative passages (United Kingdom, United States, Germany, France, Australia) are there for a reason. The fastest way to understand a foreign legal system is to see precisely where it diverges from your own — and Polish director liability diverges at almost every point that matters.

Ten Things to Know Before Reading Further

For the reader boarding a flight, here is the entire book in ten sentences.

1. In a Polish limited liability company (sp. z o.o.), if enforcement against the company fails, its management board members are jointly and severally liable for the company's debts with their entire personal assets — by operation of law, without any finding of mismanagement (Article 299 of the Commercial Companies Code).
2. The same architecture applies to tax arrears and social security contributions, and there it covers joint-stock companies as well (Article 116

of the Tax Ordinance); Polish tax authorities treat pursuing board members not as an option but as an obligation.

3. The escape routes exist but are narrow: a timely bankruptcy petition, a timely opened restructuring, proof of no fault, or proof that the creditor suffered no damage — and the burden of proving each rests on you.
4. "Timely" means within thirty days of the company becoming insolvent, and insolvency is defined by statutory tests (loss of liquidity; balance-sheet over-indebtedness persisting twenty-four months) whose precise trigger date is often knowable only in hindsight.
5. Polish courts have held, expressly, that not speaking Polish does not excuse you; nor does an internal division of duties, nor being a figurehead, nor serving without pay, nor most illnesses.
6. Liability extends beyond the principal debt to interest, court costs, and enforcement costs, and survives the company's liquidation; for tax purposes it can even survive your resignation, if the arrears relate to your period in office.
7. Filing for bankruptcy too late also exposes you to criminal liability (Article 586 of the Commercial Companies Code) and, in aggravated scenarios, to the creditor-harm offences of Articles 300–302 of the Criminal Code.
8. No business judgment rule will save you here: Poland codified one in 2022, but it shields directors against claims by the company, not against the statutory transfer of company debts to directors.
9. Internationally, Poland is an outlier — stricter than the UK's fault-based wrongful trading, Germany's conduct-specific regime, France's causation-based liability, Australia's safe-harbour model, and radically stricter than Delaware — although EU harmonisation is slowly drifting in Poland's direction.
10. The shield that works is procedural, not heroic: rigorous financial monitoring, documented decision-making, properly structured D&O insurance with strong Side A coverage, early use of restructuring proceedings, and a clean, well-documented exit when the time comes.

If those ten points are already second nature to you, you may not need this book. If any of them surprised you, read on.

Part I — The Map

Chapter 1. Lost in Translation: Boards, Directors, and the Polish "Dyrektor"

Before discussing liability, we must agree on who, exactly, is liable. This is not pedantry. The single most common misunderstanding among foreign executives in Poland is terminological, and it has financial consequences.

One tier, two tiers

Corporate governance worldwide runs on two architectures.

The **one-tier (monistic) model**, dominant in common law jurisdictions, gathers executive directors, non-executive directors, and the supervisory function into a single body: the Board of Directors. The Delaware General Corporation Law is the classic expression — the board manages, or directs the management of, the business and affairs of the corporation, typically delegating supervision to committees (audit, risk, compensation) staffed largely by non-executives.

The **two-tier (dualistic) model**, dominant in continental Europe and adopted by Poland, splits the same functions into two separate organs. The **management board** (zarząd) runs the company and represents it externally; the **supervisory board** (rada nadzorcza) oversees the management board but does not manage. A member of the supervisory board does not conduct the company's affairs — and, crucially for this book, does not bear the management board's statutory liability for the company's debts.

The translation key, then, is this: an "executive director" in the one-tier world corresponds to a **member of the management board** in Poland; a "non-executive director" corresponds to a **member of the supervisory board**. Throughout this guide, "director" means a member of the management board — the person in the line of fire.

(For completeness: since 2021 Polish law also offers the simple joint-stock company, prosta spółka akcyjna, which may choose a one-tier board of directors. The liability mechanics described in this book extend to that vehicle as well, so the choice of architecture offers no escape hatch.)

The false friend: "dyrektor"

Now the trap. The Polish word *dyrektor* sounds like "director" and means something else entirely. In Polish corporate practice, a *dyrektor* is an internal officer — a *dyrektor finansowy* is a CFO, a *dyrektor zarządzający* is a managing director in the operational sense. These people may run substantial parts of the business, but unless they hold a power of attorney or a commercial proxy (prokura), they cannot represent the company externally, and — the point that matters here — they are *not* subject to the statutory transfer of the company's

debts. An officer answers for their own wrongful acts under general civil law; they do not answer for the company's unpaid invoices.

The asymmetry is worth stating bluntly, because foreign executives routinely get it backwards. In the United States, a senior officer's title signals exposure; in Poland, the dangerous word is not *dyrektor* but *członek zarządu* — member of the management board. A consultant who lets the company register them as a board member "just as a formality" has assumed the full liability described in the chapters that follow. A powerful country manager who runs everything but sits on no board has, for the purposes of Article 299, assumed almost none of it.

Anglo-American term	Polish equivalent	Subject to automatic debt transfer?
Executive director / board member	Członek zarządu (management board member)	**Yes** — Art. 299 CCC, Art. 116 Tax Ordinance
Non-executive director	Członek rady nadzorczej (supervisory board member)	No — only general fault-based civil liability
Officer (CEO, CFO, COO as employees)	Dyrektor (e.g. dyrektor finansowy)	No — only liability for own wrongful acts
Liquidator	Likwidator	**Yes** — Art. 299¹ CCC (since 1 January 2016)

One refinement to the table: since 2016, liquidators of a limited liability company answer on the same terms as management board members (Article 299¹ CCC). Accepting a "winding-down mandate" in a distressed Polish company is therefore not the low-risk housekeeping role it may appear to be.

Chapter 2. The Polish Exception: Why Limited Liability Is More Limited Than You Think

A construct with no European siblings

Article 299 of the Commercial Companies Code (Kodeks spółek handlowych, "CCC") — the centrepiece of this book — is, as the leading Polish commentary observes, an original creation of Polish legislation, unknown to other European legal systems. It is exceptional even within Poland: no analogous liability for private-law debts exists for the management of joint-stock companies, cooperatives, or foundations. Only in the realm of public levies does Article 116 of the Tax Ordinance replicate the construction, there extending it to joint-stock companies and other legal persons.

The provision is old. Its ancestor, Article 298 of the 1934 Commercial Code, was drafted by the interwar Codification Commission, which justified it on grounds that read as freshly today as they did in 1931: experience had shown that limited liability companies were too often "liquidated in fact" without any regard for the rules protecting creditors. Remarkably, the same Commission also anticipated the provision's central pathology. It declined to make the liability absolute,

warning that an unconditional guarantee by managers "would lead, in many cases, to the appointment as managers of persons offering no material guarantee whatsoever, acting as figureheads behind whom the shareholders — the real managers of the company — would hide." Ninety years later, Polish courts are still litigating figurehead cases, and still resolving them against the figurehead (see Chapter 6). The drafters saw the problem coming; they simply decided creditors mattered more.

What this does to "limited liability"

The orthodox account of the capital company holds that the corporate veil shields both shareholders and managers from the company's failures, pierced only in exceptional circumstances. In Poland, for management board members, the orthodoxy is close to inverted. One can defensibly say — and we do say — that personal liability of board members for the debts of a failed company is the *rule* from which a director escapes only by proving one of a short list of statutory defences. Functionally, the position of a Polish management board member at the moment of corporate distress resembles that of a general partner in a partnership more than that of an officer of a Delaware corporation.

A perception formed in distant legal environments — that directors rarely face personal financial consequences in practice — simply does not survive contact with Polish reality. Three features of the local landscape explain why.

First, creditor culture. Poland is not, in general, a litigious country. But pursuing the board members of a defaulting company is not regarded here as an aggressive escalation; it is a standard phase of routine debt recovery, undertaken by collection departments and their lawyers as a matter of due care, often without much prior analysis of litigation cost or the time value of money. The claim against the director is, so to speak, on the checklist.

Second, the tax authority has no choice. For tax arrears, the Supreme Administrative Court has held that Article 116 of the Tax Ordinance *obliges* the tax authority to conduct liability proceedings against *all* persons who may bear responsibility — in practice, all board members (resolution of the Supreme Administrative Court of 9 March 2009, I FPS 4/08). Calling this a "routine course of action" would be a euphemism; it is a legal necessity on the authority's part. Where a creditor might weigh commercial relationships before suing, the tax office weighs nothing. It proceeds.

Third, the policy choice is explicit. Some legal systems, facing the psychology of managers grappling with insolvency, choose to encourage bold rescue attempts — the American instinct, lately also the Australian one. Polish law makes the opposite choice without embarrassment: when the company can no longer pay, the directors' personal assets are conscripted to repay its creditors, and the protection of creditors is openly prioritised over the financial freedom of management. Whether this is wise legislative policy is debated in the literature

(we return to the question, lex ferenda, in Chapter 10). That it is the law, lex lata, is not debated at all.

One genuine consolation, and one half-consolation

Foreign directors accustomed to U.S. practice can strike one item from their worry list: securities class actions, the primary legal risk for the board of a distressed American public company, are essentially absent from the Polish landscape. Group proceedings exist on paper but are rare, procedurally cumbersome, and have no tradition in director-liability matters. The Polish risk is not a jury and a headline; it is a quiet administrative decision or a modest commercial lawsuit that ends with a bailiff and your personal bank account.

The half-consolation: Polish litigation costs are moderate. A director sued under Article 299 will rarely face the "can't afford to win" scenario familiar from high-cost jurisdictions, where a defendant capitulates simply because continuing the defence is financially impossible. The defence is affordable. Whether it succeeds is, as we shall see, another matter.

Part II — The Machinery

Chapter 3. The Statutory Architecture: Who Answers for What

Polish director liability is not one rule but a system of interlocking provisions. The foreign director should hold the full map in mind, because the provisions differ in scope, in claimant, and — critically — in which corporate form they cover.

Article 299 CCC — civil liability for commercial debts. If enforcement against a limited liability company proves ineffective, management board members are jointly and severally liable for its obligations. This is the workhorse provision, examined in depth in Chapter 4. It applies to the sp. z o.o. (and, through Article 299¹, to its liquidators; a parallel construction covers the simple joint-stock company). It does *not* apply to the classic joint-stock company (S.A.) — a structural quirk with planning implications noted below.

[Article 21(3) and (3a) of the Bankruptcy Law — damages for late filing.]() Anyone obliged to file a bankruptcy petition who fails to do so within the statutory deadline is liable for the damage caused thereby; since 2016 the law presumes the damage equals the creditor's unsatisfied claim. This provision covers representatives of *all* legal persons — including joint-stock companies — and is the principal route by which S.A. board members face creditor claims. It is fault-based (the director may prove absence of fault), which makes it gentler than Article 299 in theory, though the statutory presumption of damage does much of the claimant's work in practice.

Article 116 of the Tax Ordinance — tax arrears. Board members of limited liability companies, joint-stock companies, and simple joint-stock companies (in each case including companies "in organisation") answer with their entire assets for the company's tax arrears where enforcement against the company is wholly or partly ineffective, unless they establish one of the statutory defences. By Articles 31 and 32 of the Social Insurance System Act, the same regime governs **unpaid social security (ZUS) contributions** — in a payroll-heavy business, often the largest single exposure. Chapter 5 is devoted to this provision.

Articles 291–293 CCC — liability towards the company. The familiar, internationally recognisable duty-of-care liability of directors to their own company for damage caused by unlawful acts or omissions. Important, but not this book's subject: it requires fault, it is owed to the company, and since October 2022 it is softened by a codified business judgment rule (Chapter 11). The danger to the foreign director comes from the *other* provisions, which no business judgment protects.

Criminal provisions. Article 586 CCC criminalises the failure to file a timely bankruptcy petition; Articles 300–302 of the Criminal Code criminalise asset-stripping, enforcement frustration, and preferential payments in the vicinity of

insolvency; Articles 296 and 296a of the Criminal Code address abuse of trust in business dealings. Chapter 8 maps these.

Exposure	Legal basis	Company forms covered	Fault required?
Commercial debts of the company	Art. 299 CCC	Sp. z o.o. (and PSA analogue); liquidators via Art. 299¹	No — defences only
Damages for late bankruptcy filing	Art. 21(3), (3a) Bankruptcy Law	All legal persons, incl. S.A.	Yes, but damage presumed
Tax arrears	Art. 116 Tax Ordinance	Sp. z o.o., S.A., PSA (incl. in organisation)	No — defences only
Social security contributions	Art. 31–32 Social Insurance System Act → Art. 116	As above	No — defences only
Damage to the company	Art. 293 / 483 CCC	All capital companies	Yes; BJR available since 2022
Criminal: late filing	Art. 586 CCC	All capital companies	Yes (intent/negligence per criminal law)
Criminal: harming creditors	Art. 300–302 Criminal Code	Any debtor / person managing debtor's affairs	Yes

Two planning observations follow directly from the table. First, the absence of an Article 299 analogue for the S.A. means that, at the margin, the joint-stock form is structurally kinder to its board where *commercial* debts are concerned — though the difference evaporates for taxes and ZUS, where Article 116 covers both forms with equal severity. Second, the criminal and civil tracks are independent: a director can be acquitted of the Article 586 offence and still lose everything under Article 299, or vice versa. Polish law does not offer package deals.

Chapter 4. Article 299 CCC: The Transfer Mechanism Dissected

The rule and its anatomy

Article 299 § 1 CCC provides: if enforcement against the company proves ineffective, the members of the management board are jointly and severally liable for its obligations. Two conditions, and only two, found the claim: (i) an unsatisfied obligation of the company, and (ii) the ineffectiveness of enforcement against the company's assets. The creditor need not prove the director's fault, the director's enrichment, mismanagement, causation, or anything else. As the commentary literature puts it with admirable economy: what decides is the bare fact that the creditor was not satisfied.

The liability covers **pecuniary obligations** of whatever origin — contract, tort, unjust enrichment — and it covers them *whole*: the principal, contractual or

statutory **interest** accrued against the company (capitalised in the claim against the director), and the **costs of the proceedings and enforcement** awarded against the company (Supreme Court resolution of 7 December 2006, III CZP 118/06). A creditor who spent three years and considerable costs obtaining and enforcing a judgment against the company presents the director with the entire bill.

What the liability is — a doctrinal dispute with practical teeth

Polish doctrine has argued for decades over the legal nature of this liability, and the dispute is not academic ornament; it determines the limitation period, among other things.

The **dominant view in the case law**, anchored by the seven-judge resolution of the Supreme Court of 7 November 2008 (III CZP 72/08), treats Article 299 as a special *compensatory (delictual)* liability: the director answers for the "damage" consisting in the deterioration of the creditor's prospects of satisfaction caused by the late filing. On this view, the limitation period is that of tort claims (Article 442^1 of the Civil Code): three years from when the creditor learned of the ineffective enforcement and of the person liable.

A **strong doctrinal current** — represented, among others, by the commentary against which this text was verified — rejects the delictual label and characterises Article 299 as a statutory **quasi-guarantee for another's debt**: the director answers for the company's obligation, not for his own wrongful act, and the defences of § 2 do not convert the guarantee into tort liability. For the practitioner the labels matter less than the convergent bottom line: under either theory, fault and damage are *not* conditions the creditor must prove; at most they surface as defences the director must establish.

Whatever the label, the foreign director should hear the comparative register clearly. By U.S. standards, this is a severe guarantee-type liability with little room to discuss the personal culpability of the director's conduct. The suggestion that American law might tolerate directors bearing quasi-guarantee responsibility for their company's trade debts would not merely be rejected; it would be regarded as alarming, and any deliberation on the subject dismissed as preposterous. In Poland it is Tuesday.

One genuinely sobering footnote on limitation. The Supreme Court has accepted (judgment of 8 March 2012, III CSK 238/11) that where the failure to file qualifies as a criminal offence — Article 586 CCC or Article 301 § 3 of the Criminal Code — the civil court may make that assessment itself, even absent any criminal conviction, with the consequence that the **twenty-year** limitation period for claims arising from crimes (Article 442^1 § 2 of the Civil Code) applies. Commentators have noted the paradox this produces: since a director who cannot prove timely filing or absence of fault will usually also satisfy the elements of the Article 586 offence, the claim against the *subsidiary* debtor may outlive, several

times over, the claim against the company itself. A director who left a failed Polish company in 2010 is not necessarily safe in 2028.

"Entrapment": why the defence begins ten metres behind the starting line

Even a prospective director who has absorbed everything above will often retain one comforting assumption: surely, before my personal assets are touched, a court will comprehensively examine whether the claim against the company was valid in the first place. That assumption lacks any basis in reality, and disabusing the reader of it is perhaps this book's most important single service. We call the mechanism **director entrapment**: a structure of presumptions and preclusions that leaves the director defending a position largely decided before they arrive.

Presumption upon presumption. The case law holds that Article 299 implies a legal presumption of the creditor's damage in the amount of the company's unenforced debt, a presumption of the causal link between that damage and the failure to file on time, and a presumption of the culpability of that failure (see, recently, the decision of the Supreme Court, Civil Chamber, of 22 February 2024, I CSK 6076/22). The creditor proves the debt and the failed enforcement; everything else is presumed against the director, who must rebut it.

The debt itself is largely off the table. Where the company's obligation is confirmed by a final court judgment, the prevailing case law bars the director from re-litigating it: the existence of the company's obligation is a prerequisite established by the enforcement title, not an issue to be tried anew (see the decision of the Supreme Court of 10 November 2022, I CSK 1854/22, and the line of authority it continues). The director thus answers for a debt adjudicated in proceedings to which they were not a party — a result the doctrinal literature criticises with some force, pointing out that the binding effect of judgments (res judicata) operates between the *parties*, and the director was not one. The criticism is well taken as a matter of lex ferenda; as a matter of courtroom reality, expect the judgment against the company to stand. The practical breathing space lies elsewhere: where the enforcement title is *not* a court judgment — a notarial deed of submission to enforcement, for instance — the director retains genuine room to dispute the underlying debt, and the better doctrinal view (and some authority) also allows the director to invoke events extinguishing the debt after the title arose, such as set-off (Supreme Court resolution of 17 February 2011, III CZP 129/10).

Ineffective enforcement is generously construed. The classic proof is a bailiff's decision discontinuing enforcement for want of assets, but it is not required. The tax case law — equally relevant in spirit to the civil track — holds that ineffectiveness may be established by any actions of the enforcement authority which, even without a formal discontinuation decision, leave no doubt that the claim cannot be satisfied from any part of the company's assets (judgment of the Supreme Administrative Court of 5 April 2022, III FSK 4880/21).

Note, in the other direction, a nuance creditors sometimes miss and directors should remember: the mere declaration of the company's bankruptcy does not, by itself, prove enforcement would be ineffective — the bankruptcy estate may yet satisfy creditors in part, and a creditor suing mid-procedure bears a complex burden of showing what will certainly not be recovered.

Subsidiary, but only just. The liability is subsidiary in the sense that the creditor must first exhaust the route against the company. But subsidiarity here is a sequencing rule, not a substantive filter: once the sequence is complete, nothing of substance remains to be shown. And one mitigating doctrine deserves note: a creditor who slept on the claim — who delayed enforcement against the company while assets were still available — may find the delay held against them, but only if the *director* proves that timely enforcement would have brought satisfaction (Supreme Court judgment of 16 November 2011, V CSK 515/10). Even the creditor's negligence becomes the director's burden to demonstrate.

Who exactly is caught, and when

The temporal and personal scope of Article 299 follows rules a foreign director should internalise precisely, because several of them are counterintuitive.

Formal appointment governs — registration does not. Liability attaches to persons validly *appointed* to the management board, for the period of their actual mandate. The commercial register is declaratory: a director answers from appointment even if never registered, and a former director does *not* answer for obligations arising after their mandate expired merely because the register still shows their name (the register-based contrary view in older case law is now firmly rejected). The mirror image: a person who never accepted appointment, or was entered in the register without basis, is outside Article 299 — though note that the *tax* track reaches further toward de facto managers (Chapter 6).

The two-condition overlap. A given director answers for a given debt if, broadly, they held office at a time when the obligation existed *and* during the period when the bankruptcy petition should have been filed. A director whose mandate ended before the company became insolvent is outside the provision for that reason alone. Conversely — and this surprises newcomers — a director **appointed after** the grounds for bankruptcy already existed is fully caught: their thirty-day clock runs from taking office, and they answer not only for new debts but also for pre-existing ones if they, too, fail to file (see, in the tax context, the judgment of the Supreme Administrative Court of 3 July 2008, II FSK 633/07: each successive board member answers for the further deterioration of creditors' position caused by their own failure to file). Accepting a "rescue mandate" in a distressed Polish company therefore means inheriting the filing obligation on day one — a point of acute relevance to turnaround professionals.

Procedure favours no one, but know the basics. The claim is brought before the court of the *director's* domicile (general venue), the limitation period under

the dominant view is three years from the creditor's knowledge of the failed enforcement, and joint and several liability means the creditor may select one solvent director and leave them to seek recourse from colleagues — recourse governed by the board's internal arrangements, which (as Chapter 6 explains) bind the directors among themselves and no one else.

Chapter 5. Taxes and Social Security: Article 116 of the Tax Ordinance

If Article 299 is severe, Article 116 of the Tax Ordinance is severe and tireless. Several features distinguish the tax track, all of them unfavourable.

Broader corporate coverage. Article 116 reaches management boards of limited liability companies, joint-stock companies and, since 1 July 2021, simple joint-stock companies — in each case including companies "in organisation" (where, absent a management board, the company's attorney-in-fact or even the shareholders answer). The S.A. director who took comfort from the absence of an Article 299 analogue finds no comfort here.

An obligated claimant. As noted in Chapter 2, the authority must pursue all potentially liable board members; the liability decision is issued against all, and only at the enforcement stage does the authority choose whose assets to reach first (resolution of the Supreme Administrative Court of 9 March 2009, I FPS 4/08). There is no negotiation partner with discretion to exercise.

Temporal scope keyed to payment deadlines. Since 2009, board members answer for arrears in respect of obligations *whose payment deadline fell* during their period in office (Article 116 § 2). The distinction matters: a tax obligation may arise in year one and fall due in year two; the year-two board carries it. Equally, decisions assessing tax for past periods are *declaratory* — the obligation arose by operation of law during the period to which it relates — so a decision delivered to the company long after a director's resignation can still found that director's liability, provided the relevant payment deadlines fell within their tenure (judgment of the Supreme Administrative Court of 25 January 2024, III FSK 3433/21). Chapter 6 returns to the unsettling corollary: the resigned director may bear the consequences of an assessment they had no power to contest, because the decision whether to appeal belonged to a board they no longer sat on.

Whole-estate, benefit-blind liability. Liability covers the director's entire assets, jointly and severally with the company and co-directors, with no cap by reference to remuneration received — indeed, serving without any remuneration changes nothing, because the legislature deliberately attached liability to the *function*, not to any economic benefit derived from it. The purpose, openly stated in the commentary literature, is to compel performance of the bankruptcy-filing duty; which is why a board that filed on time is excused even though the tax creditor went unpaid.

Ineffective enforcement, formally established but flexibly proven. The authority must first direct enforcement at the company's entire estate and exhaust the available methods; only then may a liability decision issue. But following the seven-judge resolution of 8 December 2008 (II FPS 6/08), ineffectiveness may be established by any legally admissible evidence — a formal discontinuation decision is sufficient, not necessary (and see again III FSK 4880/21). The authorities are, moreover, entitled to assess for themselves when the grounds for bankruptcy arose; they need no expert opinion to do so (judgment of the Provincial Administrative Court in Białystok of 5 October 2020, I SA/Bk 410/20).

The defences, tax edition. The director escapes by demonstrating (1)(a) a timely bankruptcy petition or timely opened restructuring; or (1)(b) absence of fault in the failure to file; or (2) by *identifying company assets* from which enforcement will satisfy the arrears **in significant part**. The third defence is unique to the tax track and narrower than it sounds. The assets must be concrete, actually existing, demonstrably the company's property, and of enforceable value that is "significant" relative to the arrears (judgments of the Supreme Administrative Court of 11 December 2019, II FSK 2089/19, and 13 May 2020, II FSK 3003/19). The commentary literature adds that the statute's "significant part" resists quantification — a few percent is certainly too little, more than half certainly suffices, and the space between is judicial terrain. Pointing vaguely at receivables or at machinery of contested ownership achieves nothing.

Burden of proof — with one structural mitigation. Formally, the director must prove the defences. The literature rightly insists, however, that the authority remains bound by the principle of objective truth (Articles 122 and 187 § 1 of the Tax Ordinance) and must gather evidence on its own initiative — a duty of real importance where the director, long departed or locked out by a bankruptcy trustee, has no access to the company's books. A director defending an Article 116 case should invoke this duty early and in writing: the authority that ignores a director's evidentiary motions builds the grounds for annulment on appeal.

One quiet anomaly worth knowing. Polish bankruptcy law does not permit a bankruptcy petition where the company has only a single creditor. The case law has drawn the honest conclusion: a board member who *could not lawfully file* cannot be faulted for not filing, and bears no Article 116 liability on that account (judgment of the Provincial Administrative Court in Wrocław of 17 March 2020, I SA/Wr 768/19). It is a small island of logic the well-advised director should know exists — and should not overestimate, since a second creditor (the tax office itself, for instance) usually materialises quickly.

Chapter 6. The Case-Law Gallery: What Will Not Save You (and What Might)

Statutes state rules; judgments reveal temperament. The decisions collected here — each verified against its source — show how Polish courts actually treat the excuses directors actually offer. Foreign directors should read this chapter twice, because several entries speak to them by name.

Lost in translation: ignorance of Polish does not excuse

The Supreme Court, in a judgment that every foreign director of a Polish company should frame and hang above their desk (judgment of 8 September 2021, II CSKP 2/21), held that weak or even absent knowledge of Polish does not release a board member from liability. A person who consents to manage a company governed by Polish law, the Court reasoned, must — assessing the matter reasonably and rationally — be aware that they are obliged to comply with Polish rules regardless of their linguistic equipment; the lack of the language indicates at most their own imprudence, or an expectation of support from translators and staff, and is in any case a subjective circumstance that could only ever justify *declining the appointment*. The Court's logic is hard to fault and impossible to evade: the time to invoke your ignorance of Polish is before signing the consent to appointment, not after the bailiff's visit.

Divided duties, united liability

Boards routinely divide responsibilities: one member takes sales, another finance. Such arrangements are lawful and organisationally sensible — and entirely ineffective against creditors. Agreements made *pro foro interno*, among board members, cannot exempt any of them from liability towards third parties or from statutory duties such as the filing obligation (again II CSKP 2/21; in the same restrictive spirit, Supreme Court judgments of 9 December 2010, III CSK 46/10, and 15 May 2014, II CSK 446/13). The internal division survives only as a basis for *recourse claims between* the directors afterwards — cold comfort, since recourse against a colleague presupposes a colleague with assets. The tax case law adds the finishing touch: even a formal division of competences within the board does not excuse a member from knowing the company's basic financial condition (judgment of the Supreme Administrative Court of 17 December 2021, III FSK 208/21). The CFO's portfolio is, for liability purposes, everyone's portfolio.

Illness: a defence with a high fever threshold

Health may exonerate, but only health of a particular gravity: the condition must objectively *prevent* the member from conducting the company's affairs — a significant deterioration, for example in the course of a serious illness, assessed objectively rather than by the director's own sense of incapacity (II CSKP 2/21; in the tax line, compare the Supreme Administrative Court's judgment of 28 March 2018, II FSK 817/16, accepting long-term illness as potentially excluding fault —

with contrary strands in the case law showing the question is decided case by case). A demanding travel schedule, burnout, or "I was mostly abroad" do not approach the threshold; documented incapacitating illness might.

The figurehead pays full price

The harshest line of authority, and the most instructive. A person who — without compulsion, threat, or deceit — consents to join a board knowing they will play a purely decorative role, and then acquiesces in that state of affairs, bears *full* responsibility for the company's activities and for the consequences of ventures conducted by those who actually managed it (judgment of the Court of Appeal in Kraków of 24 November 2021, I AGa 139/20). Consciously ceding actual management to someone outside the board exempts no one from the duties of the office, of which the first is monitoring the company's solvency so that the petition can be filed on time. The 1931 drafters' prophecy (Chapter 2) is thus enforced against the prophets' subjects: the figurehead strategy does not transfer risk to the puppeteer; it concentrates risk on the puppet. Foreign professionals are recruited for precisely such roles with some regularity — "we need an EU-resident board member, purely formal, you won't have to do anything." Everything in this book is the answer to that proposal.

Resignation as performance art: the half-exit

The tax cases on resignation form a diptych. Panel one: a director who formally resigns but in fact continues to run the company remains liable as if still in office — the assessment looks to the actual exercise of management functions, precisely to defeat frontman arrangements (judgment of the Supreme Administrative Court of 2 February 2024, III FSK 4114/21; the doctrine of de facto management familiar to common lawyers as the shadow/de facto director, to the French as dirigeant de fait). Panel two, the asymmetry: the converse case — formally appointed but factually passive — does *not* benefit from the same realism, as the figurehead line just discussed shows. The system, in other words, applies substance-over-form only in the direction that expands liability. One may find this intellectually untidy; one should nonetheless plan around it. An exit must be both formal *and* factual: resignation effective on delivery to the company (its validity does not depend on registration), followed by genuine, documented cessation of any managerial conduct — no signing, no instructing, no "helping out with the bank."

The post-resignation tax decision: liability without a steering wheel

Chapter 5 introduced the declaratory-decision doctrine (III FSK 3433/21): tax decisions ascertain obligations that arose by operation of law during the periods they cover. Its sharpest edge: a decision may be delivered to the company *after* a director's departure, concerning periods *before* it, and the company's current management — not the departed director — decides whether to appeal. If they do

not, or do so badly, the decision becomes final and the departed director answers for it. This is entrapment in its purest form: liability for the outcome of a procedural contest one was not allowed to enter. The practical mitigations are imperfect but real, and belong in every exit protocol (Chapter 12): secure contractual information and cooperation rights on departure, preserve copies of the tax-relevant documentation for your period, and remember that in the eventual Article 116 proceeding *against you* the declaratory decision establishes the arrears, but your defences (timely filing; no fault) remain fully arguable.

Liquidation of the company changes nothing

Dissolving the company does not dissolve the director's exposure. In the civil track, claims may proceed against the director even though the company no longer exists (in such cases without first obtaining an enforcement title against the vanished company); in the tax track, the matter is regulated expressly — liability may be imposed on those who held office at liquidation, the amounts being determined within the liability proceeding itself (Article 116 § 2a of the Tax Ordinance; judgment of the Supreme Administrative Court of 25 January 2024, III FSK 3663/21, warning that a contrary rule would invite the abuse of liquidation as a liability-laundering device). The intuition that "the company is gone, the file is closed" is precisely backwards: the company's disappearance removes the only debtor standing between the creditor and you.

Foreign companies with Polish branches: no jurisdictional moat

A foreign company operating in Poland through a branch does not place its management beyond the mechanism. Where insolvency proceedings concerning the Polish branch fall within Polish jurisdiction under the EU Insolvency Regulation framework, the grounds for bankruptcy may be assessed under Polish law, and liability transferred to the foreign company's management on Polish terms (judgment of the Supreme Administrative Court of 19 January 2024, III FSK 580/23, concerning a Maltese company's Polish branch). Directors of foreign parent or operating companies with substantial Polish branch activity should treat this book as addressed to them too.

What might actually work: an honest inventory

Lest the gallery induce despair, the defences that genuinely succeed:

- **A timely, formally correct petition** — by anyone. The statute does not require that *you* filed; a petition filed in proper time by any authorised person (a co-director, even a creditor) exonerates the whole board (judgment of the Supreme Administrative Court — Katowice of 19 November 2001, I SA/Ka 1734/00). But the petition must meet formal requirements: a petition returned for formal defects exonerates no one (judgment of the Supreme Administrative Court of 10 April 2015, II FSK 852/13). The outcome of a properly filed petition, by contrast, is irrelevant — even its dismissal for want of assets to fund the proceedings does not

undo the exoneration (judgment of the Provincial Administrative Court in Gdańsk of 13 January 2009, I SA/Gd 669/08).

- **Timely opened restructuring** (or an approved arrangement in the arrangement-approval procedure) — the modern, business-preserving equivalent, and often the strategically superior move (Chapter 12).
- **Mandate ended before insolvency.** A director whose office expired before the grounds for bankruptcy arose is outside the mechanism; and a *former* director, lacking standing to file, cannot be at fault for not filing when the grounds emerged only after departure (the seven-judge resolution of the Supreme Administrative Court of 10 August 2009, II FPS 3/09, settled this in the director's favour after years of divergence).
- **No damage (civil track).** Proof that the creditor would have recovered nothing even on a timely filing — typically by reconstructing the hypothetical bankruptcy distribution (judgment of the Court of Appeal in Poznań of 16 December 2022, I AGa 191/21). Expert-heavy, expensive, and genuinely available where the company was hopelessly underwater early.
- **Identification of company assets (tax track)** — concrete, existing, owned, significant (Chapter 5).
- **The single-creditor anomaly** (Chapter 5) — narrow, but real.

The pattern across the inventory is unmistakable: every working defence is either *procedural diligence performed on time* or *an accident of timing*. None rewards good management, courage, or commercial judgment. That is the system's deep grammar, and the practical programme of Chapter 12 follows from it.

Part III — The Clock

Chapter 7. When Is a Company Insolvent? The Thirty-Day Question

Everything in Parts I and II converges on a single factual question: *when did the company become insolvent?* From that date run thirty days (Article 21(1) of the Bankruptcy Law; until the end of 2015 it was a brutal fourteen — conduct from before 1 January 2016 is judged under the old rules), and every member of the management board bears the filing duty individually, regardless of joint-representation rules — indeed, each member is empowered to file alone, precisely so that no one can hide behind a co-signature requirement.

The two tests

Polish law, like German law from which the architecture descends, recognises two independent gateways to insolvency (Article 11 of the Bankruptcy Law).

Loss of liquidity (Article 11(1)). The debtor is insolvent upon *losing the capacity* to perform its due pecuniary obligations. Note the noun: capacity. The test is not a missed payment but a lost ability — a distinction the case law works hard, with mixed success, to operationalise (below). A statutory presumption assists creditors: a delay exceeding **three months** in performing pecuniary obligations presumes lost capacity. Only *pecuniary* obligations count — a developer's failure to deliver apartments, however scandalous, is not in itself a bankruptcy ground (it was, before 2009; no longer).

Over-indebtedness (Article 11(2)). A legal person is insolvent also when its pecuniary obligations exceed the value of its assets and this state persists for more than **twenty-four months** — even if it pays everything on time. The calculation has its own grammar: future and conditional obligations are excluded, as are shareholder loans and similar intra-group financing (the statute's pointer to the subordination rules is, the commentary notes, imprecise — the better view excludes *all* shareholder loans from the comparison, since there is no ratio legis for forcing a company into bankruptcy on account of debt that ranks last anyway); assets outside the future bankruptcy estate do not count; and a balance-sheet presumption applies (liabilities per the books, net of provisions and intra-group items, exceeding assets for 24+ months). Because the company's filed financial statements are public and binding in this assessment — their interpretation under different valuation methods cannot be allowed to yield opposite answers about the balance-sheet test — boards should treat the annual accounts as a liability document, not an accounting formality. The 24-month runway, introduced to protect shareholders from premature forced filings, gives the over-indebtedness limb a long fuse; in practice it is the liquidity limb that detonates.

Two safety valves: the court *may* dismiss a petition where the balance-sheet test is met but no near-term threat to paying obligations exists (Article 11(6)); and the

court *will* dismiss a creditor's petition where the debtor shows the claim is wholly disputed and the dispute predates the petition — a shield against bankruptcy petitions deployed as debt-collection artillery. A third dismissal ground — assets insufficient even for the costs of the proceedings — closes the courthouse door, but, as Chapter 6 noted, does not reopen the director's exposure if the petition was timely and proper.

Formal, not moral

For the declaration of bankruptcy itself, the *cause* of insolvency and the timing of the petition are irrelevant; the proceeding protects creditors, full stop. The cause and the timing become legally decisive elsewhere — in the liability provisions this book is about. Polish law thus separates, with some elegance, the questions "should this company be wound up?" and "who pays for the delay?" The foreign director lives in the second question.

The case law on timing: guidance from the oracle

Given that everything turns on the trigger date, one would expect the courts to have furnished a clear and precise definition of when the filing clock starts. The Supreme Court has indeed furnished a series of indications. Their validity is not in doubt; their clarity is another matter — they are formulated in a manner of which the oracle at Delphi, or Nostradamus on a good day, need not have been ashamed. The canonical four, drawn from the commentary to Article 11:

11. A brief halt in payments due to *transient* difficulties is not a bankruptcy ground; insolvency arises only when the debtor, for want of means, fails for an extended period to perform the predominant part of its obligations (Supreme Court, 19 January 2011, V CSK 211/10).
12. One must not schematically assume that every delay, even a single one, triggers insolvency requiring a petition (Provincial Administrative Court in Warsaw, 17 December 2020, III SA/Wa 301/20).
13. Yet the cessation of performing due obligations gives rise to the filing duty *even if* assets still exceed debts — the debtor's remedy being to sell assets or borrow (Supreme Court, 8 January 2013, III KK 117/12).
14. And insolvency arises not only when the debtor lacks funds but also when it fails to perform *for other reasons* (Supreme Administrative Court, 6 March 2018, II FSK 2173/17).

To which add a fifth, for completeness: non-payment of even a *single* creditor holding a substantial claim can constitute insolvency (Provincial Administrative Court in Gorzów Wielkopolski, 12 May 2020, I SA/Go 688/19).

The temporary-difficulties trap

Judgment V CSK 211/10 deserves a closer look, because it contains — quite unintentionally — a rather dark joke at the board's expense.

The holding sounds merciful: if the difficulties are merely temporary, there is no insolvency, no filing duty, no clock, no personal liability. Where is the humour in

this, you may wonder? In the tense. Whether difficulties *were* temporary can be determined only ex post, with the benefit of hindsight — that is, at the precise moment when it is too late to protect the board by filing on time. The Supreme Court presumably intended to throw boards a lifeline; what it handed the drowning was a razor blade to cling to. A typical board *will* fight for the company, *will* read its own optimism as evidence the difficulties are temporary, and *will* find in V CSK 211/10 the doctrinal permission to wait. When the capacity for that reading is finally exhausted, the petition deadline is not computed from the day the difficulties ceased to be temporary. It is computed from the original day the debtor stopped performing. The merciful judgment, followed in good faith, manufactures the very liability it appeared to forestall.

The operational conclusion is the one theme of this book that admits no nuance: **when in doubt, the safe error is filing early.** The costs of a premature petition are real but bounded — a dismissed petition, some reputational noise, perhaps a dispute with shareholders. The costs of a late one are the subject of Parts II and IV. Boards that institutionalise the question — a standing monthly solvency review against both statutory tests, minuted, with professional advice sought the first month either test flickers — convert an unanswerable judgment call into an answerable procedural routine. Chapter 12 provides the checklist.

Part IV — The Sword

Chapter 8. Criminal Exposure: When Late Becomes Culpable

Civil liability takes your assets; criminal liability takes considerably more — including, under Polish law, the possibility of a ban on serving as a board member at all. The criminal provisions form three concentric circles.

The inner circle: failing to file (Article 586 CCC)

A member of the management board (or a liquidator) who fails to file a bankruptcy petition despite the conditions justifying the company's bankruptcy commits an offence punishable by a fine, restriction of liberty, or imprisonment of up to one year. The offence shadows the civil mechanism: same trigger, same thirty-day clock, but now with criminal-law standards of intent and proof — and with the limitation-period side effect described in Chapter 4, by which a civil court's *own* finding that the elements of Article 586 are satisfied can stretch the civil claim's life to twenty years. The provision is no museum piece; prosecutions accompany contentious insolvencies with regularity, often initiated by the very creditors pursuing the civil claim, for whom a criminal file is both leverage and a discovery device.

The middle circle: offences against creditors (Articles 300–302 of the Criminal Code)

International insolvency practice groups the classic pre-bankruptcy misdeeds under the heading of **antecedent transactions**, with three canonical types: preference transactions (paying one creditor ahead of others on the eve of collapse), transactions at an undervalue (gifting or under-selling assets), and transactions defrauding creditors (moving assets out of reach). In most jurisdictions these trigger civil avoidance and compensation; in a number, including Poland, they are also crimes.

The Polish Criminal Code does not borrow the common-law taxonomy but covers the same ground with its own instruments:

- **Asset-stripping when insolvency threatens (Article 300 § 1):** whoever, facing impending insolvency or bankruptcy, frustrates or diminishes the satisfaction of their creditor by removing, concealing, disposing of, donating, destroying, actually or ostensibly encumbering, or damaging components of their assets — imprisonment up to 3 years.
- **Frustrating enforcement (Article 300 § 2):** the same conduct directed at assets seized or threatened with seizure, with intent to defeat a judgment or other state decision (including removing seizure marks) — imprisonment from 3 months to 5 years. Note the aggravation: once enforcement is in prospect, the same act becomes a more serious crime.
- **The phoenix manoeuvre (Article 301 § 1):** a debtor who frustrates or limits the satisfaction of multiple creditors by creating a new entity and

transferring assets to it — 3 months to 5 years. The "new company, old business, no debts" play, beloved of distressed operators everywhere, is in Poland a named criminal offence.

- **Engineered or reckless bankruptcy (Article 301 §§ 2–3):** deliberately driving oneself into bankruptcy or insolvency while owing multiple creditors (3 months to 5 years); doing so *recklessly* — notably by squandering assets, incurring obligations, or transacting in blatant contradiction to principles of sound management — a fine, restriction of liberty, or imprisonment up to 2 years. The reckless variant deserves a foreign director's particular attention: it criminalises a *style* of management, and stands ready as the fallback count in any contested collapse.
- **Preferring creditors (Article 302 § 1):** whoever, when insolvency or bankruptcy impends and they cannot satisfy all creditors, pays or secures only some, thereby acting to the detriment of the others — a fine, restriction of liberty, or imprisonment up to 2 years. The case law is uncompromising about motive: the *criteria* by which the debtor selected whom to pay — strategic supplier, oldest friend, loudest lawyer — are entirely irrelevant to the offence, as is the state of any enforcement proceedings (judgment of the Court of Appeal in Katowice of 2 December 2021, II AKa 238/21).

Article 302 reshapes daily management more than any other provision in this book. In the twilight zone before filing, the ordinary treasury meeting — *whom do we pay this week?* — becomes a sequence of decisions each of which is, potentially, the actus reus of a criminal offence. The only structurally safe resolution of the dilemma is the one Polish law has been recommending all along: stop selecting among creditors and file, placing the selection in the hands of a trustee operating under statutory priorities.

The outer circle: abuse of trust (Articles 296, 296a of the Criminal Code)

Beyond the insolvency-specific offences lies the general crime of criminal mismanagement: a person obliged to manage another's property who, by abusing their authority or failing in their duty, causes the principal significant financial damage faces imprisonment (with severity scaling with the damage), and Article 296a adds the corruption variant. These provisions are not insolvency-triggered, but corporate collapse is their natural habitat: the post-mortem of a failed company is precisely where a trustee, a creditor, or a prosecutor goes looking for the decision that "no honest manager could have made." Their practical bite for the careful director is indirect but important: they are the reason the *documentation* of major decisions (Chapter 12) matters even when no creditor is yet in sight.

A comparative footnote on criminal severity

Lest Poland appear uniquely bloodthirsty: Germany imprisons for up to three years for delayed filing (§ 15a of the Insolvenzordnung); France's *banqueroute* punishes fraudulent continuation of a loss-making business; Australia

criminalises insolvent trading where dishonesty is involved (up to five years); the UK reserves criminal sanction for fraudulent trading, leaving merely *wrongful* trading to the civil courts. The Polish distinctiveness is not the existence of criminal teeth but their combination with the automatic civil transfer: elsewhere, the criminal track is the aggravated exception to a forgiving civil baseline; in Poland, it is the aggravated exception to an unforgiving one.

Part V — The World

Chapter 9. The Comparative Panorama: Five Mirrors

Nothing clarifies a legal system like a foreign mirror. We hold up five, in ascending order of distance from Poland.

Germany: strict clock, specific conduct

German law supplies the closest relative — and the instructive differences. Under § 15a of the Insolvency Code (Insolvenzordnung), managing directors must file **without undue delay, at the latest within three weeks of illiquidity (Zahlungsunfähigkeit) and six weeks of over-indebtedness (Überschuldung)** — deadlines even tighter than Poland's thirty days — and delayed filing is itself criminal, with up to three years' imprisonment. So far, recognisably the same family.

The divergence lies in the civil consequences. German law imposes no general liability of the GmbH managing director for the company's debts upon failure to file. Liability is **conduct-specific**: the classic head (formerly § 64 GmbHG, now § 15b InsO) attaches to *payments made after* the onset of insolvency, obliging the director to restore those specific outflows — not to guarantee the entire creditor body. And since 2005 Germany has codified a **business judgment rule** (§ 93(1) AktG, the *unternehmerische Entscheidung* doctrine, modelled with acknowledged candour on Delaware), giving good-faith, informed decisions a structured safe harbour. The German director who files late answers for what they *did* in the twilight period; the Polish director answers for everything the company owes. Same clock, different bill.

France: liability with a causation valve

France channels director liability through the *responsabilité pour insuffisance d'actif* (historically the *action en comblement de passif*): once collective insolvency proceedings open, directors — including de facto directors, *dirigeants de fait* — may be ordered to bear all or part of the asset shortfall, but only upon proof of three cumulative elements: **management fault, damage, and a causal link** between them. The filing deadline is forty-five days from cessation of payments; *banqueroute* supplies the criminal layer. In scale of potential exposure, France resembles Poland — the whole deficiency may land on the director. In *mechanism*, it does not: the French judge must find that mismanagement caused the shortfall, and retains discretion over the quantum. The causation valve, absent from Article 299, is the difference between a liability regime and a guarantee regime.

United Kingdom: the fault-based archetype

Section 214 of the Insolvency Act 1986 — **wrongful trading** — is the provision foreign textbooks usually cite as the European benchmark, and it is everything Article 299 is not. Liability requires that the director *knew or ought to have concluded* that there was no reasonable prospect of avoiding insolvent liquidation; it is then defeated entirely if the director took **every step** with a view to minimising creditor losses; only a liquidator (or administrator) may sue; and the court orders such contribution "as it thinks proper" — full judicial discretion over quantum. There is no fixed filing deadline at all, and no criminal sanction for merely wrongful (as opposed to fraudulent) trading. The system's flexibility was demonstrated vividly during the pandemic, when the Corporate Insolvency and Governance Act 2020 simply *suspended* wrongful-trading liability for extended periods (1 March–30 September 2020 and 26 November 2020–30 June 2021) to keep boards trading through the storm. One struggles to imagine the Polish legislature suspending Article 299 because times were hard; the provision exists precisely *for* hard times.

United States: the anti-Poland

Delaware is the control group of this experiment. *North American Catholic Educational Programming Foundation v. Gheewalla* (Del. 2007) settled that directors' fiduciary duties run to the corporation and its shareholders even in the "zone of insolvency"; upon actual insolvency, creditors gain at most *derivative* standing — never a direct claim against the directors for the company's debts. The **business judgment rule** then does the rest: informed, disinterested, good-faith decisions — emphatically including the decision *when and whether* to file for bankruptcy — are immune from second-guessing. As the bankruptcy court in *In re Midway Games* (428 B.R. 303, 315 (Bankr. D. Del. 2010)) put it, directors are not liable for actions taken "in an effort to prolong the corporation's viability, even in the face of bankruptcy." The American director facing distress is *expected* to gamble for resurrection within the bounds of good faith; the Polish director who does the same thing is accumulating personal liability by the invoice and, possibly, committing the offence of Article 301 § 3. No single contrast in this book matters more for an American reader's instincts.

Australia: the engineered middle way

Australia's regime is worth a foreign director's study because it shows a legislature consciously *tuning* the trade-off the other systems take as given. Section 588G of the Corporations Act 2001 imposes a duty to prevent insolvent trading, triggered by "reasonable grounds for suspecting" insolvency — closer to Poland in trigger design than the UK. But the statute then layers on calibrated relief: the § 588H defences (reasonable expectation of solvency; reasonable reliance on a competent person; non-participation due to illness), a criminal threshold requiring *dishonesty*, and — since 2017 — the § 588GA **safe harbour**, shielding directors who, upon suspecting insolvency, pursue a course of action

"reasonably likely to lead to a better outcome" than immediate administration, conditional on employee entitlements being paid and tax reporting current. Australia, in other words, looked at the rescue-versus-creditor dilemma and legislated a supervised middle path. Poland's only safe harbour is the courthouse.

The panorama in one table

	Poland	Germany	France	UK	USA (Del.)	Australia
Filing deadline	30 days	3 wks / 6 wks	45 days	none	none	none
Civil liability trigger	Failed enforcement vs company	Specific post-insolvency payments	Fault causing shortfall	Knowledge + insolvent liquidation	Breach of fiduciary duty (derivative)	Reasonable suspicion + new debt
Fault required?	No (defences only)	Conduct-specific	Yes (3 cumulative elements)	Yes	Yes	Yes, with defences
Scope of exposure	All company debts + interest + costs	Specific payments	Up to whole shortfall, discretionary	Court's discretion	Damages for breach	Debts incurred while insolvent
Who claims	Any creditor, directly	Insolvency administrator	Insolvency organs	Liquidator/ administrator	Derivative claimants	Liquidator/ ASIC/ creditors
BJR / safe harbour	BJR (2022) — but not vs. Art. 299/116	Codified BJR (2005)	Judicial discretion	"Every step" defence; CIGA precedent	Robust BJR	Statutory safe harbour (2017)
Criminal late-filing	Yes (up to 1 yr)	Yes (up to 3 yrs)	Banqueroute	No (fraud only)	No	Only if dishonest

Read along any row and the conclusion repeats: Poland sits at or beyond the strict edge of every dimension simultaneously. Other systems are strict somewhere; Poland is strict everywhere at once.

Chapter 10. International Standards: The Outlier and the Slow Convergence

International soft law gives the comparison a normative dimension: not just *how* Poland differs, but whether the difference is the kind international best practice endorses.

UNCITRAL Legislative Guide on Insolvency Law, Part IV (2013) — the most authoritative global framework on directors' obligations in the period approaching insolvency — deliberately prescribes no single model, but its architecture is unmistakably calibrationist: obligations should arise when insolvency is imminent or unavoidable; states should define the liability-creating

conduct, the persons owed, and the available **defences**; and liability should be tuned to discourage *both* excessive risk-taking *and* excessive risk-aversion. Poland's tests of insolvency fit the framework comfortably. Its liability mechanism does not: a regime in which the defences exist on paper but operate, through the presumption structure described in Chapter 4, close to strict liability sits outside the band UNCITRAL contemplates as best practice. The risk-aversion half of UNCITRAL's symmetry — the recognition that over-deterred directors file too early, abandon viable rescues, and refuse appointments in distressed companies — is the half Polish law has never legislated for.

The G20/OECD Principles of Corporate Governance (2023 revision) pursue board accountability through fiduciary duty, transparency, and effective oversight — accountability *mechanisms*, not debt guarantees. Poland satisfies the Principles' accountability objective and then continues well past it; nothing in the OECD framework calls for, though nothing forbids, the quasi-guarantee.

The World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes (2021) endorse exactly the commencement architecture Poland uses — a primary liquidity test, optionally supplemented by a balance-sheet test — and call for clear, predictable director obligations. On commencement design, Poland is a model pupil; the Principles' demand for *predictability*, however, reads awkwardly against Chapter 7's oracle problem, where the trigger date is clear in everything except its application.

The EU dimension is where movement is occurring, and where intellectual honesty requires careful tense management. Directive (EU) 2019/1023 on preventive restructuring is settled law: it obliges Member States to maintain early-stage restructuring frameworks and embeds the "rescue culture" — a philosophy Poland has implemented in its restructuring procedures (which, to give Polish law its due, genuinely function as the liability-relieving alternative to bankruptcy described throughout this book). The second instrument — the insolvency harmonisation directive built on the Commission's December 2022 proposal — contains, in the proposal, a harmonised duty on directors to request the opening of insolvency proceedings **no later than three months** after they became aware, or could reasonably be expected to have been aware, of insolvency, with civil liability for breach. Two features deserve emphasis, with epistemic labels attached. *Certain:* the proposal's three-month duty carries a **knowledge trigger** — "became aware or could reasonably be expected to have become aware" — which is precisely the element Poland's objective thirty-day rule lacks. *To be verified by the reader:* the instrument's adoption status and transposition timeline (analyses accompanying this text place adoption in 2025 with transposition running to the end of the decade; given the pace and mutability of EU legislative procedure, confirm the current state before relying on it). The direction of travel, however, is clear either way: the EU is converging *toward* the principle that directors owe creditors a filing duty enforced by personal liability — vindicating the Polish premise — while rejecting the Polish *mechanism* in favour

of longer deadlines and subjective triggers. Poland was, on this telling, early rather than wrong about the destination, and remains alone in the harshness of the vehicle.

The lex ferenda question writes itself: if the EU's harmonised future is a knowledge-triggered, three-month, fault-sensitive duty, the days of the thirty-day objective guillotine may be numbered — but transposition horizons being what they are, every director reading this book will serve out their mandate under the guillotine. Plan accordingly.

Chapter 11. The Business Judgment Rule in Poland: Present, but Pointing the Wrong Way

A development a diligent foreign reader may discover with relief, and must immediately learn to discount: **Poland has a business judgment rule.** Since 13 October 2022, the Commercial Companies Code provides (Article 293 § 3 for the sp. z o.o.; Article 483 § 3 for the S.A.; the simple joint-stock company had its version from inception) that a board member does not breach the duty of due care if, acting loyally to the company, they act within the limits of justified economic risk, including on the basis of information, analyses, and opinions that ought in the circumstances to be taken into account in making a careful assessment.

This is a genuine reform, and within its domain a meaningful one: it shields the rational risk-taker against *the company's* damages claims under Articles 293/483 — the post-acquisition lawsuit, the new-owner's retribution suit, the bankruptcy trustee acting in the company's name on a soured investment. Document your decision process well (Chapter 12), and the 2022 rule is a real wall.

But observe what stands on the other side of the wall and what does not. Article 299 liability is not liability for a *decision*; it is liability for the company's *debts*, conditioned on a failed enforcement and an untimely petition. Article 116 likewise. Neither asks whether your business judgment was sound, informed, or loyal; the most brilliantly reasoned, immaculately documented decision to trade on for sixty more days in pursuit of a rescue is, for Article 299 purposes, simply sixty days of lateness. The business judgment rule and the transfer mechanism are not in tension; they are not even in conversation. They regulate different questions — and the question that ruins foreign directors is the one the BJR does not touch.

Hence the asymmetry that defines director risk in Poland and may serve as this Part's closing aphorism: *in Poland, the law protects you when the company sues you for being bold, and ruins you when a creditor sues you for being late.*

Part VI — The Shield

Chapter 12. The Practical Toolkit: A Protection Programme for the Foreign Director

Everything to this point has been diagnosis. This chapter is the prescription — a programme that follows point by point from the legal mechanics established above. None of it is exotic; all of it is the difference, observable in practice, between directors who walk away from corporate failures and directors who fund them.

Before accepting the mandate

1. Due diligence on the company you are about to guarantee. Since accepting a Polish board seat economically resembles guaranteeing the company's debts subject to conditions, perform the diligence a guarantor would: the last three annual financial statements (and remember from Chapter 7 that the filed statements *bind* the over-indebtedness assessment); aging of payables and any enforcement or tax proceedings already pending; ZUS and tax clearance certificates (zaświadczenia o niezaleganiu) — cheap, fast, and revealing; the state of the company's books generally, because you will need them to monitor solvency from day one. Recall from Chapter 4 that a director appointed *after* insolvency arose inherits a thirty-day clock that starts at appointment: if the diligence reveals the company may already be insolvent, you are not negotiating a job, you are negotiating which day your filing duty begins.

2. Refuse decorative mandates. The figurehead line of authority (Chapter 6) makes "purely formal" board seats the worst risk-reward proposition in Polish corporate life: full liability, no control. If the role on offer comes with the assurance that you "won't have to do anything," the assurance is the problem. Either negotiate real authority and information access, or decline.

3. Contract your information rights. Polish statute gives a board member the *duty* to know the company's condition; make sure your arrangements give you the corresponding *means*. The appointment package should guarantee: monthly management accounts and liquidity reporting; direct access to the chief accountant and the books; prompt notice of any tax control, enforcement action, or material payment default; and — looking ahead to the post-resignation decision problem (Chapter 6) — continuing access, after departure, to documentation concerning your period in office, plus an undertaking that the company will inform you of and consult you on tax decisions relating to that period.

4. Put D&O insurance in place before you need it — and read the insolvency clauses. Directors' and officers' insurance is standard equipment internationally and underused in the Polish mid-market. Its architecture matters more than its existence: **Side A** cover (paying the director directly when the company cannot indemnify) is the layer that performs in precisely this book's

scenario, since an insolvent company indemnifies no one; Side B (reimbursing company indemnification) is irrelevant by then, and Side C protects the entity, not you. Scrutinise, with professional help, the exclusions that decide everything in a Polish collapse: insolvency exclusions, the treatment of Article 299 and Article 116 claims (statutory debt-transfer claims sit awkwardly in policies drafted for negligence suits — confirm in writing that they are covered), conduct exclusions and their *final-adjudication* triggers, defence-cost advancement, and the run-off (tail) period after you leave the board — which, given the three-to-twenty-year limitation horizons of Chapter 4, should be as long as money can buy. A policy that excludes the only claims Polish directors actually face is an expensive placebo.

During the mandate

5. Institutionalise the solvency question. The single highest-value habit this book can recommend: a standing, minuted, monthly board review of both statutory insolvency tests — due obligations versus payment capacity (with the three-month presumption tracked explicitly); balance-sheet position against the twenty-four-month over-indebtedness fuse. The point is twofold. Prospectively, it converts Chapter 7's unanswerable hindsight question into an answerable routine. Retrospectively, it manufactures the evidence for the *no-fault* defence: a director who can produce eighteen months of minuted solvency reviews, management representations, and advisor consultations is in a different evidentiary universe from one who can produce optimism.

6. Document as if the trustee were reading. Every significant decision in the vicinity of financial stress — new debt, asset disposals, payment prioritisation, rescue negotiations — should leave a contemporaneous record of the information considered, the alternatives weighed, and the advice received. This is what the 2022 business judgment rule rewards (Chapter 11), what the Article 296 criminal exposure fears (Chapter 8), and what the no-fault defence requires (Chapter 6). In a Polish corporate failure, the well-documented director and the undocumented director did the same things; only one of them can prove it.

7. Treat tax and ZUS as the senior creditors they functionally are. Not as a legal proposition — preferring them at the expense of others raises its own Article 302 question in the end-game — but as a monitoring priority: arrears to the tax office and ZUS are the exposures pursued by the one creditor that *must* pursue you (Chapter 5), with the longest institutional memory and the best enforcement tools. A company that is quietly financing itself by not paying VAT or social contributions is writing its board's personal liability in monthly instalments. If you discover it, the clock in your head should already be ticking.

8. When distress appears, move the question to restructuring — early. Polish restructuring law is the system's one genuine olive branch: a timely opened restructuring proceeding (or approved arrangement) exonerates exactly as a bankruptcy petition does, while offering what bankruptcy does not — a live business at the end. The strategic logic is asymmetric in the director's favour:

opened early, restructuring preserves option value and stops the liability clock; attempted late, it may be refused for want of funds, leaving the board outside both safe harbours. The recurring fatal pattern in Polish practice is the board that negotiates informally with creditors for six months — accumulating Article 299 exposure and Article 302 risk with every selective payment — before discovering the formal tools it could have invoked in month one.

9. In the twilight zone, stop choosing among creditors. The moment the company cannot satisfy everyone, every discretionary payment is a potential Article 302 § 1 offence whose motive is legally irrelevant (Chapter 8). The treasury function must shift from commercial logic ("who do we need most?") to legal logic ("who may we pay at all?") — current wages and genuinely simultaneous exchanges occupy safer ground than old unsecured debt — and the shift should be made on written legal advice, both because the lines are fine and because the advice itself is later evidence of care.

10. File on the doubt. The thesis of Chapter 7, restated as instruction. The thirty-day deadline is short, the trigger is retrospective, the presumptions run against you, and the courts have told you — in the language judgment of Chapter 6 — that every difficulty of assessment was your problem to have solved earlier. Between the bounded costs of filing early and the unbounded costs of filing late, the rational director's threshold for filing sits much lower than the intuitive one. The board that asks "can we still defensibly *not* file?" is asking the right question; the board that asks "are we definitely required to file?" is already drafting its Article 299 defence.

Leaving

11. Resign completely or not at all. The exit protocol, assembled from Chapter 6's case law: a written resignation delivered to the company (effective on delivery; do not let registration formalities delay or blur the date); notification to the registry court if the company drags its feet on deregistration (you cannot file the deletion yourself, but your documented notification protects you); and — the part the cases punish — total, verifiable cessation of managerial conduct from that date. No transitional signing, no instructing staff, no representing the company to the bank "while they find someone." The half-exit collects the liabilities of office without its powers (III FSK 4114/21).

12. Take your evidence with you. Before access disappears: copies (within lawful and contractual bounds) of the financial statements, board minutes, solvency reviews, and advisor correspondence covering your tenure; the contractual information-and-consultation rights of point 3 activated in the separation documents. The Article 116 decision concerning your period may arrive years later, addressed to a company that no longer answers your calls (Chapter 6); the proceeding *against you* will then be winnable or unwinnable largely on the strength of the file you preserved today. And diarise the horizon realistically: three years is the working limitation period for the civil claim, longer

for tax, and Chapter 4's twenty-year scenario, however rare, counsels keeping the archive.

The programme in one sentence

Polish law cannot be managed by courage, only by procedure: know the tests, watch them monthly, write everything down, insure the gap, use restructuring early, file on the doubt, and leave cleanly — because in this system the directors who survive corporate failure are never the boldest, and always the best documented.

Epilogue: The Honest Conclusion

It would be tidy to end by reassuring the foreign reader that Polish director liability, properly understood, is no more dangerous than anyone else's. The preceding chapters forbid that ending. Properly understood, it is *more* dangerous — by design, by tradition dating to 1934, and by a legislative philosophy that openly prices the protection of creditors above the peace of mind of managers. The international standards bend slowly toward Poland's premise while rejecting its severity; until they arrive, the severity is the operative law.

But the honest conclusion is not a counsel of despair, because the danger has a precise shape, and precisely shaped dangers can be engineered around. Article 299 does not punish bad managers; it punishes late filers. Article 116 does not pursue the negligent; it pursues the undocumented. The criminal provisions do not trap the unlucky; they trap the improvisers. Every mechanism described in this book keys on conduct that a properly briefed director controls completely: whether the solvency question was asked on schedule, whether the petition was filed on the doubt, whether the file was kept, whether the exit was clean.

The unprepared foreign director in Poland is a guarantor who doesn't know it. The prepared one is something rarer and better: a professional who has read the rules of an unusually demanding game, priced them, organised against them — and can therefore serve, decide, and even take bold commercial risks with a confidence the unprepared can only counterfeit. Between those two directors stands nothing but information. You now have it.

This guide is general information, not legal advice. Director liability outcomes depend on facts no general text can anticipate; before accepting, exercising, or resigning a Polish board mandate in circumstances of financial uncertainty, obtain advice on your specific situation.

About the Author

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He has advised on Polish and international corporate structures since the firm's founding, and his commentary on tax, regulatory, and corporate matters appears regularly in the Polish business and legal press, including Rzeczpospolita, Dziennik Gazeta Prawna, and Parkiet.

Kancelaria Prawna Skarbiec advises foreign directors and shareholders of Polish companies on the matters covered in this guide — from pre-appointment due diligence and board documentation to restructuring strategy and the defence of Article 299 and Article 116 proceedings.

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