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DIRECTOR LIABILITY IN BANKRUPTCY: ARTICLE 104 AND THE 2025 SOE BUSINESS JUDGMENT RULE

Hafidz Afriendi Winaharta[1]

[1] Faculty of Law, Universitas Brawijaya, Indonesia. E-mail: hafidzwinaharta@student.ub.ac.id

Abstract: *This article examines directors' personal liability in corporate bankruptcy under Article 104 of the Indonesian Company Law and compares it with the Business Judgment Rule (BJR) for State-Owned Enterprise (SOE) directors after the 2025 SOE reforms. It uses normative or doctrinal legal research through statutory, conceptual, and functional comparative approaches. The analysis shows that Article 104 neither imposes strict liability nor reverses the burden of proof wholesale. A claimant must establish the Article 104(2) trigger, including the causal connection between director fault or negligence, bankruptcy, and an insufficient bankruptcy estate. Article 104(4) then places an exculpatory burden on each director to demonstrate good faith, due care, absence of conflict, and preventive action. The 2025 SOE reforms likewise do not create absolute immunity. Article 9F, introduced by Law No. 1 of 2025 and retained in the current framework, substantially mirrors BJR criteria already found in the Company Law, while Law No. 16 of 2025 deleted Article 9G and revised Article 4B. The principal issue is therefore not a direct contradiction between two liability regimes, but the need for harmonized interpretation and evidentiary standards that distinguish legitimate business risk from culpable managerial conduct.*

Keywords: *Bankruptcy; Business Judgment Rule; Director Liability; Personal Liability; State-Owned Enterprises.*

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Introduction

Indonesian company law, the most explicit form of limited liability protects shareholders: Article 3(1) of Law No. 40 of 2007 provides that shareholders are generally not personally liable for obligations made in the company's name beyond the value of their shares. Directors occupy a different legal position. They manage and represent the company, and their exposure to personal liability depends on the statutory duties and liability rules governing the Board of Directors rather than on shareholder limited liability itself (Isfardiyana, 2014; Putra, 2021).

This distinction becomes important in bankruptcy. A corporate bankruptcy creates a general attachment over the debtor company's bankruptcy estate under Law No. 37 of 2004; it does not automatically merge the directors' personal assets into that estate.

Personal exposure arises only where a separate legal basis for director liability is satisfied. Article 104 of the Company Law supplies one such basis. If bankruptcy occurs because of the fault or negligence of the Board of Directors and the bankruptcy estate is insufficient to pay the company's obligations, the directors who fall within the statutory rule may be held jointly and severally liable for the unpaid balance (Republic of Indonesia, 2004, 2007; Isfardiyana, 2014).

Indonesian scholarship often discusses Article 104 through the language of piercing the corporate veil. That label is understandable because the provision permits recovery beyond the company's own assets, but it should be used carefully. Piercing the corporate veil classically concerns disregard of corporate separateness, often in relation to shareholders. Article 104 is more precisely a statutory rule of director liability triggered by culpable management in bankruptcy. The distinction matters because personal liability does not arise merely from business failure, insolvency, or an unpaid creditor balance; fault or negligence remains part of the statutory trigger (Apandi et al., 2023; Isfardiyana, 2014; Sugandi et al., 2024).

The counterweight is the Business Judgment Rule. Article 97(5) of the Company Law allows a director to avoid personal liability for company losses by proving that the loss was not caused by the director's fault or negligence, that management was carried out in good faith and with prudence for the company's interests and purposes, that no direct or indirect conflict of interest existed, and that steps were taken to prevent or stop the loss. Article 104(4) contains a closely related exculpation rule for bankruptcy. These provisions embody a process-oriented idea: courts should distinguish an informed and loyal business decision that later fails from culpable managerial conduct (Bainbridge, 2004; Disemadi et al., 2020; Eisenberg, 1993; Rissy, 2020).

The problem acquired a new dimension in 2025 when Law No. 1 of 2025 amended the State-Owned Enterprise (SOE/BUMN) Law and introduced Article 9F. That provision states that directors cannot be held legally responsible for losses if they prove conditions closely resembling the Company Law's BJR criteria. Early commentary treated the reform as a major separation between the liability of SOE directors and private-company directors, especially because Law No. 1 of 2025 also introduced Article 4B concerning SOE gains and losses and Article 9G concerning the status of SOE organs (Rahman, 2026; Setiawati & Vitrana, 2025).

That early comparison is no longer sufficient. Law No. 16 of 2025, effective from 6 October 2025, made a fourth amendment to the SOE Law. It revised Article 4B, deleted Article 9G, and changed several institutional provisions, while Article 9F remained part of the current BJR framework. The current law also continues to place Persero companies within the general company-law framework unless the SOE Law provides otherwise. Consequently, an analysis written in 2026 cannot treat Article 9G of Law No. 1 of 2025 as an operative basis for a permanent difference in director status (Republic of Indonesia, 2025a, 2025b).

The research gap is therefore narrower and more legally significant than a simple public-versus-private comparison. First, Article 104 is often described as creating a reversed burden of proof once bankruptcy and an estate deficit are shown, even though Article 104(2) itself still requires bankruptcy caused by director fault or negligence. Second, the BJR standards in Articles 97(5), 104(4), and SOE Article 9F are textually similar, yet they operate in different procedural settings. Third, international insolvency scholarship shows that director decision-making changes as a company approaches financial distress because creditor interests become increasingly important, making a purely shareholder-centered account of BJR incomplete (Keay, 2003, 2005, 2015; Keay & Lombard, 2024).

This article therefore asks two questions. How should the liability mechanism and evidentiary allocation under Article 104 be understood when a company becomes bankrupt? What legal consequences follow from the coexistence of the Company Law BJR and the SOE-specific BJR after the 2025 amendments, and what form of harmonization is required? The article argues that the current statutes are better understood as overlapping rather than contradictory regimes. The central editorial and doctrinal task is to clarify the sequence of proof and to develop consistent process-based indicators of good faith, due care, conflict management, and bankruptcy prevention.

Method

This study uses normative legal research supported by empirical descriptive data contained in the manuscript. The normative component applies statutory and conceptual approaches. The statutory approach examines Law No. 31 of 1999 as amended by Law No. 20 of 2001 on the Eradication of Criminal Acts of Corruption, Law No. 17 of 2003 on State Finances, Law No. 1 of 2023 on the Criminal Code, Law No. 20 of 2025 on the Criminal Procedure Code, Police Regulation No. 8 of 2021, Presidential Regulation No. 122 of 2024, and UNCAC. The conceptual approach is used to distinguish retributive punishment, restorative justice, and asset recovery, and to assess whether restorative principles can inform investigative practice without becoming a legal basis for terminating corruption proceedings.

Secondary legal materials consist of books, peer-reviewed journal articles, international asset-recovery guidance, and institutional reports. The empirical component is limited to the internal Indonesian National Police statistics reproduced in the manuscript concerning corruption case handling and recorded state financial loss and recovery for 2020–2024. Because the underlying police database was not independently audited in

This study uses normative or doctrinal legal research. The object of analysis is the legal norm governing director responsibility for company losses and bankruptcy, together with the relationship between the Company Law and the SOE Law after the 2025 amendments. No interviews, surveys, respondents, or statistical tests are used. The inquiry is prescriptive because it evaluates the coherence of existing rules and formulates an interpretive framework for their application (Marzuki, 2017; Soekanto & Mamudji, 2015).

Three approaches are employed. The statutory approach examines Law No. 40 of 2007 as amended, particularly Articles 92, 97, and 104; Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations; Law No. 1 of 2025; and Law No. 16 of 2025 as the current fourth amendment to the SOE Law. The conceptual approach analyzes corporate personality, fiduciary responsibility, personal director liability, the Business Judgment Rule, creditor interests, and the distinction between standards of conduct and standards of judicial review. The functional comparative approach uses selected United States, United Kingdom, and Australian scholarship to identify how mature corporate and insolvency systems distinguish legitimate business risk from culpable conduct during financial distress (Bainbridge, 2004; Brotchie & Morrison, 2020; Eisenberg, 1993; Keay, 2015).

Primary legal materials consist of statutes and the Civil Code provisions relevant to evidentiary and patrimonial responsibility. Secondary legal materials include verified Indonesian journal articles, corporate-law books, and articles from established international law and insolvency journals. The materials were collected through document study and cross-checked against official legal databases, journal publisher pages, DOI records, and institutional repositories where available. Analysis proceeds through grammatical and systematic interpretation, legislative chronology, comparison of equivalent BJR elements, and prescriptive synthesis. This sequence is used to avoid treating policy commentary as if it were binding law.

Discussion

Article 104 as a Two-Stage Director Liability Rule

Article 104 begins from the premise that the company, not the directors, is the bankrupt debtor. Paragraph (1) regulates the Board of Directors' authority to petition for the company's own bankruptcy and requires prior approval of the General Meeting of Shareholders, without displacing the Bankruptcy Law. Paragraph (2) then creates exceptional personal liability when two substantive conditions converge: the bankruptcy occurs because of the fault or negligence of the Board of Directors, and the bankruptcy estate is insufficient to pay all company obligations in the bankruptcy. Only then does joint and several liability arise for the unpaid balance (Republic of Indonesia, 2007).

> **Article 104(1)** *"Direksi tidak berwenang mengajukan permohonan pailit atas Perseroan sendiri kepada pengadilan niaga sebelum memperoleh persetujuan RUPS, dengan tidak mengurangi ketentuan sebagaimana diatur dalam Undang-Undang tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang."*
>
> "The Board of Directors is not authorized to submit a petition for the bankruptcy of its own Company to the Commercial Court before obtaining approval of the General Meeting of Shareholders, without prejudice to the provisions of the law concerning Bankruptcy and Suspension of Debt Payment Obligations."
>
> **Article 104(2)** *"Dalam hal kepailitan sebagaimana dimaksud pada ayat (1) terjadi karena kesalahan atau kelalaian Direksi dan harta pailit tidak cukup untuk membayar seluruh kewajiban Perseroan dalam kepailitan tersebut, setiap anggota Direksi secara tanggung renteng bertanggung jawab atas seluruh kewajiban yang tidak terlunasi dari harta pailit tersebut."*
>
> "Where the bankruptcy referred to in paragraph (1) occurs because of the fault or negligence of the Board of Directors and the bankruptcy estate is insufficient to pay all of the Company's obligations in the bankruptcy, each member of the Board of Directors is jointly and severally liable for all obligations remaining unpaid from the bankruptcy estate."

The provision should not be read as strict liability. Nor is an estate deficit sufficient by itself. The statutory language requires a causal link between culpable director conduct and the bankruptcy. In practical litigation, the claimant must therefore identify the conduct said to constitute fault or negligence and explain why that conduct caused or materially contributed to the company's bankruptcy. The insufficiency of the bankruptcy estate is a further condition defining the amount of the potential personal exposure (Indrawati et al., 2021; Isfardiyana, 2014; Panalaga, 2023).

> **Article 104(3):** *"Tanggung jawab sebagaimana dimaksud pada ayat (2) berlaku juga bagi anggota Direksi yang salah atau lalai yang pernah menjabat sebagai anggota Direksi dalam jangka waktu 5 (lima) tahun sebelum putusan pernyataan pailit diucapkan."*
>
> "The liability referred to in paragraph (2) also applies to members of the Board of Directors who were at fault or negligent and who served as members of the Board of Directors within the five-year period preceding the pronouncement of the bankruptcy declaration."

Paragraph (3) is also narrower than a general five-year look-back. Liability applies to former directors who were themselves at fault or negligent and who served within the five years preceding the bankruptcy declaration. The statute does not impose automatic liability on everyone who happened to sit on the board during that period. A former director's role, period of service, participation in the relevant decision, and access to information remain relevant to attribution of responsibility.

> **Article 104(4):** *"Anggota Direksi tidak bertanggungjawab atas kepailitan Perseroan sebagaimana dimaksud pada ayat (2) apabila dapat membuktikan: (a) kepailitan tersebut bukan karena kesalahan atau kelalaiannya; (b) telah melakukan pengurusan dengan itikad baik, kehati-hatian, dan penuh tanggungjawab untuk kepentingan Perseroan dan sesuai dengan maksud dan tujuan Perseroan; (c) tidak mempunyai benturan kepentingan baik langsung maupun tidak langsung atas tindakan pengurusan yang dilakukan; dan (d) telah mengambil tindakan untuk mencegah terjadinya kepailitan."*
>
> "A member of the Board of Directors is not liable for the Company's bankruptcy as referred to in paragraph (2) if that member can prove that: (a) the bankruptcy was not caused by the member's fault or negligence; (b) the management was carried out in good faith, with prudence and full responsibility for the interests of the Company and in accordance with its purposes and objectives; (c) the member had no direct or indirect conflict of interest in the management action concerned; and (d) the member took measures to prevent the bankruptcy."

Article 104(4) then provides an individual exculpation mechanism. A director avoids liability by proving that the bankruptcy was not caused by the director's fault or negligence, that management was conducted in good faith, prudently, and responsibly in the interests and purposes of the company, that no direct or indirect conflict of interest existed, and that preventive steps were taken. These conditions resemble the BJR formulation in Article 97(5), but Article 104(4) is tailored to bankruptcy and expressly requires action to prevent the bankruptcy itself.

> **Article 104(5):** *"Ketentuan sebagaimana dimaksud pada ayat (2), ayat (3), dan ayat (4) berlaku juga bagi Direksi dari Perseroan yang dinyatakan pailit berdasarkan gugatan pihak ketiga."*
>
> "The provisions referred to in paragraphs (2), (3), and (4) also apply to the Board of Directors of a Company declared bankrupt on the petition of a third party."
>
> **Official Elucidation of Article 104:** *"Untuk membuktikan kesalahan atau kelalaian Direksi, gugatan diajukan ke pengadilan niaga sesuai dengan ketentuan dalam Undang-Undang tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang."*
>
> "To prove the fault or negligence of the Board of Directors, the claim is brought before the Commercial Court in accordance with the law concerning Bankruptcy and Suspension of Debt Payment Obligations."

The evidentiary structure is therefore best described as two-stage rather than wholly reversed. Article 104(2) contains elements that must be established to activate the statutory liability regime. The Official Elucidation reinforces this reading by stating that a claim is brought before the Commercial Court to prove the Board of Directors' fault or negligence. Article 104(4), however, places the evidentiary burden of personal exculpation on each director. This allocation is defensible because directors ordinarily control board minutes, internal risk assessments, financial reports, professional advice, and other records that can demonstrate how a decision was made. It does not follow that the law conclusively presumes fault merely because a company is insolvent. Paragraph (5) further confirms that the liability and exculpation rules in paragraphs (2)–(4) also apply where the bankruptcy originates from a third-party petition (Prakasa & Sudarwanto, 2025; Putra, 2021; Republic of Indonesia, 2007).

The general patrimonial provisions relied upon in the enforcement analysis are also reproduced for clarity:

> **Civil Code Article 1131:** *"Segala barang-barang bergerak dan tak bergerak milik debitur, baik yang sudah ada maupun yang akan ada, menjadi jaminan untuk perikatan-perikatan perorangan debitur itu."*
>
> "All movable and immovable property belonging to the debtor, whether already existing or arising in the future, serves as security for the debtor's personal obligations."
>
> **Civil Code Article 1132 :** *"Barang-barang itu menjadi jaminan bersama bagi semua kreditur terhadapnya; hasil penjualan barang-barang itu dibagi menurut perbandingan piutang masing-masing kecuali bila di antara para kreditur itu ada alasan-alasan sah untuk didahulukan."*
>
> "Those assets constitute common security for all creditors; the proceeds of their sale are distributed in proportion to each creditor's claim, unless lawful grounds exist for one creditor to have priority over another."

The same caution applies to enforcement against personal property. Articles 1131 and 1132 of the Civil Code express the general patrimonial basis of a debtor's obligations (Republic of Indonesia, 1847). A director's assets do not automatically become part of the corporate bankruptcy estate. They become exposed to civil execution only after the director is personally liable under a valid legal basis and that liability can be enforced through the applicable judicial process. This distinction prevents the bankruptcy estate and the director's private estate from being conceptually merged.

Business Judgment Rule in the Company Law and the Current SOE Law

The source manuscript treated Law No. 1 of 2025 as creating a much stronger BJR for SOE directors than the protection available to private-company directors. The present statutory position requires a more qualified conclusion. Article 9F was indeed introduced in 2025 and expressly states that an SOE director cannot be held legally responsible for a loss if the director proves the prescribed conditions. Yet those conditions substantially reproduce the architecture already visible in Articles 97(5) and 104(4) of the Company Law: absence of fault or negligence, good-faith and prudent management, absence of conflict, and preventive action (Republic of Indonesia, 2007, 2025a).

Law No. 16 of 2025 further changes the comparison. Article 9G, which had stated that SOE directors, commissioners, and supervisory-board members were not state administrators, was deleted. Article 4B was also revised, and its current explanation maintains the distinction between SOE gains or losses and state gains or losses. That financial characterization is relevant to the public-law environment surrounding SOEs, but it should not be converted into a general civil immunity for directors. BJR protection remains conditional on the director proving the statutory requirements, and misconduct, conflict of interest, or culpable management is not immunized by the mere existence of a business loss (Republic of Indonesia, 2025b; Rahman, 2026; Setiawati & Vitrana, 2025).

A Persero also remains a limited liability company. Under the current SOE framework, establishment and operation of Persero companies follow company-law legislation unless the SOE Law determines otherwise. The consequence is that BUMN-specific rules and general Company Law duties should be read cumulatively where they address different matters, and lex specialis reasoning should be used only where the SOE Law actually supplies a different rule. This makes it difficult to describe the current framework as two mutually exclusive BJR regimes.

The more accurate issue is regulatory differentiation. An SOE director operates within additional layers of public ownership, state-asset governance, audit, and public accountability, while a private director does not. At the same time, the core process expected of directors is similar: rational decision-making based on adequate information, good faith, due care, company purpose, and freedom from disabling conflicts. Equality before the law does not require identical statutory wording for legally different institutions. A constitutional equality claim would require a separate demonstration that similarly situated persons are treated differently without a sufficient legal justification; the statutory difference alone does not establish that conclusion.

Legal Dimension	**Private / General Company Directors**	**SOE Directors under Current 2025 Framework**	**Editorial Assessment**
General loss liability	Article 97(3) and exculpation under Article 97(5) of Law No. 40/2007	Article 9F SOE Law plus general company-law rules for Persero unless specifically displaced	Both systems use process-based criteria; SOE rule is not an absolute shield.
Bankruptcy-specific liability	Article 104(2)-(4): fault/negligence + insufficient estate; individual exculpation	Persero remains subject to Company Law unless the SOE Law provides otherwise	No general statutory exemption from Article 104 is created merely by SOE status.

Legal Dimension	Private / General Company Directors	SOE Directors under Current 2025 Framework	Editorial Assessment
Burden of proof	Claimant must establish the Article 104(2) trigger; director bears the Article 104(4) exculpatory burden	Article 9F expressly requires the director to prove statutory protective conditions	The schemes allocate proof differently by issue, not through automatic immunity.
Status of SOE loss	Not applicable as a special category	Article 4B as amended by Law No. 16/2025 concerns SOE gains/losses and their legal characterization	Public-finance characterization should not be conflated with civil BJR liability.
State-administrator status	Not applicable	Article 9G introduced by Law No. 1/2025 was deleted by Law No. 16/2025	The deleted provision cannot support a 2026 claim of categorical non-state-administrator status.

Table 1. Current relationship between Article 104, the Company Law BJR, and the 2025 SOE framework

Comparative Insights: Business Risk and Financial Distress

Comparative scholarship helps explain why a process-based standard matters. In United States corporate law, the BJR has long been understood as limiting judicial second-guessing of disinterested and informed board decisions. Bainbridge (2004) describes it as an abstention doctrine, while Eisenberg (1993) distinguishes the standard directors should follow from the more deferential standard courts may use when reviewing conduct. Both approaches caution against treating an unsuccessful outcome as proof that the decision was negligent when made.

The insolvency context changes the analysis because the economic position of creditors becomes more vulnerable. Keay's work on directors' duties to creditors shows that common-law systems struggle with the point at which financial distress should alter directors' decision-making obligations. The same literature warns that a trigger set too early may make directors excessively defensive, while a trigger set too late may permit value-destroying risk to be shifted to creditors (Keay, 2001, 2003, 2005, 2015). Recent

Anglo-Australian comparison confirms that the timing and intensity of creditor-oriented duties remain contested even in mature jurisdictions (Keay & Lombard, 2024).

Australia offers a useful functional comparison because director liability for insolvent trading is expressly statutory. The Corporations Act 2001 imposes duties concerning debts incurred while insolvent and now operates alongside a safe-harbour framework intended to encourage reasonable restructuring efforts (Australia, 2001). Empirical and policy research on the Australian system illustrates the same tension found in Article 104: law must deter directors from deepening creditor losses without punishing every attempt to rescue a financially distressed company (Brotchie & Morrison, 2020).

These comparative materials do not justify importing foreign tests mechanically into Indonesian law. Delaware gross-negligence concepts, United Kingdom creditor-duty doctrine, and Australian insolvent-trading rules arise from different statutory and procedural systems. Their value is methodological. They show why Indonesian courts should examine the quality of the decision-making process, the company's financial condition at the time, the information reasonably available, conflicts of interest, and the steps taken to protect the company and creditors instead of reasoning backward from bankruptcy alone.

Operationalizing Good Faith, Due Care, and Bankruptcy Prevention

Harmonization should begin with evidence rather than a new abstract definition. Good faith is difficult to reduce to a single formula because it concerns loyalty, purpose, and honesty. Courts can nevertheless assess observable indicators: whether the director disclosed material interests, sought information proportionate to the significance of the transaction, considered contrary advice, used competent professional input where necessary, and documented the commercial rationale before the decision was implemented (Bainbridge, 2004; Rissy, 2020).

Due care should also be evaluated prospectively. A court should ask what a prudent director could reasonably have known at the time rather than whether the decision later produced a loss. Board minutes, cash-flow forecasts, solvency assessments, risk registers, audit findings, legal opinions, and alternative financing scenarios are relevant because they demonstrate the process actually used. An outcome-oriented test would collapse BJR protection precisely when it is most needed: after a decision fails.

Bankruptcy prevention under Article 104(4)(d) deserves a more specific interpretation than the general mitigation language of Article 97(5). Once serious financial distress is apparent, appropriate preventive measures may include convening the board, obtaining updated cash-flow and liability information, stopping transactions that worsen the deficit without a credible restructuring rationale, seeking professional restructuring advice, negotiating with creditors, and considering PKPU or other lawful rescue mechanisms. The appropriate response will depend on the company's condition; the statute does not require a director to guarantee that bankruptcy will be avoided.

Good Corporate Governance can support this analysis but should not become an automatic safe harbour. Formal compliance with internal procedures is strong evidence of a responsible process, yet it cannot validate a decision taken with undisclosed conflicts, manipulated information, or an improper purpose. Conversely, a minor procedural defect should not automatically establish fault if the decision was substantively informed, loyal, and reasonably directed toward the company's interests. This balanced approach is consistent with the broader distinction between standards of conduct and standards of review (Eisenberg, 1993).

For multi-member boards, courts should also resist undifferentiated collective liability. Article 104 uses joint and several liability, but paragraphs (3) and (4) still make fault, negligence, and exculpation relevant to individual directors. The record should therefore identify who participated, who dissented, who possessed specialized responsibility, what information each director received, and what preventive steps each director took. A documented dissent or demand for corrective action may be highly relevant even though it does not automatically end the inquiry.

A Harmonized Judicial Framework for Article 104

A practical framework for Commercial Courts can be organized in five stages. First, confirm the company's bankruptcy and the insufficiency of the bankruptcy estate. Second, identify the director conduct alleged to constitute fault or negligence and determine whether the conduct caused or materially contributed to the bankruptcy. Third, determine which current or former directors fall within the relevant period and had a legally meaningful connection to the impugned management. Fourth, evaluate each director's Article 104(4) exculpation evidence. Fifth, determine the amount and enforcement consequences of any personal liability without treating the director's assets as part of the corporate estate before liability is adjudicated.

The same process-oriented indicators should inform Article 97(5) and SOE Article 9F to the extent their language overlaps. A separate Supreme Court guideline or consistent jurisprudential test could be useful, but it should clarify rather than replace the statutory elements. The guideline should identify minimum evidentiary categories, explain the relationship between fault and business risk, and state that financial loss alone does not prove breach. It should also preserve room for stronger scrutiny where conflicts of interest, self-dealing, fraud, concealment, or decisions taken after obvious insolvency are alleged.

Legislative amendment is not the only route. The Company Law already contains the essential architecture of BJR and bankruptcy-specific exculpation. The more immediate problem is interpretive consistency. Updating Article 104 may eventually be useful to clarify causation, the procedural burden, and the position of former directors, but judicial standards can be developed now from the existing text. The current SOE Law likewise provides an opportunity to align terminology without implying that SOE directors deserve a categorically higher level of private-law protection.

This approach also better fits creditor protection. During financial distress, excessive insulation of directors can encourage risk shifting, while excessive personal exposure can discourage viable restructuring and competent management. The objective is not maximal director protection or maximal creditor recovery in every case. It is a predictable legal test that imposes personal responsibility when culpable management causes bankruptcy and preserves decision-making space for directors who act loyally, carefully, and on an informed basis (Keay, 2003, 2015; Keay & Lombard, 2024).

Conclusion

Article 104 of the Company Law creates an exceptional route from corporate bankruptcy to directors' personal liability, but the route is narrower than the source manuscript originally suggested. Bankruptcy and an insufficient estate do not automatically establish director fault. Article 104(2) requires bankruptcy caused by fault or negligence, while Article 104(4) gives each director an exculpatory burden to demonstrate absence of personal fault, good-faith and prudent management, absence of conflict, and preventive action. The most accurate description is therefore a two-stage evidentiary structure rather than a complete reversal of the burden of proof.

The comparison with SOE directors must also use the current 2025 statutory framework. Article 9F introduced an express BJR for SOE directors, but its substantive criteria largely parallel those in Articles 97(5) and 104(4) of the Company Law. Law No. 16 of 2025 subsequently deleted Article 9G and revised Article 4B. These changes mean that the current issue is not a simple contradiction between an unprotected private-director regime and an absolute SOE immunity regime. Persero companies remain connected to general company law, while the SOE statute adds a distinct public-ownership and governance context.

For publication purposes, the more defensible reform proposal is harmonization of interpretation and evidence. Courts should separate ordinary business risk from culpable management by examining the decision-making process, contemporaneous financial information, conflicts of interest, professional advice, solvency indicators, and steps taken to prevent or mitigate bankruptcy. A Supreme Court guideline could improve consistency if it follows the statutory sequence rather than creating a new immunity. This model protects creditors when director fault causes an unpayable deficit while preserving the decision-making space required for legitimate corporate risk-taking.

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