THE LAW APPLICABLE TO THE LIABILITY OF CORPORATE DIRECTORS IN EUROPE (COMPANY LAW V. TORT LAW IN THE LIGHT OF BMA AG CASE C-498/20)

ARIEL MUCHA, PHD

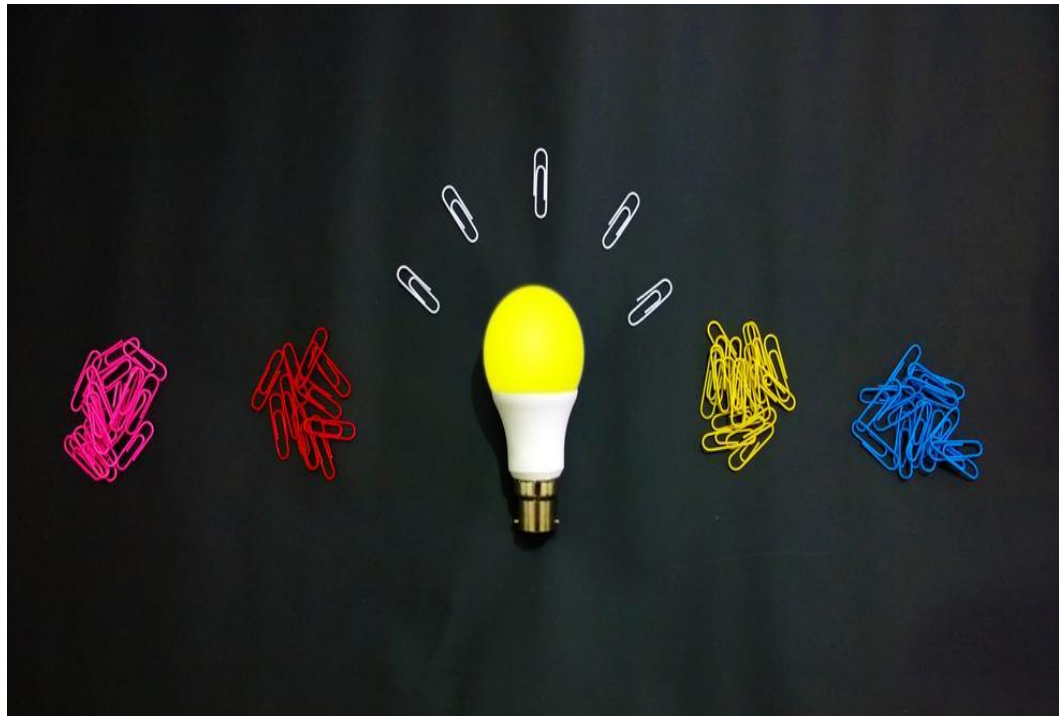
PEDAGOGICAL UNIVERISTY, KRAKOW (POLAND)

AGENDA

1. **Background**
2. **BMA AG case (C-498/20)**
3. **Critique and alternative solution**
4. **Conclusions**

- **Question:** which law governs liability for breaching corporate directors's duty of care?

There could be a lot more but I will keep it short for a sake of time limits.



BACKGROUND – DIRECTORS' POSITION IN THE COMPANY

- No general harmonisation of corporate directors' duties and labilities so far in Europe.
- Centros, Überseering, and Inspire Art … has considerably diminished the impact of the real seat doctrine in the European Union
- What is the content of the lex societatis? The appointment of directors triggers a fiduciary duty as prescribed by the lex societatis.
  - Directors status as preliminary question
  - Problem of non-appointed directors
    - De facto directors (corporate characterization?)
    - Shadow directors (corporate/tort/insolvency characterisation?)

Director's obligation and duties:

- duties arising of causa societatis;
- duties existing towards the company arising from other legal relations, like labour contracts;
- duties arising in the specific situation, like in the proximity of insolvency, securities law duties, accounting duties, and those obligation following from the law in general (tort law).

LEGAL BASIS FOR CHARACTERISATION OF DURECTORS LIBILITY

- No harmonisation of conflict of laws rules as regards corporate law.
- Draft proposal (2016): European Group for Private International:
  - https://gedip-egpil.eu/wp-content/uploads/2016/09/Societe-TxtSousGroup-1.pdf
    - Lex societatis scope: the liability of directors and members for obligations of the company;
    - the liability in tort of the members and directors of a company vis à vis third partie excluded; only examples given, like 'misrepresentation' should be governed by Rome II.
    - Lack of regulation of group of companies
    - Conservative approach; non-operational construction of overriding mandatory provision (10) and public policy clause (11)
- The best approximation: Art. 1(2) (d) Rome II Regulation.

THE CONTENT OF THE EXCLUSION

EU legislator excludes the matters associated with:

- "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…".

The personal liability of officers and shareholders for the obligations of the company falls under Art. 1(2) (d) Rome II and as such **is not** governed by the Rome II Regulation.

C-498/20 ZK V BMA

- Kerr decisions offered a concept of "structural aspects of companies" or "internal organization of a company" (C-25/18, par 34).
- In in **C-498/20 ZK v BMA** CJ held on the applicable law for the claims included'Peeters Gatzen' suit (in the case: a tortious suit brought by a liquidator in the interest of creditors), apart from answers given to the issues of jurisdiction.
- Facts:
  - The liquidator in the bankruptcy of a Dutch company whose debts have become irrecoverable brought an action for damages (Peeters Gatzen suit) against the German grandparent company (BMA AG).
  - The basis for the claim was a breach of duty of care towards the insolvent company's creditors by the grandparent company. In short, the latter ceased to provide funds to the Dutch company.
  - One of few problems adressed by the Court and AG was: **does the exclusion from Art. 1(2) (d) Rome II apply to such a claim?**

AG OPINION IN BMA AG CASE

- The concept of 'company law' should be interpreted autonomously.
- The distinction between internal relations or "life" of the company (subject to exclusion) and external relations (covered by the Regulations).
- Internal elements: incorporation, legal capacity, internal structure and dissolution of companies.
- **Grey area:** personal liability of officers and members for the obligations of the company or other legal persons.
  - If a provision on non-contractual liability is so rooted in considerations specific to the company law context that it is irrelevant outside it, then this takes precedence for classification purposes.
- The AG's proposal for determining whether a non-contractual obligation is (or is not) covered by Art. 1 sec. 2 lit. d) of the Rome II Regulation:
  - the rationale (ratio legis) for the attribution of liability to shareholders and directors and whether it is rooted in or based on company law;
    - The exclusion applies where the law extends liability from the company to the board member or assigns it directly to the board member for company law reasons.
    - The scope of the Rome II Regulation will cover cases of liability arising from the breach of the general obligation of neminem laedere.

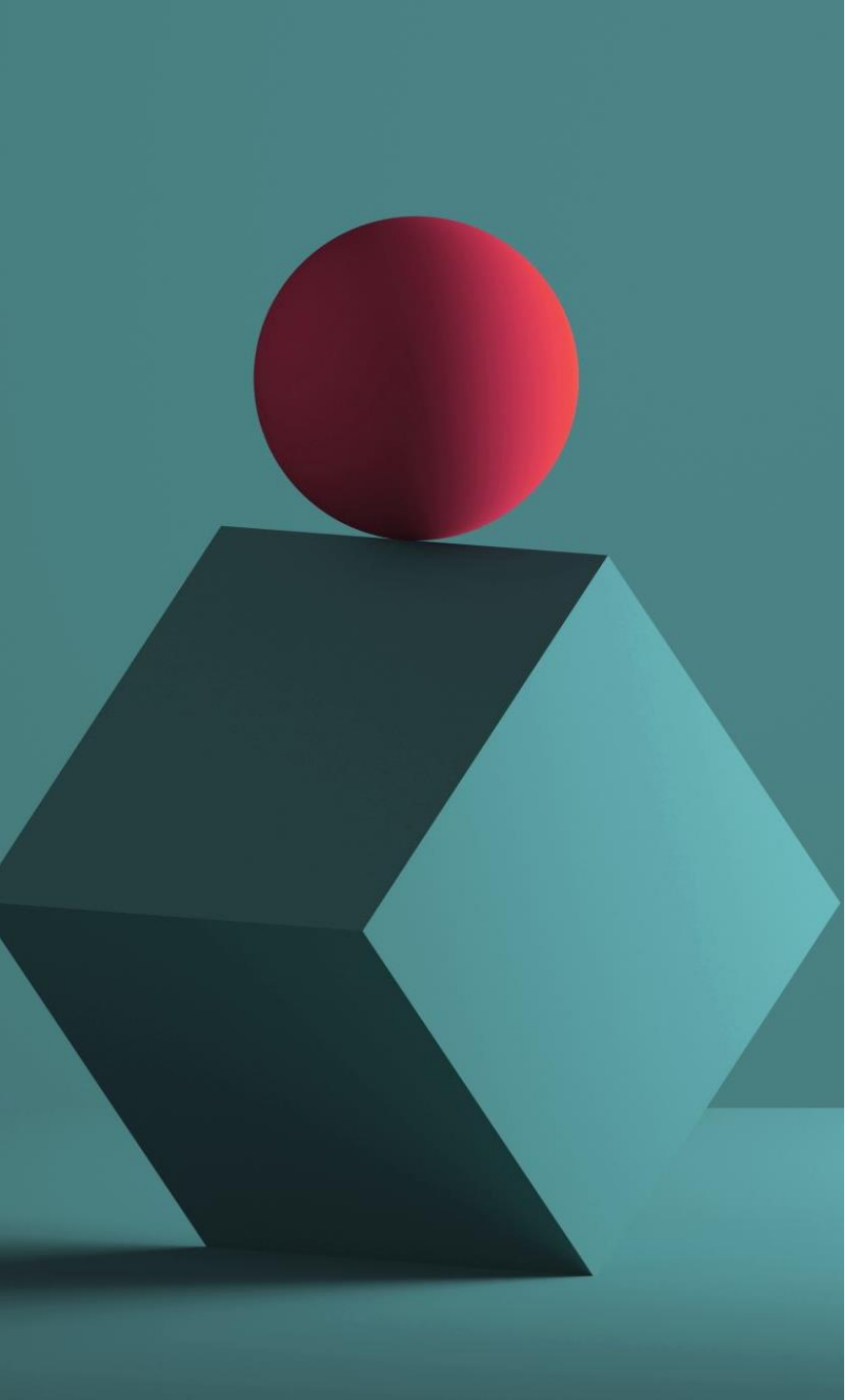
THE COURT'S DECISION
C-498/20 ZKV BMA

The Court followed the line of arguments presented by the AG.

"structural aspects of companies" v. outer world claims

"…it is necessary to ascertain in each case whether officers, administrators or auditors referred to in Article 1(2)(d) of the Rome II Regulation have a non-contractual obligation for reasons specific to, or indeed extraneous to, company law."

"As regards specifically the breach of the duty of care at issue in the main proceedings, a distinction must be drawn between the specific duty of care arising from the relationship between the members and the company, which does not fall within the substantive scope of the Rome II Regulation, and the generic duty of care *erga omnes*, which does. That assessment is for the national court alone."



CRITIQUE

- **In general:** no added-value from BMA AG case.
- Provided test is only **a smell test based on the clash of legislative purpose method**.
  - What if both purposes are equal? What is the priority rule, or we have accumulation of claims in such a situation? The latter is rather contrary to Rome II aims to subject claims to specific legal system.
  - How deal with contradictory obligation?
- The main problem is if both AG and the Court decided that the company law should have autonomus definitione why they did not provide such definition; or the definitione is: the comapny law is a law divided into two relations: internal and external….
  - No definitione of „purpose" for company and tort law.
  - We have general test but without instruments to apply it; it's unfeasible in practice.
- The criterion proposed is prone to abuses from the Member States;
  - What are the limits for Members States when they create directors obligation against third parties? Do we apply Gebhard (proportionality) test?
- Maybe this strategic ambiguity serves the greater good?

EUROPE AFTER BMA AG: DOES IT PROTECT WEAKER CONSTITUENCIES?

Sweden company producing furniture

middlemen

factory in Belarus

- What law applies to Swedish company directors in case of a claim raised by the workers of factory in Belarus?
  - If the obligation araises from neminem laedere principle than Belarusian law according to Art. 4(1) Rome II – (lex loci damni)
- Effect: no real protection for workers.

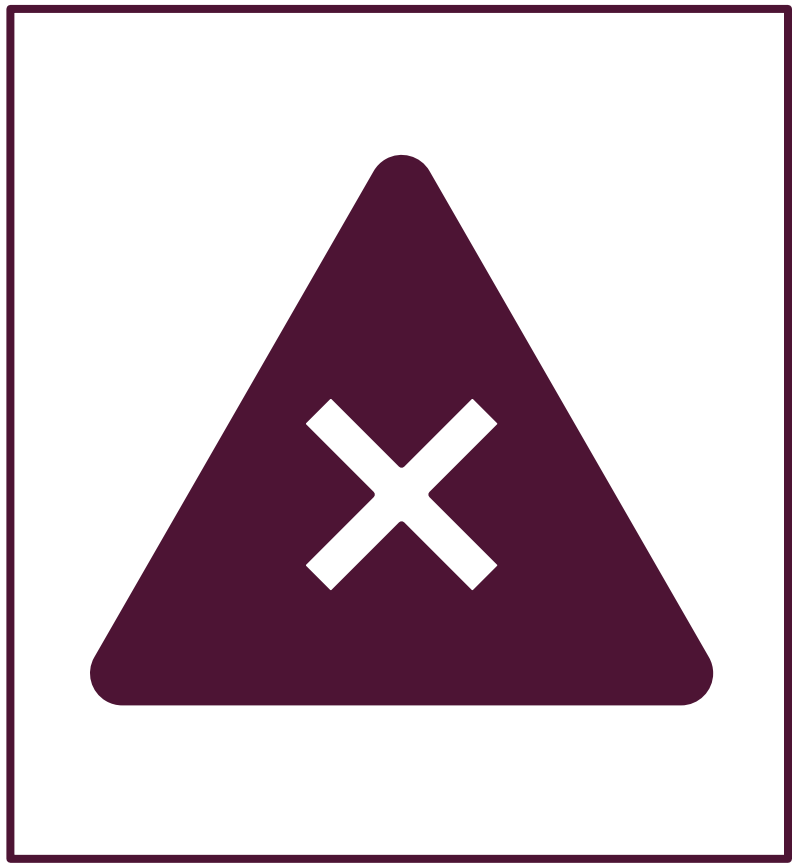
CONCLUSIONS

- Current system does not work
- No regulatory stability, no effective protection of vulnerable constituencies has been achieved.
- Need for a refom like:
  - Harmonisation of directors duty
  - Harmonistation of law applicable to companies rules
  - Change in interpretation:
    - If a seat is located artificialy in a jurisdiction which immunise from applying liability to directors to activity undertaken in the other Member States, than abus of EU law can be activated
      - Public policy clause
      - Ovveriding mandatory provisons
    - How to distinguish company and tort law: interest test (in whoses interest the director was acted)
      - own (lex loci delicti)
      - the company (lex societatis)

THANK YOU FOR YOUR ATTENTION!

ARIEL.MUCHA@UP.KRAKOW.PL

AG OPINION IN BMA AG CASE



- For example, the following are excluded from the scope of the Rome II Regulation:
  - Liability of a board member who breaches his obligation to file for dissolution (or bankruptcy) of the company, if legally justified.
  - Claim against partners for failing to take the actions required to complete the formation of a limited liability company.
  - A claim against members of the management board responsible for the company's debts, if they do not perform certain formal activities aimed at controlling the financial situation of this company, if it does not have sufficient financial resources.

EUROPE AFTER BMA AG:

- Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937

  Article 25

  Directors' duty of care

  1.Member States shall ensure that, when fulfilling their duty to act in the best interest of the company, directors of companies …. take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term.

  2.Member States shall ensure that their laws, regulations and administrative provisions providing for a breach of directors' duties apply also to the provisions of this Article.

  Here, duties are to be included in the duties of the management board, so there will be no lex loci damni

  - But what matters is a purpose and the purpose is not to protect internal relations of the company but the external world; so maybe it is for the Rome II to be applied???