COVID-19 and Business Law

Edited by Horst Eidenmüller, Luca Enriques, Geneviève Helleringer, and Kristin van Zwieten

Beck-Hart-Nomos, Oxford, 2020, 97 pp., £18, ISBN 9781509944736

The COVID-019 pandemic of 2020 forced every country to consider or re-consider the frameworks in place to both support ailing businesses and ensure efficient means of ending them. With the wide-ranging impact that the pandemic has had on the world-wide economy, it is not surprising that a great many blogs, articles, and commentaries on domestic and comparative law and reforms have been produced in quick succession.

Among the many academic commentaries deriving their existential *raison d'être* from the changes made necessary by the need to respond in policy and law to the economic and financial ravages of the pandemic is *COVID-19 and Business Law*.[1] A collection of short chapters (originally Oxford Business Law Blog posts) edited by Horst Eidenmüller, Luca Enriques, Geneviève Helleringer, and Kristin van Zwieten published in the middle of 2020, the book contains a set of thematic commentaries focussed on a variety of narrow legal areas and how these may be improved or adapted to accommodate the requirements of businesses during the pandemic. Themes include corporate law, financial markets, insolvency law, dispute resolution, and competition and regulation and focus on how business law can contribute to containing the COVID 19 pandemic as well as how it can be adapted to achieve success in this goal.

Corporate Law

The pandemic has brought a sharp focus onto the balance between shareholder and *stakeholder* interests given the enforced lockdowns and closures that have impacted businesses and employees alike, notes Kalmanath. There have been widespread voluntary reactions by businesses that clearly benefit stakeholders and broader society interests during the pandemic that do not generally reflect what is 'best for business'. Many businesses have taken corporate social responsibility to a new level of kindness that goes beyond reputational interests, making innovative changes to address social problems.[2] With all of that being said, Gavin questions how it is possible to square a director's duty to promote the success of a company[3] with actions taken by businesses during the pandemic that are clearly not profitable but are to the benefit of the public interest. Some companies have remained shut down voluntarily while others have completely changed their production with little thought to the bottom-line. 'Where production changes become quasi-humanitarian in tone and companies internalise costs in the interim, directors seek justification' by showing a positive impact on the community and the 'desirability of maintaining high business standards respectively', in which case such activities have a positive reputational impact that engender communitarian goodwill in the future.[4]

The shifts and production and changes in business practices may also be considered responsible business practices under the circumstances insofar as they reduce the overall impact of the pandemic on individuals and businesses. Gomtsian notes three main lessons that can be taken away from the reactions of businesses and governments during the pandemic. First, in the absence of legislative action, change in corporate behaviour happens when there is a broad consensus in society that collective action is required to deal with an urgent threat. Secondly, businesses need clear guidelines as to what practical steps they care expected to take to meet common goals. Finally, developing a consensus over global challenges requires international cooperation.[5] Although such 'responsible capitalism' is not as widespread going into the anniversary of the beginning of the pandemic, it can at least be acknowledged that some businesses will make the right choices under the circumstances.

---

[1] Horst Eidenmüller, Luca Enriques, Geneviève Helleringer, and Kristin van Zwieten (eds), *COVID-19 and Business Law* (Beck Hart Nomos 2020).

[2] Akshaya Kamalnath, 'Chapter 1. Shareholder Primacy in the Time of Cornavirus' in (n 1) 3-6.

[3] Specifically under s 172 of the Companies Act 2006 (United Kingdom).

[4] Philip Gavin, 'Chapter 2. Directors' Duty under UK Law to Promote the Success of the Company during the COVID19 Pandemic' in (n 1) 7-9, 8.

[5] Suren Gomtsian, 'Chapter 3. When Businesses Can Do Good: Lessons from the Coronavirus Crisis for Promoting Responsible Business Practices' in (n 1) 11-13.

Financial Markets

The beginning of the COVID-19 crisis saw an unprecedented decrease in supply and demand as well as extreme economic uncertainty. Equity prices plunged and questions were raised as to whether action should be taken to protect global financial markets. In previous crises following the turn of the millennium, there was a 'Pavlovian response', noted by Enriques and Pagano, to freeze exchanges and limit equity trading 'aimed to restore orderly functioning of the markets and avoiding unwarranted drops in stock prices.' Although short-selling bans have been issued by regulators, empirical evidence indicates that bans and restrictions do not necessarily solve the problem and, in fact, have negative liquidity effects in the market.[6] Stock market shutdowns have also been entertained, but in what circumstances should such a thing occur? Andhov argues that stock exchanges should have been closed shortly after the pandemic lockdowns began to mitigate harmful financial impact, noting that 'stock markets are essentially a reflection of investors' confidence which affects the actual sentiment and investment as much as access to funding.' Such a thing would need to be coordinated globally, however, as to do otherwise would not protect companies or market participants and would introduce greater volatility instead.[7]

On a related matter, Chiu, Kokkinis, and Miglionico contemplate financial regulation suspension in the time of COVID19. Although such suspensions attempt to strike a balance between functioning financial markets and mitigating short-term damage to financial actors, they also need careful consideration and stress testing before adjusting financial regulations. There are costs, unintended consequences, and potential moral hazard associated with the suspension of financial regulation, therefore actions should be carefully and deliberately considered with proportionality and efficiency in mind.[8]

The shifting focus of the markets reflect reflect the impact that the pandemic has had on society. It has created a line between the 'heroes and villians' of the pandemic, with those responding kindly and responsibly as the heroes with those taking advantage on the other side. Christi suggests that the shift in focus on the social side of corporate social responsibility during the pandemic could be reflected in new environmental, *social* and governance (ESG) indices[9] that focus on companies with more heroic pandemic responses, rewarding them with investment for their moral corporate behaviour.[10] That said, introducing new ideas into financial markets in a time of uncertainty is difficult, which is particularly true for those seeking start-up funding. Androve and Andrade note that the dynamics of venture capital industry will undoubtedly be different post-pandemic with a higher focus on investor control. Venture capitalists will also likely be focusing their efforts on their own portfolios, leaving less money for new ventures.[11] Many new companies will also be in need of rescue due to the impact of lockdowns on business profits, as discussed by Ringe and Ringe. Start-ups are already high-risk with little excess liquidity to support restructuring plans. Government rescue of start-ups is therefore controversial as it is difficult to determine the right ones to rescue and how to avoid giving 'rescuing' that do not need it as well as the method of rescue. Ringe and Ringe advocate an equity-based system or a direct subsidy rather than conventional loans due to the high risk for the lender and the burden of debt for the debtor. A number of programmes have been launched across the world to support business innovation that try to avoid excessive risk-taking.[12] Only time will tell if when the support disappears post COVID, whether the businesses go too.

Insolvency Law

Lockdown restrictions on operating have led to a global string of insolvencies, despite the efforts of most governments to mitigate the situation for businesses. One suggestion mooted by van Zwieten, Eidenmüller, and Enriques is 'that emergency legislation be introduced to extend the maturity of bond debt' to buy time for large companies and reduce the risk of fire sales. This would essentially amount

[6] Luca Enriques and Marco Pagano, 'Chapter 4. Emergency Measures for Equity Trading: The Case against Short-Selling Bans and Stock Exchange Shutdowns' in (n 1) 17-23.
[7] Alexandra Ahdhov, 'Chapter 5. COVID-19: Should We Close Stock Exchanges?' in (n 1) 25-27.
[8] Iris H-Y Chiu, Andreas Kokkinis, and Andrea Miglionico, 'Chapter 6. Financial Regulation Suspensions in Times of Crisis.
[9] ESG funds are investment portfolios with environmental, social, and governance factors integrated into the investment process. The contents of the portfolio will have passed stringent tests of sustainability in accordance with its ESG criteria.
[10] Anna L. Christi, 'Chapter 7. A COVID-19 Index Fund – The New Fearless Girl?' in (n 1) 33-35.
[11] Alexandra Andhov and Raphael Andrade, 'Chapter 8. Start-Up Funding in Times of Covid-19' in (n 1) 37-40.
[12] Dorthea Ringe and Wolf-Georg Ringe, 'Chapter 9. How to Rescue Startups During the Pandemic' in (n 1) 41-45.

to a global moratorium on corporate bonds, which carries with it its own risks. However, these authors contend that the COVID-19 crisis has introduced circumstances with which current rescue and restructuring procedures are unable to cope well enough to buffer the extreme impact of the financial crisis.[13] Certainly, the second half of 2020 has mirrored the authors' observation, but as yet no global stay has been set.

A number of jurisdictions have alleviated the risk accompanying directors' duties in the shadow of insolvency. Among jurisdictions including New Zealand and Australia, the UK introduced a suspension of the wrongful trading rule that, at the time of writing, has been extended yet again at the beginning of 2021. Although limited in its impact, the suspension of wrongful trading gives some flexibility to directors so that they can be confident in their trade decisions during the pandemic without fear of personal liability.[14] Licht adds to this position, noting that as rules that 'everybody loves to hate', wrongful trading rules are controversial, fundamentally because they ask directors to protect creditors' interests when the creditors themselves have not yet acted themselves. Wrongful trading rules 'arise in a uniquely difficult legal point – a point that can metaphorically be described as warping of legal space.' Although loosening the rules during the crisis may provide temporary relief, Licht contends that further clarification of directors' duties in this area is needed, particularly as the suspension ends and courts must grapple with claims of wrongful trading associated with post-pandemic business failures.[15]

While governments have been focused on helping businesses to avoid formal insolvency and liquidation, a novel idea introduced by Eidenmüller and van Zwieten is an obligation on creditors to cooperate during corporate workouts and avoid prisoners' dilemmas created by creditors holding out solely in their own self-interest. The authors replicate the commonly understood creditors' bargain insofar as it supposes creditors would agree to reducing their individual freedom in favour of collective cooperation in the interests of the workout (and the collective of creditors) to justify this concept. Essentially, creditors would be 'obliged to negotiate a restructuring plan in good faith' with some liability risk for creditors who 'torpedoes an efficient workout plan for maximum (unreasonable) gain'.[16] This concept carries with it a number of theoretical challenges, but as the authors note, in these extraordinary times, perhaps extraordinary measures and 'out-of-the-box' thinking are called for.

The insolvency section ends with some South and Latin American insights. In Ecuador, for example, alternatives to liquidation are limited due to archaic law and a rule of 'recapitalise or liquidate', which during a financial crisis of this magnitude will be undoubtedly difficult if not impossible. Mena and Velasco propose the suspension of this rule to address the adverse financial effects caused by the pandemic, which will be particularly helpful to smaller businesses.[17] In contrast, Colombia issued an emergency decree to benefit small businesses during the pandemic. The amendments are limited in time and scope as noted by Pereira but include suspending the duty to file for reorganisation and measures to support small businesses. It also provides a fast-track reorganisation process. The most innovative measure introduced is a quasi-judicial reorganisation process that small businesses can file with the Chambers of Commerce, although the institutional knowledge and support may be lacking for this measure to be truly effective as a rescue mechanism for small businesses.[18]

Dispute Resolution

Social distancing and the need to reduce human contact during the pandemic have created unique problems for justice systems throughout the world. Although many courts have opted for telephone or online options to ensure case lists can be handled despite physical limitations, this carries with it its own complications. Zou describes some of the innovations undertaken in China over the last decade that have made a shift to virtual justice during the pandemic easier than in some jurisdictions, not the

[13] Kristin van Zwieten, Horst Eidenmuller, and luca Enriques, 'Chapter 10. COVID-10: A Global Moratorium for Corporate Bonds' in (n 1) 49-51.
[14] Kristin van Zwieten, 'Chapter 11. The Wrong Target? COVID-19 and the Wrongful Trading Rule' in (n 1) 53-55.
[15] Amir Licht, 'Chapter 12. What's so Wrong with Wrongful Trading – on Suspending Director Liability during the Coronavirus Crisis' in (n 1) 57-59.
[16] Horst Eidenmuller and Kristin van Zwieten, 'Chapter 15. COVID-19 and Beyond: The Case for Creditor Cooperation in Corporate Workouts' in (n 1) 67-69.
[17] Esteban Ortiz Mena and Paul Noboa Velasco, 'Chapter 13. Corporate Liquidation Proceedings in Ecuador: The Recapitalize or Liquidate Rule in Times of COVID-19' in (n 1) 61-62.
[18] Alvaro Pereira, 'Chapter 14. Flattening the Filing Curve for SMEs: Lessons from Colombia's Insolvency Reform' in (n 1) 63-65.

least of which has been the implementation of new information and communication technologies, including making trial data resources available online. 'Smart courts' could be a long-term solution to the inconvenience and costs of attending courts in person, as well as a way to continue to deliver justice during a pandemic.[19]

Competition Law and Regulation

The final part of the book begins with a philosophical contemplation of the belief that competition is the key to prosperity. However, Ezrachi and Stucke observes that in some circumstances, such as the COVID-19 pandemic, competition has been toxic – competing for personal protective equipment, ventilators, masks, and in 2021, vaccines. Self-interested grabbing has been the ugly hallmark of the pandemic on every level, beginning with the toilet paper crisis in the early days. While competition encourages innovation and quality, it can also mean a race to the bottom when it comes to overhead costs of business, such as working conditions and health and safety corner-cutting. The pandemic has tested assumptions about competition and has exposed the fragility of markets based on the precepts of unbridled capitalism while also illuminating noble competition leading to cooperation in the pharmaceutical industry, for example. Regulation can therefore ensure fairness and nobility in competition that can produce markets in service to humanity, rather than the other way around.[20]

Eidenmüller adds a perspective the impact of regulatory difference and competition. A varied response to the pandemic is arguably inevitable due to the need for swift action by governments, making a coordinated approach impossible. Multi-state coordinated responses are difficult in the best of times due to the need for *ad hoc* consent, which is 'difficult to achieve and fragile.' States have also been hit at different points in time and with different intensities, leading to the need to respond in different ways, also influenced by unique legal and regulatory cultures. Although there are also benefits to regulatory competition in terms of lessons that can be learned,[21] the problem is that the pandemic may have passed before the best or most efficient solution can be identified. Ventoruzzo argues in contrast that while regulatory competition can have a virtuous effect if certain conditions are met, the pandemic does not present circumstances that satisfy those conditions. There is lack of uniformity, reliability, comparability, and transparency of information about the pandemic between countries, principally as there has not been the time to coordinate fully. Further, the interconnectedness of markets, industries, and borders create externalities that will impact the global economy that must also be considered. Supply coordination would also be beneficial, particularly when it comes to medical supplies and research. Fundamentally, Ventoruzzo concludes that regulatory competition in the time of crisis rather than encouraging a race to the top, will more likely lead to disunity in the long run.[22]

Fiscal policy during the pandemic has put a great strain on sovereign coffers, increasing sovereign debt and potentially leading to deteriorating sovereign financing conditions. A comprehensive rescue package was adopted by the European Council in April 2020 that aimed to provide an economic policy response to the pandemic.[23] The package did not arrive gracefully due to profound divergences and a core political problem: 'the sometimes emotionally charged focus on terms and concepts that are by some actors perceived as toxic.' The package provides support for workers, businesses, and sovereigns, but may not be sufficient to protect Member State finances and Eurozone stability, particularly considering the ongoing nature of the crisis into 2021.[24]

Conclusion: Uncertainty and Illumination

The overriding character of the pandemic has been uncertainty: in when it will end, for policy- and decision-makers, for regulators, and for a society questioning when they can hug their mother again. Whereas risk can be counted and quantified to some extent, uncertainty defies forecasting. Schammo

[19] Mimi Zou, 'Chapter 16. Virtual Justice in the Time of COVID-19' in (n 1) 73-75.
[20] Ariel Ezrachi and Maurice E Stucke, 'Chapter 17. Contemplating COVID-19 and Competition – Returning to the Rat Race or Aspiring for Something Nobler?' in (n 1) 79-82.
[21] Horst Eidenmuller, 'Chapter 18. The Race to Fight COVID-19: On the Desireability of Regulatory Competition' in (n 1) 83-86.
[22] Marco Ventoruzzo, 'A Response to Eidenmuller's Defense of Regulatory Competition in the Fight against COVID-19' in (n 1) 87-90.
[23] European Council, 'Report on the comprehensive economic policy response to the COVID-19 pandemic' (Press Release, 9 April 2020) <https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/> accessed 26 January 2021.
[24] Julian Probstl, 'Chapter 20. The Quest for a Comon European Fiscal Response to Fight COVID-19' in (n 1) 91-94.

notes that financial regulation (and indeed any other reforms, adjustments, or suspensions during the crisis) should be considered against the 'backdrop of heightened uncertainty.' These uncertain times may therefore lead to the introduction of precautions for the next one in financial regulation, business law, and safety nets for the affected masses. Such precautions may introduce some limitations on freedom and costs in production and doing business and such 'paralysing' precautionary activity is not without its critics. That said, there are lessons to learn and a precautionary principle may have a broader application as the world emerges from this currently ongoing crisis.[25]

COVID-19 and Business Law and its contributions were arguably released so early in the pandemic that the positioning may not hold true given its continuation into 2021. That said, most of the contributions also deal with concepts generally or from a theoretical perspective, rather than looking solely at some of the temporary adjustments or knee-jerk reforms that were produced later in 2020. *COVID-19 and Business Law* therefore provides a valuable insight across a broad field of important areas of business law that could be useful starting points or foundations upon which more permanent changes could be built. It is also a snapshot of an array of business law circumstances that highlight how a crisis of such proportions as the coronavirus pandemic can lay bare the strengths and weaknesses of our assumptions about how effective the law is in achieving its aims during a time of crisis.

Dr Jennifer L L Gant

26 January 2021

[25] Pierre Schammo, 'Chapter 21. Who Knows What Tomorrow Brings? Of Uncertainty in Times of Pandemic' in (n 1) 95-97.