

The Business Judgment Rule and its Impact on Austrian Law

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1 Introduction

1.1 Origin of the Business Judgment Rule

The Business Judgment Rule (BJR) has its origin in US company law, dating back to the 1800s.¹ The first mentioning of what is now generally known as BJR is found in Louisiana's Supreme Court decision *Percy v. Millaudon*.² Other early cases establishing the BJR are *Godbold v. Branch Bank*,³ an 1847 Alabama Supreme Court decision, and *Hodges v. New England Screw Co.*⁴ In the latter, the court stated: "We think a board of directors acting in good faith and with reasonable care and diligence, who nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake."⁵ This judgment clearly recognizes human fallibility. As long as directors perform their responsibilities dutifully and decide in good faith, they shall not be personally held liable for the outcome of business decisions. In addition, these early judgments emphasized the reasonable diligence and care demanded from directors during their performance of duties.⁶ Thus, originally the BJR was not intended as a defence precluding judicial inquiry into the procedures and methodologies applied by the directors when making entrepreneurial decisions. In fact, the BJR was only the starting point for inquiry into the director's decision-making process.

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¹ ARSHT, S. The business Judgment Rule Revisited. *Hofstra Law Review* [online]. 1979-1980, Vol. 8, Iss. 1, Article 6, p. 93-134. Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol8/iss1/6>

² *Percy v. Millaudon*, 8 Mart. (n.s.) 68, 74 f, 78 (La. 1829).

³ *Godbold v. Branch Bank*, 11 Ala. 191 (1847).

⁴ *Hodges v. New England Screw Co.*, 3 R. I. 9 (1853).

⁵ *Hodges v. New England Screw Co.*, 3 R. I. 9, 18 (1853).

⁶ ARSHT, S., 1979. *Ibid*, p. 100.

1.2 Content and Rationales of the Business Judgment Rule

The current case law by Delaware courts describes the BJR as the "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."⁷ Although the BJR is considered "one of the least understood concepts in the entire corporate field,"⁸ certain core statements are generally accepted. The directors' acting must be independent and disinterested as to the matter acted upon and they must act with due care and in good faith.⁹ This due care inquiry is process-orientated and the standard of due care is measured by gross negligence.¹⁰ Furthermore, the burden of proof is borne by the party challenging the directors' decision; he or she has to establish facts rebutting the presumption.¹¹ These parts form the BJR's pronounced procedural dimension. Additionally, the BJR also has a substantive force. If the plaintiff fails to rebut the BJR the court will not substitute its views for those of the directors' if the latter's decision can be "attributed to any rational business purpose."¹² The result of this approach, especially with the presumption in favour of directors combined with the burden of proof, is that plaintiffs rarely succeed winning duty of care cases in the US.¹³

The rationales underlying the BJR fall into three main categories:¹⁴ (a) encouragement of directors to serve and take risks, (b) avoidance of judicial en-

⁷ *Aronson v. Lewis*, 473 A.2d 805, 2 Exc. 28 (Del. 1984).

⁸ JOHNSON, L.P.Q. Corporate Officers and the Business Judgment Rule. *The Business Lawyer* [online]. 2005, Vol. 60, p. 439 (p. 454); MANNE, H.G., Our Two Corporation Systems: Law and Economics. *Virginia Law Review* [online]. 1967, Vol. 53, No. 2, pp. 259-284, (p. 270).

⁹ *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

¹⁰ *Cede & Co v. Technicolor, Inc.*, 634 A.2d 345, 364 (Del. 1993); *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

¹¹ *Aronson v. Lewis*, 473 A.2d 805, 812.

¹² *Brehm v. Eisner*, 746 A.2d 244, 264.

¹³ JOHNSON, L.P.Q., 2005. *Ibid*, p. 455 with further references.

¹⁴ JOHNSON, L.P.Q., 2005. *Ibid*, p. 455 ff.

croachment into business decisions, and (c) retaining the board of directors as central decision-making body in corporate governance. These principles justify the BJR and are briefly explained as follows:

a Encouraging Directors to Serve and Take Risks

Entrepreneurial decisions, even though made by competent directors, can in hindsight turn out to have been improvident causing the company a loss of a significant amount of money.¹⁵ If directors could be held personally liable for such decisions, rational individuals would hesitate to accept or even decline a nomination as director. Furthermore, a correlation between risk and return is acknowledged. Therefore, business decisions which are of greater risk generally promise higher returns for investors, e.g. shareholders. However, such decisions might also result in higher losses. If directors had to worry about liability for every business decision they make while not benefitting from the potential return, they would not take the necessary risks. This would not be in the shareholders' interests and reduce the company's capability to innovate. As a consequence, it would also hinder society's technological advancement.

b Avoiding Judicial Encroachment into Business Decisions

Judges generally are considered not to possess the experience, expertise, and information necessary to make complex entrepreneurial decisions, due to their lack of an economic education and background.¹⁶ Additionally, the so called "hindsight bias" must be taken into consideration. This effect describes the tendency "to assign an erroneously high probability of occurrence to a probabilistic event simply because it ended up occurring."¹⁷ Due to the hindsight bias, courts would deem loss bringing events as having been predictable, although there was hardly any objective basis on the probability of the event occurred. The BJR therefore prevents courts to review business decisions with ex post knowledge.

¹⁵ BLOCK, D. J., BARTON, N. E., RADIN, S. A. The Business Judgment Rule: Fiduciary Duties of Corporate Directors and Officers. *The Business Lawyer* [online]. 1987, Vol. 42, No. 3, pp. 995-997.

¹⁶ *Air Line Pilots Association International v. UAL Corp.*, 717 F. Supp. 575, 582 (N.D. Ill. 1989).

¹⁷ BAINBRIDGE, Stephen M. The Business Judgment Rule as Abstention Doctrine. *UCLA, Law and Econ. Research Paper* [online]. 2003, School of Law, No. 03-18, p. 112. Available at SRN: <http://ssrn.com/abstract=429260>

c Directors as Central Decision-Making Authorities

Undoubtedly, it is the directors' duty to direct the companies' fortunes; the board of directors manages the business and its affairs. By limiting judicial review using the BJR, the statutory scheme of centralizing authority in the board of directors is preserved.¹⁸ The ability to effortlessly challenge directors' decisions judicially would undermine the distribution of competences in company law. The ultimate decision-making authority would be shifted to any shareholder willing to file a complaint.¹⁹

2 Business Judgment Rule in Austria before its Codification

2.1 Initial Legal Situation

The Austrian law did not contain any provision expressly dealing with the BJR previous to January 1st 2016. Moreover, the Austrian Supreme Court (OGH) did not specifically refer to the BJR yet; only in one case²⁰ the doctrinal discussion of it was mentioned obiter.

However, the courts gave the directors large discretion for managing business affairs.²¹ Directors violated their duty of care only if they exceeded the limits of the allowed discretion grossly.

Furthermore, the principles underlying the protection of managerial freedom are identical with the above-mentioned. This results from the simple fact that in Austria business decisions also harbour

¹⁸ DOOLEY, M., VEASEY, E.N. The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared, *The Business Lawyer* [online]. 1989, Vol. 44, No. 2, pp. 503-542 (p. 522).

¹⁹ DOOLEY, M. Not in the Corporation's Best Interests. In: *ABA Journal*. 1992, Vol. 78, p. 45.

²⁰ Austrian Supreme Court (OGH), 8. 5. 2008, 6 Ob 28/08y. In: *Der Gesellschafter*. 2008, 304 (SCHMIDT, S.).

²¹ Austrian Supreme Court (OGH), 26. 02. 2002, 1 Ob 144/01k. In: *Der Gesellschafter*. 2002, 86 = wbl 2002, 325; Austrian Supreme Court (OGH), 22. 05. 2003, 8 Ob 262/02 s. In: *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht*. 2003, 441; Austrian Supreme Court (OGH), 23. 05. 2007, 3 Ob 59/07h. In: *Österreichische Zeitschrift für Recht und Rechnungswesen*. 2007, 261 (WENGER, T.); Austrian Supreme Court (OGH), 11. 06. 2008, 7 Ob 58/08 t. In: *Der Gesellschafter*, 2008, 378 (KALSS, S. ZOLLNER, J.); *Wohnrechtliche Blätter*. 2008, 598 (TORGGLER, U.); *ecolex*. 2008, 926 (REICH-ROHRWIG, J.).

potential risks. Consequently, a need for lowering the probability of directors' personal liability exists as well. In doctrine, the directors' leeway in making business decisions granted by courts is often equated with the BJR.²² In fact, the Austrian and the US jurisdiction approach the same challenges, but in a different manner.

2.2 ARAG v. Garmenbeck and its Implications for Austria

In the German-speaking civil law countries the BJR was not part of Supreme Court judgments until 1997, when the German Supreme Court (BGH) ruled in its much-vaunted ARAG v. Garmenbeck²³ decision that a personal liability of executive board members presupposes that the boundaries of reasonable business decisions, which have to be solely orientated towards the company's benefit and based upon carefully determined facts, are massively exceeded, or that there is irresponsible hazard instead of a merely aggravated risk, or that there are other irregularities.²⁴ Although the BGH did not explicitly mention the BJR, the judgment was widely regarded as implementing it.

Following the doctrine's demand²⁵ the German legislator codified parts of the BJR's substantive implications in sec. 93 para. 1 German Stock Corporation Act (dAktG): "In conducting business, the members of the management board shall employ the care of a diligent and conscientious manager. They shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on informed basis of adequate information for the benefit of the company. [...]" Unfortunately, the German codification did not implement the US BJR's procedural aspect, namely shifting the burden of proof to the plaintiff. In Germany it's upon the directors proving the BJR's prerequisites and thus having acted with due care. Hence, the BJR is considered to be deprived of its centrepiece.²⁶

²² TOLD, J. Business Judgment Rule und ihre Anwendbarkeit in Österreich. In: *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht*. 2015, p. 663.

²³ German Supreme Court (BGH), 21. 04. 1997, II ZR 175/95, In: *NJW*. 1997, 1926.

²⁴ The OGH already recognized managerial discretion in 1 Ob 179/73. Nonetheless, this decision was only discussed for its implications on labour law.

²⁵ ULMER, P. Aktionärsklage als Instrument der Kontrolle des Vorstands- und Aufsichtsratshandelns. In: *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*. 1999, Vol. 163. Pp. 290-342, (p. 299).

²⁶ SCHIMA, G. Unternehmerisches Ermessen und die Business Judgment Rule. In: KONECNY, A. *Insolvenz-*

In Austria, the OGH – in the wake of the ARAG v. Garmenbeck decision – adopted the BJR's components in its rulings, e.g. in 3 Ob 34/97i,²⁷ *Intercontinentale*²⁸ and *Hirsch Servo*,²⁹ although the BJR itself was not mentioned expressly.³⁰ Based on these judgments the doctrine carved out the following characteristics determining the BJR: It must be (a) an entrepreneurial decision, (b) taken by directors not guided by extraneous interests, (c) in the company's best interests, (d) on the basis of adequate information, and (e) without taking irresponsible hazard.³¹

a Entrepreneurial Decision

The BJR only applies with regard to entrepreneurial decisions, whereas the term entrepreneurial has to be interpreted widely.³² In principle all decisions of directors relating to or affecting the company's management are covered. The directors' power of discretion is a characteristic for a business judgment.³³ However, a decision is not considered as entrepreneurial if it is determined by law, regulation, articles of association, employment contract

-Forum 2011 - Vorträge anlässlich des 18. Insolvenz-Forums Grundlsee im November 2011 [online]. 2012, pp. 131 – 164, (p. 135). Available at: http://www.ksw.at/fileadmin/user_upload/publikationen/Schima_Unternehmerisches_Ermessen_und_die_Business_Judgment_Rule.pdf

²⁷ Austrian Supreme Court (OGH), 4. 06. 1998, 3 Ob 34/97i. In: *SZ*. 71/108; *ecolex*. 1998, 774 (REICH-ROHRWIG, J.); *Österreichische Zeitschrift für Recht und Rechnungswesen*. 1999, 37 (WENGER, T.).

²⁸ Austrian Supreme Court (OGH), 26. 02. 2002, 1 Ob 144/01k. In: *Der Gesellschafter*. 2002, 86; the findings in this decision were expressively upheld in: Austrian Supreme Court (OGH), 22. 05. 2003, 8 Ob 262/02 s. In: *Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht*. 2003, 441.

²⁹ Austrian Supreme Court (OGH), 11. 06. 2008, 7 Ob 58/08 t. In: *Der Gesellschafter*. 2008/378 (KALSS, S./ZOLLNER, J.); *Wohnrechtliche Blätter*. 2008, 598 (TORGGLER, U.); *ecolex*. 2008, 926 (REICH-ROHRWIG, J.).

³⁰ LUTTER, M. Die Business Judgment Rule in Österreich und Deutschland. In: *Der Gesellschafter*. 2007, p. 79 (p. 85); SCHIMA, G., 2011. *Ibid*, p. 131.

³¹ LUTTER, M., 2007. *Ibid*, p. 81 ff with further references.

³² LUTTER, M., 2007. *Ibid*, p. 81 f.

³³ TOLD, J., 2015. *Ibid*, p. 65; SCHIMA, G. Business Judgment Rule und Verankerung im österreichischen Recht In: *Der Gesellschafter*. 2007, Vol. 93, p. 93; KAROLLUS, M. Business Judgment Rule und Handeln auf Grundlage angemessener Information am Beispiel des Vergleichs über Ansprüche gegen Dritte. In: *Festschrift Jud*. 2012. Pp. 307, 315.

or shareholder's or supervisory boards' resolution.³⁴ Furthermore, directors exceed their managerial freedom if violating industry standards grossly. For example, bank directors do not act inside the BJR's leeway if granting loans without collateral security or examining the debtor's creditworthiness.³⁵

Additionally, it is worth mentioning that any cost-benefit justification for law-breaking is prohibited. Disobedience of the law cannot be justified even though the illegal action taken was to the company's benefit.³⁶

b No Extraneous Interests ("No Conflict of Interests")³⁷

When making business judgments, directors must be disinterested and independent as to the matter acted upon; they must not be guided by extraneous interests and, therefore, be free of any conflict of interests.³⁸ *Torggler*³⁹ stressed out appropriately that in case of a conflict of interests the directors' liability must not be restricted, "[...] because damages resulting from pursuing other than the company's interests are not the realization of the company's business risks." If, for example, an order is placed with the X-corporation, which is owned by the director himself or his wife, the director cannot be considered disinterested and independent regarding the deal and, therefore, it cannot be assumed that his business judgment was to the company's sole benefit.⁴⁰

³⁴ LUTTER, M., 2007. *Ibid*, p. 81 f; German Supreme Court (BGH), 1. 12. 2003, II ZR 216/01. In: *WM*. 2004, 468.

³⁵ German Supreme Court (BGH), 3. 12. 2001, II ZR 308/99. In: *Wertpapiermitteilung*. 2002, 220.

³⁶ NOWOTNY, C. In: DORALT, P., NOWOTNY, C.; KALSS, S. *Kommentar zum Aktiengesetz P.* 2012. § 84 Rz 10; KALSS, S. In: GOETTE, W., HABERSACK, M. *Münchener Kommentar zum Aktiengesetz II⁴*. 2014. § 93 Rz 350.

³⁷ This BJR's prerequisite is neither mentioned in the ARAG v. Garmenbeck decision nor in sec. 93 para. 1 d AktG, but found in the government's reasoning for the Act on Corporate Integrity and Modernization of the Right of Rescission (UMAG).

³⁸ BRÖMMELMEYER, C. Neue Regeln für die Binnenhaftung des Vorstands - Ein Beitrag zur Konkretisierung der Business Judgment Rule. In: *Wertpapiermitteilung*. 2005, p. 2068; LUTTER, M., 2007. *Ibid*, p. 82. f with further references.

³⁹ TORGLER, H. Business Judgment Rule und unternehmerische Ermessensentscheidungen. In: *Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung*. 2002, Vol. 4, p. 133 (p. 139).

⁴⁰ LUTTER, M., 2007. *Ibid*, p. 83.

c Decision in the Best Interest of the Company

Furthermore, it is required that the directors could reasonably assume to act in the company's best interests when taking an entrepreneurial decision. A reasonable judgment is considered equivalent to acting in good faith.⁴¹ Therefore, directors must assess the risk of a business judgment and act in the belief that the decision taken was to the company's benefit. Directors act in bad faith if the entrepreneurial decision taken is beyond the grounds of a reasonable judgment and seems inexplicable on any other grounds.⁴²

d Adequate Information

According to the BGH in ARAG v. Garmenbeck, directors have to evaluate and ground their decisions "on every information available, whether by law or fact." This may not be taken literally; it is sufficient to obtain adequate information on the matter and its potential consequences.⁴³ The acquisition of a foreign-based company obviously requires further and other information than hiring a junior manager. However, the decision which information to procure is an entrepreneurial one and thus contains a certain leeway for directors too.⁴⁴ Whether the information gathered was adequate has to be evaluated on a case-by-case basis taking time constraints, the matter's complexity and the decision's commercial significance into consideration.

e No Irresponsible Hazard

Finally, to act with due care directors must not take any irresponsible risk threatening the company's very existence.⁴⁵ Accepting such risks, even when the decision is taken in good faith and grounded

⁴¹ GASSER, J. Die Business Judgment Rule in Liechtenstein. In: *Die Privatstiftung*. 2011, Vol. 62, p. 71.

⁴² GRASS, A.R. *Business Judgment Rule - Schranken der richterlichen Überprüfbarkeit von Management-Entscheidungen in aktienrechtlichen Verantwortlichkeitsprozessen*. Zürich: Schulthess, 1988, p. 64 ff.

⁴³ SCHIMA, G., 2011. *Ibid*, p. 141.; KALSS, S. In: GOETTE, W.; HABERSACK, M., *Münchener Kommentar zum Aktiengesetz II⁴*. 2014. § 93 Rz 346.

⁴⁴ BACHMANN, G. Reformbedarf bei der Business Judgment Rule? In: *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht*. 2013, Vol. 177, p. 1. (1 f); BUNZ, T. Ist nur vollständige Information „angemessen“? Anforderungen an den Grad der Informiertheit bei unternehmerischen Entscheidungen. In: *Der Konzern*. 2012, Vol. 10, p. 444 (447 ff).

⁴⁵ TORGLER, H., 2002. *Ibid*, p. 136; LUTTER, M., 2007. *Ibid*, p. 85, with further references.

on adequate information, violates the directors' duty to manage the company's business affairs prudently.

3 Codification of the BJR

3.1 Legal Situation as of January 1st 2016

On January 1st 2016 the BJR was implemented by BGBl. I Nr. 112/2015 into the Austrian Limited Liability Act (GmbHG) and the Austrian Stock Corporation Act (AktG),⁴⁶ even though it has already partly been applied by courts and was acknowledged by the doctrine.⁴⁷ However, the implementation was considered to be reasonable because it provides a guiding principle of how to act diligently and conscientiously as director.⁴⁸ Furthermore, the codification was praised for establishing a safe harbour for directors.⁴⁹

To codify the BJR, the Austrian legislator introduced sec. 25 para. 1a GmbHG and sec. 84 para. 1a AktG.⁵⁰ The wording of these sections is orientated towards sec. 93 para. 1 dAktG⁵¹ and stipulates that executive board members are undoubtedly acting in accordance with the care of a diligent and conscientious businessman if, at the time of taking the entrepreneurial decision, they are not guided by extraneous interests and could reasonably assume to have acted on the basis of adequate information for the benefit of the company.⁵² If executive board members comply with these prerequisites they are in the BJR's "safe harbour", i.e. cannot be held personally liable. However, business decisions outside the scope of the BJR do not automatically indicate

a breach of duty or criminal conduct.⁵³ Only the "safe harbour"-effect would be omitted.

Differing from sec. 93 para. 1 dAktG, the Austrian codification explicitly mentions that a prudent businessman must not be guided by extraneous interests when taking an entrepreneurial decision. Nonetheless, German courts of course respect that the BJR is not applicable if directors are not disinterested and independent as to the matter acted upon.⁵⁴ However, the Austrian legislator wanted to implement all elements of the BJR in the law.

Eventually, it must be noted that according to the report of the Committee of Justice the BJR shall also apply to supervisory board members and other persons who take business decision in their functions.⁵⁵

3.2 Burden of Proof

One of the most relevant aspects in duty of care disputes is the allocation of burden of proof. As mentioned above, the US BJR is the legal "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company."⁵⁶ If the plaintiff is not able to rebut this presumption, US courts will only test the irrationality of the entrepreneurial decision.⁵⁷ Because irrationality is the outer limit of the BJR,⁵⁸ the court will dismiss the case if the decision can be attributed to any rational business purpose.

Unlike the US, the burden of proof is regulated differently in Austrian law:

If the company claims damages from directors, the respective entrepreneurial decision is assessed by using a specific standard of due care. This standard of due care is provided in sec. 84 para. 1 AktG. Directors who violate their duties shall be liable to the company for any damages caused. However, regarding the burden of proof sec. 84 para. 2 AktG states that directors will not be held liable if they

⁴⁶ REICH-ROHRWIG, J.; ZIMMERMANN, A. Strafrechtsänderungsgesetz 2015 setzt die Business Judgment Rule um. In: *ecolex*. 2015, no. 8, p. 677.

⁴⁷ Austrian Supreme Court (OGH), 08. 05. 2008, 6 Ob 28/08y; OGH, 26. 02. 2002, 1 Ob 144/01k; OGH, 22. 05. 2003, 8 Ob 262/02 s; OGH, 11. 06. 2008, 7 Ob 58/08 t; OGH, 23. 05. 2007, 3 Ob 59/07h; STRASSER, R. In: JABORNEGG, P.; STRASSER, R. *AktG II*⁵. § 84 AktG, Rz 98a; Schima, G., 2007. *Ibid*, p. 93 ff.

⁴⁸ LUTTER, M., 2007. *Ibid*, p. 81.

⁴⁹ 728 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXV. GP, Bericht des Justizausschusses, p. 7.

⁵⁰ BGBl. I Nr. 22/2015.

⁵¹ The report of the Committee of Justice of the Austrian Parliament (Justizausschussbericht) even refers explicitly to sec. 93 of the German Stock Corporation Act (dAktG); see 728 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXV. GP, Bericht des Justizausschusses, p. 7.

⁵² Compare sec. 93 para. 1 dAktG.

⁵³ 728 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXV. GP, Bericht des Justizausschusses, p. 7.

⁵⁴ BRÖMMELMEYER, C., 2005. *Ibid*, p. 2068; HOPT, K.; ROTH, M. In: *Großkomm AktG*⁵. § 93 Rz 90; SPINDLER, G. In: GOETTE, W.; HABERSACK, M., *MünchKomm AktG*⁴. § 93 Rz 60 ff.

⁵⁵ 728 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXV. GP, Bericht des Justizausschusses, p. 12.

⁵⁶ *Aronson v. Lewis*, 473 A. 2d 805, 812 (Del. 1984).

⁵⁷ TOLD, J., 2015. *Ibid*, p. 61.

⁵⁸ Annual Review of Developments in Business and Corporate Litigation, 2005 Edition, Committee on Business and Corporate Litigation, 603; *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

can prove the diligence and prudence of their business decisions. The OGH and the doctrine interpret sec. 84 para. 2 AktG in the manner that the claiming company must prove the damage, the causal connection between the damage and the directors' decision as well as circumstances indicating a breach of duty, while the executive board members must prove the legality of their business decisions.⁵⁹ If the conduct or omission was unlawful, the executive board members will not be held liable if they can prove their action taken was not at fault.⁶⁰ The same applies by way of analogy to sec. 25 GmbHG.

Speaking of the burden of proof, the crucial point is whether it is upon the company to prove the directors' lack of due care or upon the directors to justify their acting. Due to sec. 84 para. 2 AktG most experts hold the opinion that executive board members have to prove their compliance with the BJR.⁶¹ However, as a consequence of the BJR's implementation in sec. 84 para. 1a AktG the authors do not agree with this approach. According to the report of the Committee of Justice the Austrian BJR is supposed to embody a safe harbour for directors. If the BJR shall fulfill its purpose as to protect directors under the aforementioned circumstances it is necessary to allocate the burden of proof differently:

The OGH rules that the company has to prove circumstances indicating the directors' lack of due care.⁶² However, if sec. 84. para 1a shall not be deprived of its safe harbour effect, the OGH's approach has to be interpreted in the manner that the company, in a first step, must prove that executive board members did not comply with at least one of the BJR's prerequisites.⁶³ Having done so, the respective entrepreneurial decision will be assessed using the standard of due care according to sec. 84 para. 1 AktG. Executive board members then have to prove, in a second step, that the decision taken was not unlawful and their conduct not at fault. Otherwise the

BJR's implementation could only be considered as a determination of the standard of due care, without any impact on the current legal situation. Though, this would not correspond with the Austrian legislator's intention to create a safe harbour.⁶⁴

4 Conclusion

The BJR is rooted in US company law and described as "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." It is upon the plaintiff to establish facts rebutting the presumption.

The legal situation in Austria is different. On January 1st 2016 the BJR was implemented in sec. 25 para. 1a Austrian Limited Liability Act (GmbHG) and sec. 84 para. 1a Austrian Stock Corporation Act (AktG), even though it has already been applied by courts and was acknowledged by the doctrine. Unlike the US, Austrian courts and the doctrine represent the opinion that it is upon the directors to prove having complied with the BJR. Unfortunately, the codification did not explicitly implement the US BJR's procedural aspects, namely shifting the burden of proof to the plaintiff.

However, to satisfy the legislator's intention to establish a safe harbour for directors the burden of proof must be allocated differently. Only if the company proves that executive board members did not comply with at least one of the BJR's prerequisites (sec. 84 para. 1a AktG), it is upon the directors to prove having acted with due care (sec. 84 para. 1).

⁵⁹ Austrian Supreme Court (OGH), 24. 06. 1998, 3 Ob 34/97i; OGH, 14. 01. 2000, 1 Ob 228/99 g; OGH, 22. 10. 2003, 3 Ob 287/02f; OGH, 19. 03. 2013, 9 ObA 135/12 m; TORGLER, U., 2002. *Ibid*, p. 136 f; NOWOTNY, C. In: DORALT, P.; NOWOTNY, C.; KALSS, S. *AktG*². § 84, Rz 27; However, according to STRASSER, R. In: JABORNEGG, P., STRASSER, R. *AktG IF*⁵. § 84 AktG Rz 98a the company must even prove that the conduct or omission was unlawful.

⁶⁰ German Supreme Court (BGH), 04. 11. 2002, II ZR 224/00; Austrian Supreme Court (OGH), 24. 06. 1998, 3 Ob 34/97i.

⁶¹ Austrian Supreme Court (OGH), 16. 03. 2007, 6 Ob 34/07d. In: *Der Gesellschafter*. 2007, 274 (Torggler, U.)

⁶² NOWOTNY, C. In: DORALT, P.; NOWOTNY, C.; KALSS, S. *AktG*². § 84, Rz 27.

⁶³ STRASSER, R. In: JABORNEGG, P.; STRASSER, R. *AktG IF*⁵. § 84 AktG, Rz 98a.

⁶⁴ 728 der Beilagen zu den Stenographischen Protokollen des Nationalrates XXV. GP, Bericht des Justizausschusses, p. 7.