RUCH PRAWNICZY, EKONOMICZNY I SOCJOLOGICZNY
Rok LXXXVI – zeszyt 2 – 2024
https://doi.org/10.14746/rpeis.2024.86.2.08

ARIEL MUCHA[a]

THE LAW APPLICABLE TO CLAIMS FOR BREACH OF DUTY OF CARE BY FOREIGN CONTROLLING COMPANIES AND THEIR DIRECTORS UNDER EU LAW

PRAWO WŁAŚCIWE DLA ROSZCZEŃ Z TYTUŁU NARUSZENIA OBOWIĄZKU STARANNOŚCI PRZEZ ZAGRANICZNE SPÓŁKI KONTROLUJĄCE I ICH DYREKTORÓW NA GRUNCIE PRAWA UE

The research presented in the article aims to identify the criteria for determining the law applicable to third party claims against board members and parent companies for non-contractual obligations. The article examines the provisions of EU law and the case law of the Courts of Justice on the basis of the dogmatic method, combined with elements assessing the economic efficiency of the identified approaches. Research on this topic is prompted by the absence of an adequate legal framework determining the qualification of the claims in question. The Rome II Regulation only provides for the exclusion of company law claims from its scope. However, this exclusion does not provide criteria for determining which claims fall under company law. This issue was recently addressed by the Court of Justice in the case of *BMA AG*, C-498/20, concerning the scope of the law applicable to the liability of a German company for breach of the general duty of care towards the creditors of a Dutch subsidiary. The Court held that such a claim should be classified as *lex delicti*. The findings of the research suggest that the Court of Justice has not offered clear criteria that would enable national authorities to distinguish between corporate and tort claims. Meanwhile, it seems that there are more arguments in favour of the corporate nature of claims arising from decisions relating to the management of the company's assets.

Keywords: *BMA AG*; C-498/20; directors' liability; corporate law

Celem opracowania jest określenie kryteriów wyznaczenia prawa właściwego dla niektórych roszczeń osób trzecich wobec członków zarządu spółki z tytułu zobowiązań pozaumownych. Działanie badawcze zostało zawężone do przepisów prawa unijnego i orzecznictwa Trybunały Sprawiedliwości zgodnie z metodą dogmatyczną z elementami oceny ekonomicznej efektywności wybranych rozwiązań. Podjęcie badań we wskazanym obszarze wynika z braku stosownych ram prawnych przesądzających kwestię kwalifikacji tego rodzaju roszczeń. Rozporządzenie Rzym II przewiduje jedynie wyłączenie ze swojego zakresu zastosowania roszczeń wynikających z prawa spółek. Wyłączenie to jednak nie zawiera kryteriów pozwalających określić, które roszczenia przynależą do prawa spółek. Stosunkowo niedawno problem ten został poruszony przez Trybunał Sprawiedliwości w sprawie *BMA AG*, C-498/20, w zakresie prawa właściwego dla oceny odpowiedzialności niemieckiej spółki za naruszenie generalnego obowiązku dochowania należytej staranności wie-

[a] Jagiellonian University in Kraków, Poland / Uniwersytet Jagielloński w Krakowie, Polska
ariel.mucha@uj.edu.pl, https://orcid.org/0000-0001-5983-0752

RPEiS 86(2), 2024: 155–177. © WPiA UAM, 2024. ISSN (Online) 2543-9170 ISSN (Print) 0035-9629
Open Access article, distributed under the terms of the CC licence (BY, https://creativecommons.org/licenses/by/4.0/deed.en).

rzycielom holenderskiej spółki zależnej. Trybunał uznał, że takie roszczenie może zostać zakwalifikowane jako mające charakter deliktowy (*lex delicti*). Wnioski z przeprowadzonych badań wskazują, że Trybunał Sprawiedliwości nie przedstawił jednak jasnych kryteriów, które umożliwiłyby organom odpowiednią kwalifikację roszczeń wynikających z działalności spółki i jej funkcjonariuszy wobec osób trzecich. Wydaje się przy tym, że w sytuacji roszczeń wynikających z decyzji odnoszących się do zarządu majątkiem spółki więcej argumentów przemawia za ich prawnospółkowym charakterem.

Słowa kluczowe: *BMA AG*; C-498/20; odpowiedzialność członków zarządu; międzynarodowe prawo spółek

I. INTRODUCTORY REMARKS

While there have been some remarkable achievements in the EU company law, so far no comprehensive harmonization of conflict of corporate rules has been proposed by the EU authorities. At the same time, other attempts to regulate international private law in the EU only excluded corporate matters from their scope. This practice is reflected in Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)[1] and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II),[2] both of which harmonize the European private international law regimes for contractual and non-contractual liability respectively. Although convenient, this clever way out of the problem poses various challenges to the jurisprudence of the EU Court of Justice. It took 20 years from *Daily Mail*[3] to *Cartesio*[4] to address the question of how to reconcile theories of real and register seat with the EU primary law.[5] In this regard, a series of European Court of Justice decisions curb application of the real seat doctrine pursuant to EU Treaty Articles 43 and 48.

Although fundamental, this seems like a drop in the ocean when trying to identify and resolve all the conflict of laws issues involved in doing cross-border corporate business. One of these is the law applicable to the duties and liabilities of directors who manage companies that do business internationally through branches or subsidiaries, or that simply do business without a formal establishment abroad. This aspect of international corporate law could be taken for granted, but this is far from the case. In recent years, the traditional

---

[1] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal [OJ] L 177, 4 July 2008, pp. 6–16.

[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal [OJ] L 199, 31 July 2007, pp. 40–49.

[3] Case 81/87, *Daily Mail and General Trust plc*, EU:C:1988:456.

[4] Case C-210/06, *Cartesio Oktató és Szolgáltató bt.*, EU:C:2008:723.

[5] For a general overview of the real seat doctrine, see Ebke (2002, p. 1015).

company law characterization faces more and more deviations in which more stakeholder-oriented fields of law are gaining in importance. This might be partly explained by liberation of certain protection instruments in company law in the last 20 years, such as capital maintenance rules. At the same time, some Europe countries have been dealing with the fallout of letterbox companies (Ringe, 2013, p. 230). Against this background, corporate directors' duties may be qualified either as internal affairs of the company or the problem for other areas of law like tort law, insolvency law, or securities law. The scholarly literature and jurisprudence are both far from finding clear-cut criteria that will define the boundaries of corporate law (Gerner-Beuerle et al., 2019, p. 120). There are only some general principles, without clear guidance, which seem unsatisfactory at best. This may be due to the heterogeneous nature of the various duties imposed on directors or other entities such as controlling companies in international group scenarios. As a result, it is unclear which substantive law governs claims against directors or other entities for mismanagement of foreign companies in an international context. Meanwhile, for internationally active companies operating in various jurisdictions, the question of the applicable law in such situations has significant value, as differences between the Member States' legal standards persist in this field. From the other perspective, stakeholders lack the certainty as to under which law they may demand justice.

Somewhat surprisingly, in Europe the issue of corporate directors' duties and liability has only recently been addressed in the Court decisions. The latest judgment of the Court of Justice in *ZK v BMA Braunschweigische Maschinenbauanstalt AG*, C-498/20,[6] attempted to answer the question of how to classify the duties and liabilities of board members in international law terms. At the same time, it is another judgment that directly touches upon the limits of corporate law in Europe.[7] Still, however, the jurisprudence in the area in question actually gives rise to problems, instead of solving real-life issues. At the same time, it shows lack of understanding when it comes to the protection of third parties against corporate wrongful activities.

Against this general background, the purpose of this paper is to evaluate the approach undertaken by the Court as regards the international distribution of rules capable of handling problems arising from cross-border corporate business. The key questions it seeks to answer are: do the Luxembourg Court's rulings offer clear criteria that minimize the risk of interpretative noise that may occur when the lines between company law and tort law are drawn, and to what extent the Court had the capacity to integrate and address the concerns arising from the cross-border effects of directors' decisions and changing social conditions. The question becomes relevant in the case of directors' liability for mismanagement of the foreign company's assets, directly or through a chain of controlled companies, which constitutes a breach of the directors' duty of care and at the same time a tortious act that violates the

[6] Case C-498/20, *ZK v BMA Braunschweigische Maschinenbauanstalt AG*, EU:C:2022:173.

[7] See case C-594/14, *Kornhaas*, EU:C:2015:806.

general principle of *nemine laedere* to the detriment of shareholders, creditors or other third parties. Considering how broad the topic is, this paper is not meant to be exhaustive but rather explorative. It therefore focuses solely on the issue of directors' liability for management errors, as addressed in particular in the recent *BMA* judgment of the Court of Justice, and identifies the main concerns that may arise from this judgment.

The analysis begins by outlining the general problem of qualifying directors' duties and liability in international private law (Section II). This is followed by presenting the state of European law and the *BMA* case (Sections III and IV). The subsequent section evaluates the outcome of this case and presents various possible solutions to the underlying problem (Section V and VI). The final section provides a concluding remark.

II. THE GENERAL PROBLEM OF THE INTERNATIONAL CHARACTERIZATION OF DIRECTORS' DUTIES: BETWEEN CORPORATE AND TORT LAW

1. The general problem of characterization

In the context of international private law, characterization (qualification/classification) is a process of assigning facts (or a legal question)[8] to one or more department (category) of private law.[9] In a nutshell, the dominant approach in Europe is to look for the category of law that usually deals with a particular type of problem and is therefore most effective when a solution is sought. In this method, the line of argument is usually based on the juxtaposition of the underlying problem with the objectives and function of a particular area (rules, institutions) of substantive law.[10] Once the field of law has been defined, it is possible to identify, firstly, an appropriate conflict rule and, secondly, the applicable national law. Finally, it is necessary to verify whether the selected national rule pursues the same objectives and functions as those of the field of law identified in the first stage of the analysis.[11]

[8] Indeed, there is no common view in the literature as to what constitutes an object of characterization. For a general discussion of this issue, see Collier (2001, p. 15) and Baratta (2009, p. 156).

[9] Formally, it can also be understood as a phase of interpretation of choice of law rules: '[t]he process of subsuming claims (or defences), as formulated by the parties, under one of several domestic conflict rules requires construing the category of the corresponding legal institution' (Baratta, 2009, p. 158).

[10] See case C-594/14 *Kornhaas*, in which the Court struggled to align a German rule making directors liable to creditors of companies on the brink of insolvency (§ 64 GmbHG) with the objectives of insolvency proceedings set out in Regulation 1346/2000, now replaced by Regulation 2015/848; see in doctrine Looscheiders (2004, p. 33).

[11] This is also known as a two-step qualification, which consists of two essential questions: (i) does a given factual situation (legal question) correspond to the scope of the conflict rule (definition of the legal field)? (ii) does the indicated legal system contain a rule that matches the objectives of the given legal field identified by the conflict rule in step one?

Neither the European legislator nor the Court of Justice has developed general methods of characterization. Instead, this is determined by the subject scope of the scattered European choice-of-law rules (Heiss & Kaufmann--Mohi, 2016, p. 90), followed by contextual and functional interpretation by the Court of Justice in individual cases (for more see Baratta, 2009, pp. 162–163). The general canon of interpretation of EU law consists of: 'an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question' (case *Interedil Srl*, para. 42; see Bariatti, 2017, p. 361).[12] This means that the concepts used in individual national laws will not always coincide with those used to interpret EU law,[13] unless the Court of Justice decides to refer to the prevailing understanding in the Member States[14] or even in one Member State.[15] Translated into the conflict of laws scenario, the method consists, first, in examining and interpreting the EU choice-of-law rules, where they exist, in particular those determining the scope of EU legislative acts (Bariatti, 2017, p. 364). Secondly, in the light of the conclusions drawn from the preceding stage of analysis, the Court of Justice provides the general guidance necessary for the examination of the national substantive rule presumed to be applicable in the case (*Kornhaas*, paras. 19–21). The final call is left to the competent national authorities, who ultimately decide whether the national rules at stake fall within a particular category of law.

It is important to note that the most glaring flaw in the Court's method as outlined is that it does not seek the most optimal solution to the problem in the case from among the many possibilities offered by the various national substantive laws. In particular, it overlooks the obvious fact that rules falling within different branches of the law may act as functional substitutes. In actual fact, it is not uncommon for the Court to focus on a single rule proposed by the national institution submitting the preliminary question. It therefore lacks an overall view of the impact of a choice of law in the given context.[16] In consequence, rather than the most effective allocation of rules to the problem at hand, it focuses on the consistency and uniformity of EU law.

2. The problem of characterizing directors' duties

Having outlined the general problem of characterization, it is now important to consider which category covers the duties arising from the status of company director, namely how these duties are treated under private international law. In general, the core aspects of companies are subject to the *lex*

---

[12] Case C-396/09, *Interedil Srl*, EU:C:2011:671.

[13] It also eliminates the application of the *lex fori* approach in a strict sense in the course of the characterization.

[14] See, e.g. Case 29/76, *LTU v. Eurocontrol*; in the literature see Heiss & Kaufmann-Mohi (2016, p. 92).

[15] Case T-43/90, *García*, EU:T:1992:120, para. 36.

[16] See remarks made by Ringe (2017, p. 274) by reference to the consequences of C-594/14 *Kornhaas*.

societatis. This is the law that applies according to the criterion that most effectively binds the company to a particular legal system. The latter is crucial because the very existence of the company depends on the rules laid down by national law. As a reminder, this was stressed in the following well-known wording of the *Daily Maily* judgment: '[i]n that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning' (para. 19). Although Article 54 TFEU and the related case law do not provide a single criterion, given that Member States are obliged to recognize foreign corporate structures established in other European countries, this means that the best strategy is to apply the register seat theory (or one of its variations) in national law. Otherwise, domestic companies would be at a disadvantage when compared to foreign entities that do business internationally.

However, a mere decision on the law applicable to the company does not highlight the extent of matters covered by the conflict of laws indication. Traditionally, the company law embraces rules concerning the creation, internal relation and liquidation of the company. However, when it comes to specific circumstances, certain matters positioned between spheres of internal affairs and the external world may become controversial. These situations might be of particular interest for two or more fields of law with different axiology and aims. From this reason, without placing certain boundaries of the company law vis-à-vis other fields of law, some inconsistencies and frictions may occur between legal systems. In general, it may lead to rule gaps that create loopholes in legal protection, or rule overlaps – two or more protective systems will be imposed, causing excessive regulatory burdens.

In this context, the duties and liability of corporate officers pose specific difficulties that amplify inherent issues arising from international characterizations. Director-shareholder relationships are predicated on trust and confidence. Due to the nature of this relationship, a special legal regime is required. Therefore, although directors' duties arise mostly from statutory law, with some potential modifications in a corporate contract, they belong to corporate law rather than to general tort law duties. Corporate law stipulates two fundamental obligations for directors: duty of care and duty of loyalty. These duties exist by virtue of their office. By definition, duty of care means exercising reasonable care and skill in the business affairs of the company. In many jurisdictions, directors are allowed a great deal of discretion in conducting corporate business (managerial freedom) referred to as the business judgment rule and other legal devices.[17] As for the duty of loyalty, directors' powers are suppressed in cases of conflict of interest or conflict with general law.

Even though the fundamental obligations of directors follow from the fiduciary duties to shareholders, there are many other heterogenous duties em-

[17] It must be added that such mechanisms might be characterized under the categories of substantive or procedural law.

bedded in various legal mechanisms. Depending on the area of law, directors may be subject to different duties, such as public law, accounting law and securities market law. In addition, the intensity of the duty owed to some stakeholders may change during the life of the company. For example, once insolvency becomes inevitable, it is recognized in some jurisdictions that the interests of creditors may become paramount.[18] The main reason for this is that insolvency law is concerned with the equitable distribution of the insolvent company's assets to third parties. Company law, on the other hand, does not deal with the management of the company in financial distress.

Overall, there may be some grey areas ('outer band'[19]) between company law and other areas of law, and therefore certain obligations and liabilities may be characterized in different ways. In the end, however, a national approach to business and whether or not the corporate veil will provide managers with certain immunity[20] will have a major effect on how the business operates. Accordingly, certain situations may favour company law over other areas of law. The reason for this is that company law is superior to other areas of law when it comes to establishing effective asset management and encouraging professionals to take reasonable, albeit risky, decisions. This is consistent with the broader goals of increasing wealth in the economy and society in general. Moreover, beyond mere compensation, company law motivates directors and aligns their actions with corporate and social objectives. In general, it occurs through corporate governance rules and by market control (pricing mechanism), for example directors are eliminated through the dismissal mechanism that can be used after the successful takeover of the company. It may be debated whether this mechanism is always effective. Nevertheless, the main function of corporate rules is to deter management from violating corporate governance rules, mainly to prevent certain undesirable situations rather than to compensate for the harmful effects. In this context, as noted above, in addition to their fiduciary duties, directors have other duties and obligations arising from other legal relationships and general duties, such as, in some jurisdictions, the general duty of care based on the *nemine laedere* principle (*allgemeine Schädigungsverbot*). The latter has detailed characteristics in tort law, where it is assumed that the primary objective is compensation, and the secondary objective is future deterrence (Magnus, 2005, p. 150). It is therefore doubtful whether general tort claims are suitable to properly shape the corporate decision-making process. In most cases, directors will find it difficult to bear the financial consequences of their decisions. Thus, the primary effect will only be to reduce the ability of managers to make sound business

[18] For an overview of the different approaches to this issue, see Gurrea-Martínez (2021, pp. 378–386).

[19] The term was used by the Delaware Supreme Court in *Salzberg v. Sciabacucchi*, No. 346, 2019 (Del. March 18, 2020).

[20] It can also work in the opposite direction, and the applicable company law may be more rigid than the potential tort law indicated by the place where the damage occurred. However, in more situations, the company rules are more nuanced about the particularities of directors' duties and their liabilities than the general tort rules.

decisions, rather than to guarantee adequate compensation to harmed individuals.

The other factor that can influence the characterization issue is who is compensated first out of the directors' pockets: the company or a third party. This issue arises from the nature of a company as a vehicle for wealth accumulation. In general, directors can be held directly accountable to the company and/or third parties. Next, it is necessary to distinguish situations in which the company suffers direct damage, and the financial situation of the creditors is only a derivative of this, on the one hand, and the situation in which the creditors incur direct damage, on the other. While the latter is clear, the problem of derivative damage may give rise to different models of solving this problem. The creditors may be granted a direct claim or a claim to be satisfied from the company's assets increased by the amount of the repaired damage, or the creditor's situation will only improve if the director leaves the company as a result of being dismissed by the shareholders (no legal claim). Finally, there is the potential for conflict between procedural and substantive rules, which can add to the confusion, such as the standards for the burden of proof.

III. CURRENT STATE OF THE CONFLICT OF LAWS IN THE EU

The analysis now turns to the EU normative perspective. As mentioned previously, the Court of Justice in the judgments *Centros*,[21] *Überseering*[22] and *Inspire Art*[23] has demonstrated that each Member State has the right to set its own rules when it comes to the law applicable to companies registered on its territory. Likewise, Member States must accept foreign companies established in other Member States, regardless of where they carry out their activities. Defining the connecting factor for the *lex societatis* is only the very first step in determining the international situation of a company. The next step is to delineate the boundaries of the *lex societatis*: the matters that are normally considered to fall within this body of law. In the US this is commonly addressed, not without controversy and many practical issues, by the so-called 'internal affairs doctrine' (Manesh, 2021, p. 524). In Europe, there are no rules on the law applicable to companies or on the scope of the *lex societatis*. Informal initiatives, like the draft of the Regulation on the law applicable to companies and other bodies prepared by the European Group for Private International Law,[24] did not gain much recognition among EU institutions. Only the Rome I and Rome II Regulations provide some clues

[21] Case C-212/97, *Centros*, EU:C:1999:126.

[22] Case C-208/00, *Überseering*, EU:C:2002:632.

[23] Case C-167/0, *Inspire Art Ltd.*, EU:C:2003:512.

[24] See draft of Regulation X on the law applicable to companies and other bodies, https://gedip-egpil.eu/wp-content/uploads/2016/09/Societe-TxtSousGroup-1.pdf

as to how to approach this issue.[25] However, the strategy adopted there takes the form of an exception to the scope of these acts, so that neither Regulation contains a general provision on characterization. Accordingly, Article 1(2)(f) of the Rome I Regulation excludes the following from its ambit: 'companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body'.[26] Giuliano and Lagarde's report on the Rome Convention[27] provides a certain amount of clarification on the problem of the boundaries between tort law and company law: '[c]onfirming this exclusion, the Group stated that it affects all the complex acts (contractual, administrative, registration) which are necessary to the creation of a company or firm and to the regulation of its internal organization and winding-up, i.e. acts which fall within the scope of company law. … Examples of "internal organization" are: the calling of meetings, the right to vote, the necessary quorum, the appointment of officers of the company or firm, etc. "Winding-up" would cover either the termination of the company or firm as provided by its constitution or by operation of law, or its disappearance by merger or other similar process' (p. 12).

The EU legislative acts do not offer any further guidance on international company law rules, as separate legislation to unify them has not yet been formulated. As a result, much remains to be interpreted and clarified by the EU Court of Justice.

IV. THE POSITION OF THE LUXEMBOURG COURT IN THE *BMA* CASE

The following analysis is based on the Luxembourg Court's interpretation of the Rome I and Rome II Regulations. Although these are the main pieces of European harmonization in the field of the law applicable to contractual and non-contractual obligations, with the mentioned notable exception of company matters in both cases, the Court of Justice has provided some valuable considerations in recent years in order to identify the type of cases that should be subject to *the lex societatis*.

[25] Some basic guidance on the scope of company law can also be found, e.g., by interpreting Article 1(g) of the Succession Regulation, OJ L 201, 27 July 2012, pp. 107–134.

[26] A similar exclusion from the scope of EU law can be found in Article 1(2)(d) Rome II, with an addition of 'the personal liability of auditors to a company or to its members in the statutory audits of accounting documents.'

[27] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, OJ C 282, 31 October 1980, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31980Y1031%2801%29

As a starting point, the *Kerr* decisions[28] referred to 'structural aspects of companies' (para. 33) as excluded from the scope of the Rome I Regulation alongside 'acts which are necessary to the creation of a company … and winding-up'.[29] However, it was only recently that this concept was enhanced with some further details. In *BMA*, the Court ruled on the law applicable to the legal claims brought under the Dutch 'Peeters Gatzen' suit,[30] among other problems addressed.[31] The case was based on a rather straightforward set of facts: the liquidator in the bankruptcy of a Dutch company whose debts had become irrecoverable brought an action for damages (Peeters Gatzen suit) against the German grandparent company (BMA AG). The claim was based on the fact that the grandparent company had stopped funding the Dutch company, thereby allegedly breaching its duty of care to the Dutch company's creditors.[32] From the description of the facts provided by the Attorney General and the Court, it appears that there were differences of opinion between the parties as to the liability of a German parent company which, in their view, acted either as a shadow director or (indirect) shareholder of an insolvent Dutch company. Nevertheless, this issue has been translated into a legal question of what law applies to compensation for damage caused by a breach of a shareholder's or director's duty of care to the outside world. Put another way, the issue at stake was whether a duty of care imposed on directors or shareholders is governed only by the law of the company's registered office (*lex societatis*), or whether it changes the rules of the game on directors' liability when the latter is derived from the more general principle of not causing harm (*lex loci delicti*). The special focus of the Court of Justice on the classification of tort law vs. company law followed from the mentioned exclusion laid down in Article 1(2)(d) of the Rome II Regulation.

In her opinion, the Advocate General (AG)[33] emphasizes that the catalogue in Article 1(2)(d) of the Rome II Regulation is only exemplary and that caution should therefore be exercised in classifying any matter under company law or tort law. It is true that even the enumerated matters can be questioned in this context, as they represent a variety of situations that are not always considered part of the corporate law framework. At first sight, Article 1(2)(d) of the Rome II Regulation appears to be too broad and should therefore be

---

[28] In fact, the *Kerr* decision does not concern a company but a group without legal personality (unincorporated association) which manages a joint ownership of property in a residential block. Thus, assuming that the problem in this case was of a contractual nature, the Court did not pay much attention to the question of the scope of the *lex societatis*.

[29] See also case C-272/18, *Verein für Konsumenteninformation*, EU:C:2019:827, para. 35.

[30] An action that was accepted for the first time in the case-law of the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) by judgment of 14 January 1983.

[31] That is to say, the first three questions asked by the national court relate to jurisdiction and only the fourth to conflict of laws.

[32] The claim was not based on any former contractual relationship between a liable person and a person who has suffered damage.

[33] Opinion of Advocate General Manuel Campos Sánchez-Bordona delivered on 28 October 2021, Case C-498/20, *ZK v BMA Braunschweigische Maschinenbauanstalt AG*, ECLI:EU:C:2021:888.

narrowed down, the Advocate General maintains. As a result, she argues that certain criteria must be taken into account in order to determine what constitutes company law. Accordingly, she proposes a distinction between the internal 'life' of the company (excluded from the scope of Rome II) and external relations (covered by the Regulations). This follows the reasoning already established in the *Kerr* decision. In the next step, she identifies the matters covered by Article 1(2)(d) of Rome II which relate to the company and which do not. On the personal liability of shareholders and directors for company obligations, the Advocate General questions whether this is purely internal to the company (para. 51). As she stresses: '[i]n particular, as regards the personal liability of shareholders and directors for the company's obligations, the Rome II exemption is understandable as the company law context prevails over all other considerations. *If a provision on non-contractual liability is so rooted in considerations specific to the company law context that it is irrelevant outside it* [emphasis added], then this takes precedence for classification purposes' (para. 53). She then acknowledges: 'the implementation of this criterion is not easy not only because of the wording of the Rome II Regulation, but also because of the sheer uncertainty in the field of company law' (para. 55). A final test offered by the Advocate General is to determine whether liability is based on company law, on breach of the general *neminem laedere* obligation or on some other specific ground not related to company law (para. 56). She notes that Rome II excludes liability to third parties for breaches of corporate duties of care or loyalty. However, a breach of a general duty not to harm third parties can be classified as a tort. The Advocate General gives a few examples excluded from Rome II, such as: (1) breach of the obligation to file for bankruptcy, (2) the liability of shareholders for delays in setting up a company, and (3) a claim against members of the board of directors who are responsible for the debts of the company if they fail to carry out certain formal acts aimed at controlling the financial situation of that company when it does not have sufficient financial resources (para. 63). Conversely, claims subject to Rome II must fulfil two conditions: 1) the actions of the directors have directly harmed the interests of third parties, 2) they are covered by the general liability rules (para. 64). Furthermore, she stresses that the formal national assignment of a claim to corporate or another body of law should not be interpreted as conclusive (para. 59). Similarly, when it comes to the procedural rules, a claim may be filed as a derivative or direct action (para. 61). A comprehensive analysis of the situation is needed here, including what needs to be proved and defences offered to directors against the company and creditors (para. 62).

Following the reasoning of the AG's opinion, the Court in *BMA* case draws the line between corporate law and the outer world by reference to the 'structural aspects of companies' (para. 52). The Court provides little explanation of this concept, stating that the personal liability of officers and directors as such for the obligations of the company is not an element covered by this definition (para. 53). As the Court points out, the purpose of the exclusion is to ensure that certain questions relating to the operation and organization of the company are governed by a single body of law – the *lex societatis* – in order to ensure

consistency and effectiveness. Company law should be distinguished from other areas of law by looking at the source of non-contractual obligations, which may either be related to company law or have an external purpose (para. 54). What matters here is to whom a director owes a duty of care. Accordingly, the Rome II Regulation would apply if that duty stemmed from the 'general duty of care *erga omnes*'. This is the last point of the Court's reasoning, since it is for the national court to determine the nature of the duty under national law and whether it is of such a quality as to satisfy the definition of tort under the Rome II Regulation (para. 55).

V. ASSESSMENT OF THE *BMA* RULING AND CURRENT EU LAW

1. The functionality of the proposed solution in the *BMA* case

In general, the Luxembourg Court has for some time been attempting to determine the law applicable to the liability standards of foreign company directors. In this context, the interpretation of conflict-of-law rules has been a particular challenge for the Court of Justice, as there has been no systematic approach to this problem in the EU. This is evidently due, on the one hand, to the legal limbo of the *acquis communautaire* and, on the other hand, to the broad freedom of establishment in Europe provided by the principle of market access. This perspective could explain the Court's attempt to balance the interests of foreign companies with those of stakeholders, especially creditors.

A closer look at the Court's approach in *BMA* shows that this decision does not convincingly reduce the friction between tort law and company law. Although the Court's reasoning could be seen as obvious, it is anything but. In the grey area of the intertwined interests of a company and third parties, the proposed classification solution does not provide much clarity. That is, the internal structure approach adopted in the *BMA* case is flawed because it does not provide a clear understanding of what company law is or what objectives should be pursued by the provisions falling within it. In this context, the only valuable hint in this respect is provided by the following statement of the AG: '[i]f a provision on non-contractual liability is so rooted in considerations specific to the company law context that it is irrelevant outside it'. This idea is not clearly expressed in the judgment, which reads as follows: 'specific to company law or it [non-contractual obligation] has an extraneous purpose'. The first method represents a *condicio sine qua non* and is based on the recognition that, without the elements of the corporate regime, there would be no liability whatsoever. The second approach is founded on a functional perspective towards legal norms, which is more difficult to grasp. Nevertheless, both statements paraphrase the problem rather than offer a solution. Indeed, the scope of the fields of law was a problem at the outset, which has only been translated into a *criterium divisionis*, either in terms of the link between the

corporate regime and liability, or in terms of the objectives of the legal fields in question. But the extent to which the issue has a strong foothold in the law of companies or in the law of torts is a question that remains without a proper answer. Recognizing the potential controversy surrounding this specific issue, particularly due to the lack of a European standardization of corporate or tortious norms, the Court has deferred to the authorities of the Member States to determine the appropriate outcome. As a result, defining the objectives of different legal mechanisms could be susceptible to national idiosyncrasies. Interestingly, there was no indication from the Court as to whether the national court should take an autonomous approach to the qualification of a given claim that is common to all Member States, or whether it should use only the national understanding (*lex fori*).[34] In this context, it should be borne in mind that company law in the EU is far from being fully harmonized. Thus, the scope and objectives of the company may differ from one Member State to another, and taking into account the assessment criteria derived from national substantive law would run counter to the objective of unifying outcomes at the EU level. This may lead to a segmentation of the internal market, contrary to the European integration model, which is more than just a separation of national laws according to international private law methods.

Overall, the approach offered by the Court amounts to no more than a smell test based on the battle of purposes technique in the process of international private law classification. This criterion lacks quantifiable objective factors and relies on subjective perceptions of which purpose is considered paramount in a given situation (although it is not known why a particular purpose is rated as such). As it stands, there is no explanation of what elements fix the question to company law to such an extent that it loses its meaning outside that context as well. Company law does not close itself off from external legal issues and claims in the box of internal organizational matters. The corporate and tort regimes may overlap in certain cases. In a national law, both regimes form a coherent standard of conduct. It may be difficult to reconcile them when they are part of different legal systems that may come to the fore at the same time. In complex relationships, it will be impossible to separate a company from the outside world. The interconnection of law mechanisms here is so striking that at least a certain caution would be desirable. Yet the Court seems to believe that legal provisions pursue homogeneous objectives and can be classified in a binary way with two class labels: corporate-oriented or not. However, this algorithm will not work in the case of rules that have different objectives. These developments suggest that skirmishes at the frontiers of the corporate world are likely to persist. An example of this could be a claim against shareholders for failure to take the necessary steps to complete the formation of a private limited company. This was offered by the Advocate General in her Opinion as obviously falling under the company law exclusion of the Rome II Regulation. At the same time, it acknowledged that the rule has a dual purpose: to protect third parties who contract with an un-

[34] This will be further investigated below, with some reference to the qualification methodology.

registered entity and to encourage the definitive registration of companies. No arguments were put forward as to why the company law classification takes precedence in such a case. It may be that this liability rule would not exist without the corporate context. However, the rule in question also underlines the partnership-like nature of an immature company in the formation stage and the protection of the company's creditors during the period when the protective mechanisms of company law are not yet fully operational. Persons acting on behalf of the company in formation create certain expectations that are also fundamental to the decisions of third parties. Thus, the liability of persons who have acted on behalf of the company in formation does not usually end with the registration of the company. All in all, it is difficult to say which of the two objectives represented by this rule is more important. Rather, both objectives should be treated equally. The same can be said of the different approaches to the corporate groups, which to varying degrees seek to achieve the objectives in two fundamental aspects, namely the organizational aspect (enabling law, *Organisationsrecht*), which consists in facilitating the parent company's management of the group and the pursuit of the latter interests, and the protective aspect (*Schutzrecht*), namely the protection of corporate outsiders, such as the creditors of dependent companies. From the point of view of purpose, the international private law characterization of the legal framework of the group of companies would require a division between rules according to these two categories. Moreover, some organizational aspects at the least need to be divided between corporate and contractual qualification (Renner, 2014, pp. 475–480). Effectively, the potential outcomes of conflict-of-laws considerations extend beyond what the general objectives of a group of company rules may be. Therefore, further qualification criteria must be established, including the differentiation between internal and external organizational matters arising from the fundamental distinction between contract and corporate law. When it comes to the protection of creditors, both parent and dependent company regimes may find their own solutions. Nevertheless, most Member States find that the seat of the subsidiary determines the applicable law for mechanisms protecting the interests of the subsidiary.[35] In view of the numerous methodological explanations for such considerations (the overview in German doctrine in Kindler, 2021, pp. 1855–1859), this approach is based more on the recognition of the interests of the states of origin of the dependent company than on a systematic division of the rules in accordance with the objectives they pursue (sometimes overemphasizing the protective purposes

---

[35] See draft of Regulation X on the law applicable to companies and other bodies, n. 3: 'A Recital should clarify that this instrument applies to groups of companies but does not establishes any special conflict of law rule on this matter ["*In accordance with the conflict of law rules of this Regulation, where one undertaking controls another governed by a different legal system, its ensuing rights and obligations as regards the protection of minority shareholders and third parties are governed by the law governing the controlled undertaking, without prejudice to the obligations imposed on the controlling undertaking by its own law, for example the requirement to prepare consolidated accounts*"]', https://gedip-egpil.eu/wp-content/uploads/2016/09/Societe-TxtSousGroup-1.pdf

of company law over the organizational function). More importantly, the application of the *BMA* reasoning in such a case would formally mean that it is not the company law of the subsidiary's seat that should apply, but the tort law of the *lex loci damni*. There is no doubt that the Rome II Regulation is not tailored to the specific needs of group situations and is obviously not geared to intercorporate liability. Even if the direct (financial) damage caused by the controlling company is very likely to be located at the seat of a subsidiary, it cannot be ruled out that a collision determination based on the *lex loci damni* rule will point to a different legal system.

From a methodological point of view, there are some doubts when the Luxembourg Court in *BMA* establishes the basis of its reasoning by formulating two sources of duties imposed on directors: the corporate duty and the general duty of care. The Court seems to assume that it is an international standard that these two duties can coexist, or that it is generally permissible to frame a choice of law question one time as a breach of the corporate duty of care, and another time as a breach of the general duty of care. In this context, it should be recalled that the existence of such duties is a matter of national law determined by an applicable private international rule. By assuming the existence of a general duty of care, the Court allows the application of a *lex loci damni*, if only the national law contains a general duty of care. Firstly, this means that the *lex causae* determines the understanding of the legal issue in a case. Secondly, any director of an international company in the EU must be aware that his decisions may be subject to two sets of standards, one corporate and one *erga omnes*. Whether intentionally or not, the Court has not limited the mismanagement of company affairs to company law alone, which means that the *BMA* judgment de facto recognizes the concurrence of choice of law rules (*la règle de cumul*), namely that two such rules may be used to determine the applicable law. In other words, the exclusion in Article 1(2)(d) of the Rome II Regulation only applies if the claim is based solely on a corporate obligation. In the absence of any further constraint, it would seem to be up to the claimant to decide under which regime the claim is formulated, ergo which private international law regime is applicable in each case.

2. Possible solutions to the qualification issue

As can be seen from the above, the *BMA* ruling lacks any practical vision of how to distinguish company law from other areas of law, in particular tort law. Thus, the friction between Member State authorities on how to characterize legal claims in conflict of laws analysis will flourish. Does the chartering state have the power (and to what extent) to govern the corporate affairs based on its integral role in bringing the corporation into existence? The answer to this question should be based on the general assumption that the overall aim of directors (and company structures as well) is to effectively manage corporate assets without disregard to the situation of third parties. Typical choice-of-law analysis considers various factors to determine which state has the most significant relationship to the parties and mat-

ters at issue, and therefore the greatest interest in regulating them. This analysis is often used by courts to determine the law governing a corporation's external business activities, including relationships with employees, contractors, suppliers, customers, and the general public. Thus, the distinction must be drawn between protecting the company's assets and providing a liability function against the company's creditors (liability for negligently caused damage). Nevertheless, for the sake of predictability, the home Member State should have the primary role in defining the duties of directors towards the company and the outside world, in accordance with the unitary theory. French law, which characterizes the liability of directors as company law, even in relation to third parties, serves as an example.[36] Only in certain areas, such as insolvency law and securities regulation, should modification be considered, giving precedence to more specialized legal fields. Against this background, some ideas are presented below as to how to delimit the scope of application of company law and tort law.

At the outset, it is essential to distinguish between activities concerning the operations of the company, occurring between closely defined corporate actors, and those taking place with individuals who are not strictly bound by the corporate agreement. It is unlikely that corporate actors will seek relief under tort law, as the terms and legal regulations incorporated in the corporate contract are presumed to align with the rational corporate actors' expectations. However, it is not something that should be completely ruled out as a possibility. Such a situation requires a solution similar to the separation of contractual and tortious claims. In the second category of relationships, international law characterization will be trickier. Unfortunately, it is not all that easy for parties who have never been involved in arm's length bargaining to deal adequately with non-performance or other misconduct. Criteria that establish the boundary between the *lex societatis* and the *lex loci delicti* are not uniformly established for such situations (Gerner-Beuerle et al., 2019, pp. 120–121).

The first possible solution is based on a formal criterion derived from national law. If a claim falls within a company law statute, it qualifies as *lex societatis* for private international law purposes. This approach may appear clear and unambiguous and might be favoured by national authorities following the *lex fori* qualification. However, the Court of Justice has rejected it as overly reliant on a domestic approach to defining boundaries for private international law purposes (*Verein für Konsumenteninformation*, para. 36). As a result, it could have a negative impact on the coordination of legal solutions within the EU and lead to inconsistent decisions in individual cases.

Other approaches are based on substantive criteria linking an action to the core activities of the company (internal affairs approach) or the predominant impact of the action on the company or third parties (impact-based approach; Gerner-Beuerle et al., 2020, p. 27). As to the former, any

[36] Africatour case: Cass. civ. 1ère, 1 July 1997, Bulletin Joly des sociétés 1997, 1062, holding that Senegalese law applied to the liability of directors of a Sengalese company to third parties.

wrongdoing committed in the exercise of corporate power and in a corporate capacity should be governed by corporate law. With regard to the latter, the *lex loci delicti* covers claims relating to direct damage caused to third parties, leaving all other situations where only reflective damage appears to have occurred to the *lex societatis*. The first approach raises a problem relating to activities that appear to use the corporate veil lawfully, but do so only for harmful purposes. It requires, firstly, the definition of matters directly related to company law and, secondly, the identification of the grounds for distinguishing between actions carried out in good faith and those constituting a form of abuse. In fact, this approach is largely based on the dogmatic division of corporate activities into internal and external. As for the impact-based approach, it does not take into account the coexistence of damage caused to the company and to third parties, even though such a situation will be relatively common. For example, a poor business decision made by a director will result in losses to the company and at the same time cause the company to default on its contract, thereby harming the company's creditors. As a result, it will be necessary to search for criteria to determine which of the losses is the cause and which is the consequence, which in many cases will be impossible or will be based on additional artificial criteria that make no more than a pretence of logic.[37] Also, it is difficult to answer the question of what makes causality equal to priority in the characterization of legal rules. Overall, neither approach offers a cohesive solution to the issue at hand. Both require the implementation of extra criteria or corrective measures. This is a result of oversimplifying the intricate relationships that emerge during company operations, leading to a grey area between the classification of company law and tort law. As a consequence, events that solely pertain to tort law or corporate matters are indistinguishable, except for conspicuous instances where corporate actors have clearly overstepped their authority.

Overall, it appears that a more favourable approach than the one suggested in the *BMA* dicta would be to assume that directors are liable under a single legal framework, namely the law of the jurisdiction in which the company is registered, for actions taken in pursuit of the corporate purpose. This applies to actions that are not solely harmful to the company but also to a third party. This indeed sounds like what the Court of Justice had in mind when, at an earlier stage in the development of the Common Market, it established the principle of market access under the free movement of goods: that a product originating in an EEA State should not be subject to as many standards as there are Member States. Likewise, companies may be regarded as

[37] In *BMA* case, the Court, interpreting Article 4(1) of the Rome II Regulation (i.e. the connecting factor of the place where the damage is sustained) the Court held that the loss suffered by the creditors was only secondary, whereas the loss suffered by the assets of the bankrupt company was primary. See case C-498/20, *BMA*, para. 56. Since almost any bad business decision will first affect the assets of the company, the place where the activities of the company are carried on is relevant for the question of which national law is applicable. Moreover, if the damage is not caused to specific assets, the register office indicates the national law.

'products' of national legislation. There is a commonly held belief that a company incorporated in a single Member State is permitted to conduct business in other countries using its legal identity. However, there are variations in the manner in which the corporate veil can be lifted through tort law mechanisms across different Member States, which poses a risk that this expectation will be impeded. This circumstance is unfavourable for the thriving of businesses in Europe. As a result, any foreign standards must be appropriately substantiated (*Gebhard*, para. 37).

Consideration needs to be given to how to define that the activity has been undertaken in pursuit of the general corporate purpose in order for the approach presented to be operational. If a given provision or claim serves the proper management of the company as a vehicle for the accumulation of assets, the *lex societatis* prevails. This means that measures that are primarily aimed at the proper management of assets, rather than compensation, should be qualified as corporate law. The general standard of conduct does not take precedence over the specific duty of care.[38] Otherwise, corporate agents would be subject to multiple and sometimes conflicting standards of conduct. Additionally, this can be clarified by applying a formal criterion of acting as an agent of the company (as elucidated earlier through a formal internal affairs approach), with a substantive element of whether the action, consisting of managing the company's assets, was taken *ex ante* within the limits of justifiable economic risk (a good faith element). As to the latter, companies exist primarily to manage resources in a competitive and uncertain free market environment. In company law, the principal purpose of liability is to discourage management from violating corporate governance rules. Frequently, the mere threat of legal action or damage to reputation can inspire greater diligence. In the end, the main point is that creditors, employees and society as a whole benefit far more from good corporate governance (Pareto efficiency) than from compensation for breaches of directors' duties. Obviously, directors can be held liable for any damage caused to the company and other entities. However, liability and compensation aspects should primarily be allocated within the framework of the corporate rules so far as it concerns a reasonable act of corporate management. Reasonableness in this context does not mean second-guessing by a competent authority, but eliminates actions that merely appears to be management of the company. It serves as a corrective mechanism where the qualification of the company may raise doubts from the perspective of fundamental rules of justice. If the latter is not the case, it would be difficult to argue that individuals affected by the actions of directors require remedies outside the national law applicable to the company, such as the law of the place where the company carries on its business. It also means that no jurisdiction, no matter how strongly affected, may impose local tort rules without properly justifying them by showing that the activities of di-

[38] This may be different where a standard of conduct is derived from specific sectoral legislation, such as environmental or financial legislation.

rectors pose a serious threat to the integrity of EU integration. Only then is the right to establish a private legal relationship in the form of a company in a Member State and to carry on business throughout the territory of the EU properly secured.[39]

Furthermore, the fact that a claim arises out of the mismanagement within a group and is therefore subject to the law of the seat of the company, be it a parent company or a subsidiary, should not exclude reference to the rules of general tort origin.[40] By referencing national law, all the instruments of that legal system that are not based on previous contractual relations and have a general preventive and compensatory character are available. Thus, the standard of conduct for directors might be influenced by the regulations of national tort law in general. However, this mainly relies on the specific content of the national law concerned. Importantly, in such a case the legal assessment takes place within a legal system in which rules of different origins could be much better coordinated, thus avoiding friction between different legal systems, including second-guessing of liability based on either corporate or tort law. This can enhance the certainty and predictability of outcomes compared to applying different legal regimes depending on whether a duty arises from a fiduciary relationship or from general tort law.

It is fair to conclude that the *lex societatis* should prevail in the relations between directors, the company and third parties. For these reasons it is regrettable that in *BMA* the Court found that classification under company law is of an exceptional nature.[41] On the contrary, the tort characterization should only be inferred in specific cases where the claim cannot be traced back to the proper management of the company's assets. This is the case where an act falls outside the bounds of reasonable corporate governance and the protection afforded to directors by the law of the home country is not justified because of abusive, fraudulent or criminal behaviour which would lead in the short term to the artificial omission of any standard of liability and in the long term frustrate the purpose of companies in the economy.

---

[39] Cf. Szydło (2017) with reference to C-594/14, *Kornhaas*: 'If, conversely, the relevant host State law is non-discriminatory and simply requires the pseudo-foreign company to adapt to rules that only concern the conduct of company's activities in the host State (including the regulation of the company's directors' conduct), and is applied only after the pseudo-foreign company has been successfully established in the host Member State, then it does not restrict freedom of establishment under Articles 49 and 54 TFEU' (p. 1865).

[40] This view may be at odds with the conventional understanding of the methods used for qualification; see, e.g. Thölke (2022): 'Verwiesen wird aber nicht auf die gesamte Rechtsordnung, sonder nur auf solche Normen, die entsprechend zu qualifizieren sind' (p. 12).

[41] This seems to be based on the false premise that corporate qualification is an exception under Article 1(2)(d) of Rome II. The latter provision is not intended to make the qualification of tort law the default choice, but merely to recognize that corporate law and tort law are different categories that require their own methods of determining the applicable law. Thus, it is wrong to assume that this exclusion must be interpreted strictly.

VI. BEYOND CHARACTERIZATION PROBLEM

Perhaps there is a greater good on the horizon in this strategic ambiguity offered by the Court in the *BMA* case, which will overshadow all the criticisms formulated above. In other words, the orthodox approach to international private law qualification requires neutrality, but perhaps the Court employed a different paradigm and aimed at different goals, like the promotion of social welfare rather than internal corporate governance. But if so, it is difficult to detect. Let us assume for the moment that the real problem behind this case is not the difficulty in recognizing the normative boundaries between different legal disciplines, but the need to prevent actions that would otherwise undermine the trust between Member States and business partners through abusive reliance on foreign company law. The approach adopted in the *BMA* ruling could be aimed at protecting the expectation of third parties to be protected by national rules of conduct vis-à-vis the companies that have taken advantage of the freedom of establishment enshrined in Article 54 TFEU. In this case, non-contractual obligations not arising directly from 'the relationship between the members and the company' should be governed by the law of a country in which the company normally operates. This law shall define the standard of behaviour for directors against third parties. But this is not exactly what the Luxembourg Court said. In *BMA*, interpreting Article 4(1) of the Rome II Regulation, that is, the connecting factor of the place where the damage occurs, the Court held that in such a situation the applicable law is determined by the place of establishment of the dependent company (*BMA*, para. 61) which is in a direct contractual relationship with the creditors.[42] By coincidence, in *BMA* this happened to be the law of the subsidiary's place of operation. However, in cases where the company is incorporated in a jurisdiction other than the one in which it does business, some creditors will have to bring a claim under a law that is alien to them. By creating a chain of companies, the place where the direct damage, as defined by the Court, occurs may be far from the place where the decision-making centre and business operation is located. In fact, it supports to a large extent existing legal arbitrage strategies in corporate groups. However, it is hard to say if that was the actual intention of the Court in the *BMA* case.

In cases where the harmed party had a claim against the subsidiary's assets, the classification of the Dutch rule under *ex delicto* liability is not convincing, as it would be at least as good to classify the liability claim under company law according to the currently dominating position as regards conflicts-of-laws rules in corporate groups. What would be the consequence in the latter case? It seems that *de facto* the same result as in *BMA* would be

[42] If the Dutch company had not been in a prior contractual relationship, finding the law applicable to the liability of the controlling company (or directors) would have required a search for the place where the direct damage occurred. It is likely that it would have had a direct effect on the property of a third party, which is a not something unusual when applying Article 4(1) of Rome II.

achieved by assuming that, in the case of damage resulting from the mismanagement of the corporate group, the protective mechanism of the law applicable to a subsidiary would have to be applied. In the case of *BMA*, this would be Dutch law deciding under what condition the controlling German company is liable for damage. This is quite clear and predictable, as it does not require the search for any kind of 'internal' vs. 'external world' considerations.

The Court reached its final conclusion by interpreting the connecting factor relevant to torts. Thus, the reference to the law of the State in which the subsidiary is established is based on the place where the damage occurred. However, the situation may be different where there is no prior financial or contractual relationship between the company and the injured party. In this case, the loss may not result from non-payment to creditors, but from damage to other assets or interests located elsewhere than where the company is registered. Overall, both results suffer from the fact that they either produce unpredictable results or are unsatisfactory from the point of view of binding the company to the rules of conduct in the place where it actually operates. In the latter case, if the place of registration is decisive according to the *BMA* ruling, it may suffer from an arbitrary determination of the place of establishment of the company. For example, an action for damages brought by creditors resident in State B against a decision of the directors of a company operating in State B will be governed only by the law of State C, where the company is registered. Neither legal certainty nor the legitimate expectations of the parties concerned are protected by such a solution.

VII. CONCLUSIONS

The ambition at the time to harmonize company law across the EU has still not come true. After the time of liberalization, the EU Court has been slowly but steadily expanding surrounding corporate regulation to substitute corporate law, thereby offsetting the highly deregulated corporate law, as for instance initial capital requirements. From this perspective, the *BMA* case concerns the problem with establishing tortious liability against corporate directors (or shareholders) in international cases. The question arising in such a case concerns the extent to which the foreign standard of care might be applied to corporate officers acting from abroad. One answer would be that company law creates a shield for corporate directors which is impenetrable to conflict of laws mechanisms. As duties to the company and to third parties are strongly interlinked, so they create conflicting obligations, they should be recognized by one legal system for the sake of clarity and consistency. Additionally, in economic integration areas like the EU, if there is a problem with the minimum standard for a corporate obligation, this should induce authorities to expedite work on the harmonizing regulatory mechanisms. This, similar to product standards, is the best way to enhance trust among Member States. Meanwhile, the decision in the *BMA* case brings us closer to the point whereby

one of the elements of corporate law, in this case the liability of directors to third parties, will potentially be divided between corporate law and tort law.

The analysis carried out provides answers to the question posed at the beginning of this contribution. Firstly, neither current EU law as it stands, nor the rulings of the Luxembourg Court of Justice provide clear criteria that would allow national authorities to distinguish between corporate and tort claims when it comes to actions against corporate directors. By simply stating that the purpose of the claims arising under national law matters, without explaining what purpose is pursued by company law or tort law in general, the Court has only changed the subject of the controversy. Moreover, the *BMA* ruling increases the potential for legal arbitrage by linking the law applicable to the claim for damages to the place where the company's assets are located. This means that for financial damage scenarios, this place will be equal to the registered office of a company, a place determined by the sole decision of the corporate actors, without regard to the interests of third parties.

References

Baratta, R. (2009). The process of characterization in the EC conflict of laws: Suggesting a flexible approach. In P. Sarcevic, P. Volken & A. Bonomi (Eds.), *Yearbook of Private International Law* (pp. 155–169). Kluwer Law International.

Bariatti, S. (2017). Classification (characterization). In J. Basedow, G. Rühl, F. Ferrari & P. De Miguel Asens (Eds.), *Encyclopedia of private international law* (pp. 358–365). Edward Elgar Publishing.

Collier, J. G. (2001). *Conflict of laws*. Cambridge University Press.

Ebke, W. (2002). The "real seat" doctrine in the conflict of corporate laws. *International Lawyer, 36*(3), 1015–1038. https://scholar.smu.edu/til/vol36/iss3/13

Gerner-Beuerle, C., Mucciarelli, F., Schuster, E.-P., & Siems, M. (2019). *The private international law of companies in Europe*. C. H. Beck.

Gerner-Beuerle, C., Mucciarelli, F., Schuster, E.-P., & Siems, M. (2020). Making the case for a Rome V Regulation on the Law Applicable to Companies. *Yearbook of European Law, 39*, 459–496. https://doi.org/10.1093/yel/yeaa007

Gurrea-Martínez, A. (2021). Towards an optimal model of directors' duties in the zone of insolvency: An economic and comparative approach. *Journal of Corporate Law Studies, 21*(2), 365–395. https://doi.org/10.1080/14735970.2021.1943934

Heiss, H., & Kaufmann-Mohi, E. (2016). Classification: A subject matter for a Rome 0 regulation? In S. Leible (Ed.), *General principles of European private international law* (pp. 87–100). Kluwer Law International.

Kindler, P. (2021). Internationales Handels- und Gesellschaftsrecht. In F. J. Säcker, R. Rixecker & H. Oetker (Eds.), *Münchener Kommentar BGB: Band 13. IPR II, Internationales Wirtschaftsrecht, Art. 50–253 EGBGB* (pp. 1589–1950). C. H. Beck.

Looscheiders, D. (2004). *Internationales Privatrecht – Article 3–46 EGBGB*. Springer.

Magnus, U. (2005). Art. 10:101. Nature and purpose of damages. In European Group on Tort Law (Ed.), *Principles of European tort law – Text and commentary* (pp. 149–153). Springer.

Manesh, M. (2021). The corporate contract and the internal affairs doctrine. *American University Law Review, 71,* 501–577. http://dx.doi.org/10.2139/ssrn.3904968

Renner, M. (2014). Kollisionsrecht und Konzernwirklichkeit in der transnationalen Unternehmensgruppen. *Zeitschrift für Unternehmens- und Gesellschaftsrecht, 43*(4), 452–486. https://doi.org/10.1515/zgr-2014-0452

Ringe, W.-G. (2013). Corporate mobility in the European Union – a Flash in the Pan? An empirical study on the success of lawmaking and regulatory competition. *European Company and Financial Law Review, 10*(2), 230–267. https://doi.org/10.1515/ecfr-2013-0230

Ringe, W.-G. (2017). Kornhaas and the challenge of applying Keck in establishment. *European Law Review, 42*(2), 270–279.

Szydło, M. (2017). Directors' duties and liability in insolvency and the freedom of establishment of companies after Kornhaas. *Common Market Law Review, 54,* 1853–1866. https://doi.org/10.54648/cola2017152

Thölke, U. (2022). Grundlagen. In S. Leible & J. Reichert (Eds.), *Münchener Handbuch des Gesellschaftsrechts: Band 6. Internationales Gesellschaftsrecht. Grenzüberschreitende Umwandlungen* (pp. 1–52). C. H. Beck.