

Dear Readers,



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Poland had a good start into the year 2012 – both as a country of a fast economic growth, as well as a country of new technologies. It is not only for the already prosperous IT sector, but also for the so far underestimated aviation industry, which has come to the front of the European aviation industry and gained recognition in the international environment.

Poland will be the Official Partner Country of the International Aerospace Exhibition (ILA), which will take place in Berlin on the 11 - 16 September 2012 (www.ila-berlin.de). ILA is the largest aerospace trade show in Germany, and one of the world's largest aviation fairs next to the French Aeroslan and British Farnborough Air Show. It is worth mentioning that these fairs are extremely popular also among those who are not professionally connected with the industry.

In the Polish aviation industry the main position belongs to the "Aviation Valley" ("Dolina Lotnicza") located in Rzeszów. This association has over 90 entrepreneurs from the aviation branch of the region.

Waldemar Pawlak, the Polish Minister of Economy, underlined in his speech that Poland owes its international recognition to the high quality of services, as well as to creativity of Polish engineers and specialists in this field.

Moreover, due to a dense network of aviation companies and colleges a continuing inflow of young engineers is ensured.

"Aviation Valley" was founded in 2003 by a group of leading aviation producers. All its associated economic entities hire over 23.000 qualified employees and are on a good track to achieve the set up goal of making Poland one of the leading regions in the aviation industry in the whole European Union. Statistics depict the issue very well. The total turnover of the Association amounted to 270 million EUR in 2003, whereas already in 2011 it rose up to 1.5 billion EUR.

To maintain the continuous development "Aviation Valley" establishes new contacts with other associations of the aviation industry. That is how the cooperation agreement between the Association and the Berlin-Brandenburg Aerospace Allianz (BBAA) was signed in 2010.

We hope that we managed to "give wings" to your interest in the

In this issue

- Dear Readers,
- SIMPLIFIED ACCESS TO INFORMATION ON BUSINESSES ENTERED IN THE NATIONAL COURT REGISTER
- RESPONSIBILITY OF A BOARD MEMBER OF A POLISH LTD. (Sp. z o.o.) FOR A DELAYED SUBMISSION OF AN INSOVENCY PETITION
- LIABILITY FOR DAMAGES CAUSED BY SECURITY EXECUTION
- POLISH COURT DECISIONS

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Polish economic boom and at the same time we assure you that Poland is a good address as far as economic activity is concerned.

With regard to that we would like to suggest getting familiar with the newest legal circumstances in Poland and we wish You many nice moments reading our lu\$letter.

With kind regards,

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[top ↑](#)

SIMPLIFIED ACCESS TO INFORMATION ON BUSINESSES ENTERED IN THE NATIONAL COURT REGISTER



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The Order of the Minister of Justice of 27th December 2011, hereinafter referred to as "the Order", on the structure and organisation of the Central Information Centre of the National Court Register and on the procedure of giving information from the National Court Register and issuing of copies of the documents in the Register, as well as on the structure of information

published on businesses entered in the Register and the characteristics of hard copies enabling the verification with the data contained in the Register; came into force on 1st January 2012 (Dziennik Ustaw [Journal of Laws] dated 2011, no. 297, item 1760). Pursuant to the Order, all details of the businesses entered in the National Court Register (Krajowy Rejestr Sądowy - KRS), which are included in the current copy of KRS, were published on the Internet at the end of June of this year through the agency of the Central Information Centre. This information can be obtained under the following address: ems.ms.gov.pl/krs/wyszukiwaniepodmiotu without incurring any additional costs or the need of using an electronic signature.

On the basis of art. 4.4aa of the Law on the National Court Register dated 20th August 1997 (i.e. Journal of Laws dated 2007, no. 168, item 1186 as amended) the hard copies of current information on businesses entered in the Register downloaded by oneself have the legal force equal to the force of documents issued by the Central Information Centre of KRS (organisational unit of the Ministry of Justice responsible for, among others, running of KRS data collection and the electronic database of businesses) if they contain features enabling their verification with the data contained in KRS. The above mentioned features according to art. 9.1 of the Order are:

1. Web address with the current information about the businesses entered into KRS,
2. Design compatible with Annexes Nos. 12 and 13 to the Order,
3. Identifier of the printout.

This means that a printout containing the above information downloaded from the internet site indicated above, replaces the

certified copy of an entry issued by KRS which previously necessarily required payment of a court fee in the amount of 30 PLN.

However, should the need arise for a full copy from KRS, it is still required to submit an appropriate application and make a payment of a court fee in the amount of 60 PLN.

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top ↑

RESPONSIBILITY OF A BOARD MEMBER OF A POLISH LTD. (Sp. z o.o.) FOR A DELAYED SUBMISSION OF AN INSOVENCY PETITION



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As an increasing number of Polish limited companies (Ltd., pl. Sp. z o.o.) become insolvent, it is worth examining what is the responsibility of a board member of a Polish Ltd. for a delay in the submission of an request to open the insolvency proceeding.

Pursuant to art. 21.1 in connection with art. 21.2 of the Bankruptcy and

Reorganisation Law (Prawo upadłościowe i naprawcze; i.e. dated 02.10.2009, Journal of Laws dated 2009, no. 175, item 1361 as amended) dated 28.02.2003, hereinafter referred to as PUIN, every member of the board is obliged to submit a request to open the insolvency proceeding to the court within two weeks since the appearance of the ground for declaration of company's insolvency.

The grounds for declaring insolvency are specified in art. 10 PUIN. In accordance with the regulation, bankruptcy will be declared against a debtor who became illiquid. A debtor is recognized illiquid when he cannot fulfill his financial obligations (art. 11.1 PUIN) as well as when debtor's liabilities exceed the value of his assets, even when these obligations are currently being discharged, in cases where the debtor is a legal person or an organizational unit which does not have legal personality but to which legal capacity is assigned by a distinct law.

It is worth underlining, that for the determination, whether the debtor is illiquid, it is not significant, whether he does not fulfill all or just some of his financial obligations. Not important is also the extent to which obligations have not been fulfilled. Even the discharge of obligations of a low value means that the debtor is illiquid in terms of art.11 PUIN. The reason for the illiquidity is also not important. Illiquidity exists not only, when the debtor does not have the funds, but also, when the debtor does not fulfill his obligations for other reasons, like for example in order to make his business partner insolvent.

A board member who did not submit the request to open the proceeding of a Polish Ltd. to the court within the statutory period, notwithstanding occurrence of illiquidity of the company, can be subject to both civil (art. 299 of the Code of Commercial Companies – Kodeks spółek handlowych (KSH) and art. 21.3 PUIN) and criminal

(art. 586 KSH) liability. A ban on conducting business activity can also be ruled against such a person by the court (art. 373 PUIN).

Pursuant to art.299.1 KSH, in case the execution against the company proves to be unsuccessful, members of the board will be jointly and severally liable for its obligations. Under art.299.2 KSH a member of the board can absolve himself of this responsibility if he proves that the submission of the declaration of bankruptcy or the initiation of composition proceedings were performed in due time or that the failure to submit the declaration and initiate the proceedings cannot be attributed to him, or that even though the declaration was not submitted and the proceedings not initiated, the creditor did not incur any loss. The regulations of arts. 299.1 and 299.2 KSH do not affect the provisions governing the far-reaching liability of board members.

Firstly, it needs to be determined which members of the board bear the responsibility under art. 299 KSH. It follows from the Polish judicature that “a member of the board of a limited company is liable under art. 299.1 KSH for its obligations existing during the time of exercising this function” (decision of the Supreme Court of Poland dated 17.06.2011, file ref. II CSK 571/10). Furthermore, it is sometimes argued that when the grounds justifying a declaration of insolvency are given at the time of appointment to the position of a board member, those members who subsequently to their appointment promptly submitted the insolvency petition or applied for initiation of composition proceedings will be freed from liability arising under art.299 KSH.

In practice, duties of individual board members are usually internally divided and insolvency of the company might result from actions of only some of them. According to legal doctrine, each member of the company's board is obliged to supervise the assets of the company regardless of the assigned function. Thus, he should have the basic knowledge of the most vital business affairs of the company, including financial situation. As a result, in the event of insolvency of a Ltd., each member of the board is obliged to submit the insolvency petition.

An entry in the court register (KRS) of a person as a board member of a limited company is not decisive for the fact, whether this person is liable in case the request for opening of the insolvency proceeding has not been made in time. The entry in the KRS is of declaratory and not of constitutive nature. It can also happen, that a person, which is registered in the KRS as a board member, does not in reality fulfill this function any more, since this person was recalled by the shareholders' decision but not removed from the register.

The liability of a board member under art.299 KSH concerns obligations of both civil and public nature, unless, with regard to public obligations, the special regulations state otherwise.

A board member can be freed from the above mentioned liability if one of the following prerequisites from art. 299.2 KSH is proved:

- either was the **declaration of company's insolvency submitted or the composition proceedings were performed, both in due time** (it is of no importance if the declaration was submitted by a board member invoking this prerequisite or by any other person i.e. another board member or a creditor),
- **declaration was not submitted or composition proceedings were not initiated with no quilt of the board member** (this prerequisite may free from liability only those members to whom the quilt is not attributed),
- despite the fact that composition proceedings were not initiated

the **creditor did not suffer any damage** (this prerequisite applies to those situations when the creditor, despite submission of the declaration or initiation of composition proceedings in due time, would not satisfy his claims).

Board members of a Polish Ltd. may also be liable for not submitting the declaration of insolvency in due time, according to art. 21.3 PUIN. According to this provision, board members are liable for any damage caused by failing to submit the declaration within the statutory deadline. This damage is caused to a creditor and it consists in limitation of his claim satisfaction, due to depletion of the assets, as a result of failing to submit the declaration of company's insolvency.

According to art. 586 KSH those board members who failed to submit the insolvency declaration, are also criminally responsible. Board member or liquidator failing to submit the insolvency declaration, despite the fact that conditions to do so have already arisen, will be levied a fine, restriction of liberty or imprisonment up to one year.

Moreover, according to art. 373.1 PUIN, the court can rule a ban on running a business on one's own account from three up to ten years, as well as a ban on being a member of board of supervisors, a representative or a legal agent in a commercial company, state-controlled enterprise, cooperative society, foundation or association; on a person who failed to submit the declaration of company's insolvency within the statutory deadline through their fault, although they were obliged to do so by law.

With regard to the strict liability for failing to submit declaration for company's insolvency in due time (on civil and criminal law basis), we recommend board members to control company's finances regularly, and in case the statutory prerequisites for company's insolvency arise – to submit insolvency declaration in due time.

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[top ↑](#)

LIABILITY FOR DAMAGES CAUSED BY SECURITY EXECUTION



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The provisions of the Polish Civil Proceeding Code foresee a possibility of secure civil claims either before legal proceedings are initiated, or when the proceedings are already in progress. This can be claimed by both parties or by any participant to the proceedings, if they make the claim and the legal interest of security plausible. The legal interest of security

exists when loss of the security may result either in failure in judgment's execution or could make it more difficult to achieve the proceeding's aim. Choosing the way of security the court will take into consideration parties' or participants' interests to the extent possible in order to provide the creditor with a proper legal protection and not to burden the debtor extensively.

The most popular ways of security of pecuniary claims are:

- Distraint of property, remuneration, claims from the bank account or other claims, or other property right,
- Encumbrance on real property with a compulsory mortgage,
- Administrative receivership over a company or a farm, or over an industrial plant belonging to the company or a part of it, or over a part of a farm.

Indemnity is given upon request or when possible-ex officio.

According to the fact that proceedings in Poland may last up to several years, entrepreneurs being afraid that their debtors will “run away with the property” use the legal instrument of security more often. And sometimes it is only for this instrument that a creditor can satisfy his claims, which would not be possible without it.

What is very often forgotten by creditors, being however particularly worth underlining, is that in some cases security execution may be connected with creditor’s liability for damages. This is regulated by art. 746.1 of the Polish Civil Proceedings Code. According to this provision a subject which was awarded indemnity is obliged to compensate the damages, caused by indemnity execution, if: he failed to file a claim commencing legal proceedings in an appointed date or he withdrew the claim or petition, as well as when the claim or petition was dismissed or rejected, or when the claim or petition was (finally and legally binding) dismissed or the proceedings were remitted, or if the entitled person failed to take part in the proceedings for the whole claim or if he filed for another claim than the indemnified one. Moreover, the claim resulting from art. 746. 1 of Civil Proceedings Code cannot be filed after one year since the day the claim arose.

The liability described in art. 746. 1 of the Polish Civil Proceedings is independent from guilt (cf. the Supreme Court sentence of 25.02.2010, file ref. V CSK 293/09). In order to seek for damages from the creditor, the debtor has to file a separate claim and prove that he suffered damage and that there is cause and effect relationship between indemnity execution and the damage. The debtor may claim compensation for both actual damages as well as for expectation damages, as a result of indemnity execution.

Indemnity is a legal instrument which effectively protects creditors’ interests. Creditors however, should use it cautiously because of the possible liability for damages.

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[top ↑](#)

POLISH COURT DECISIONS

1. According to the sentence of the Supreme Court of 12.10.2011, file ref. II CSK 95/11, the management board member of a limited liability company is not liable according to art. 299 of the Polish Code of Commercial Companies, if the creditor, whose title was transferred to secure the liability, did not take any actions - although he was able to do so – in order to settle his claim with the subject matter of the contract.

2. In the resolution of 08.03.2012, file ref. III CZP 95/11, the Supreme Court held a position that “a guardian appointed on the basis of art. 42(1) of the Polish Civil Code, for a Polish Limited Liability Company can, if that was the aim of his appointment, file a

dissolution petition on behalf of the represented company.”

3. In the resolution of 20.04.2012, file ref. III CZP 10/12, the Supreme Court ruled that „an apparent guarantee contract, concluded in order to hide the transfer of liabilities between the creditor of a health care facility and a subject professionally dealing with receivables trading and with extrajudicial debt collection, may violate the contractual prohibition of concluding an agreement on receivables' transfer”.

4. In the resolution of 06.06.2012, file ref. III CZP 22/12, the Supreme Court ruled as follows: “During the proceedings for entry in the National Court Register of the data of the company's partners, having at least 10% of the share capital, individually or jointly with others (art. 38 point 8 letter c of the Law on the National Court Register dated 20th August 1997 [Journal of Laws dated 2007, no. 168, item 1186 as amended]), the Court may require submission of the contract under which the share or its part's transfer took place in the company (art. 180 of the Polish Code of Commercial Companies)”.

5. According to the Supreme Administrative Court of 16.06.2011, file ref. II OSK 244/10: „ A failure to confirm the right to inheritance in the proceedings for confirmation of inheritance acquisition or through a notary certification, does not prevent a foreigner (being a testamentary heir) from filling an application for a permission to purchase real estate within the date described in art. 7.3 of the Act of 24.03.1920 on Purchase of Real Estate by Foreigners (Dziennik Ustaw [Journal of Laws] dated 2004, no. 167, item 1758 as amended).”

[top ↑](#)

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