

BUSINESS & LIABILITY RESEARCH NETWORK

ANNUAL REPORT

2018



Universiteit
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The Netherlands

Business & Liability Research Network
2018 Annual Report

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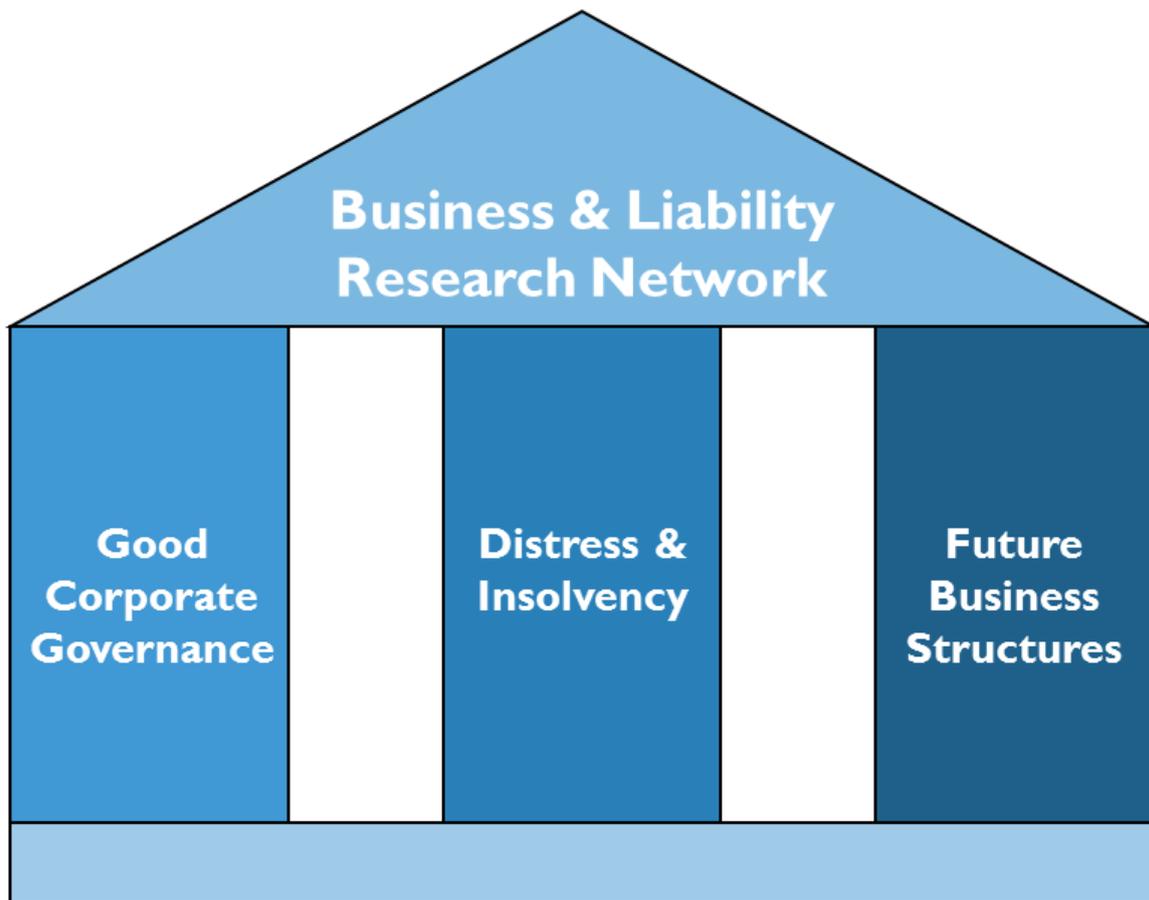
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Introduction

It is with great honour that we present the 2018 Annual Report of the **Business & Liability Research Network (BLRN)**, which provides an overview and report on the activities that took place in 2018. We are pleased with the many (research) activities that we could realise in this first BLRN year and thank all of the contributors for this success.

BLRN is a multidisciplinary research and expertise network that focuses on a variety of aspects of doing business within the context of company and insolvency law, working on three key areas: **good corporate governance, distress & insolvency** and **future business structures**.

BLRN has been established with the purpose of advancing company, liability and insolvency law in a cross-disciplinary and comparative environment where leading academics, business leaders, policy makers, practitioners and regulators can meet and work together.

Within BLRN, we strongly believe that an academic network must contribute to addressing the challenges of today's socio-economic reality.

BLRN is powered by the Department of Company Law and the Department of Business Studies of the Leiden Law School and is part of the Coherent Private Law program.



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Management*



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**Morshed
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PhD Candidate



**Jessie
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**Niek
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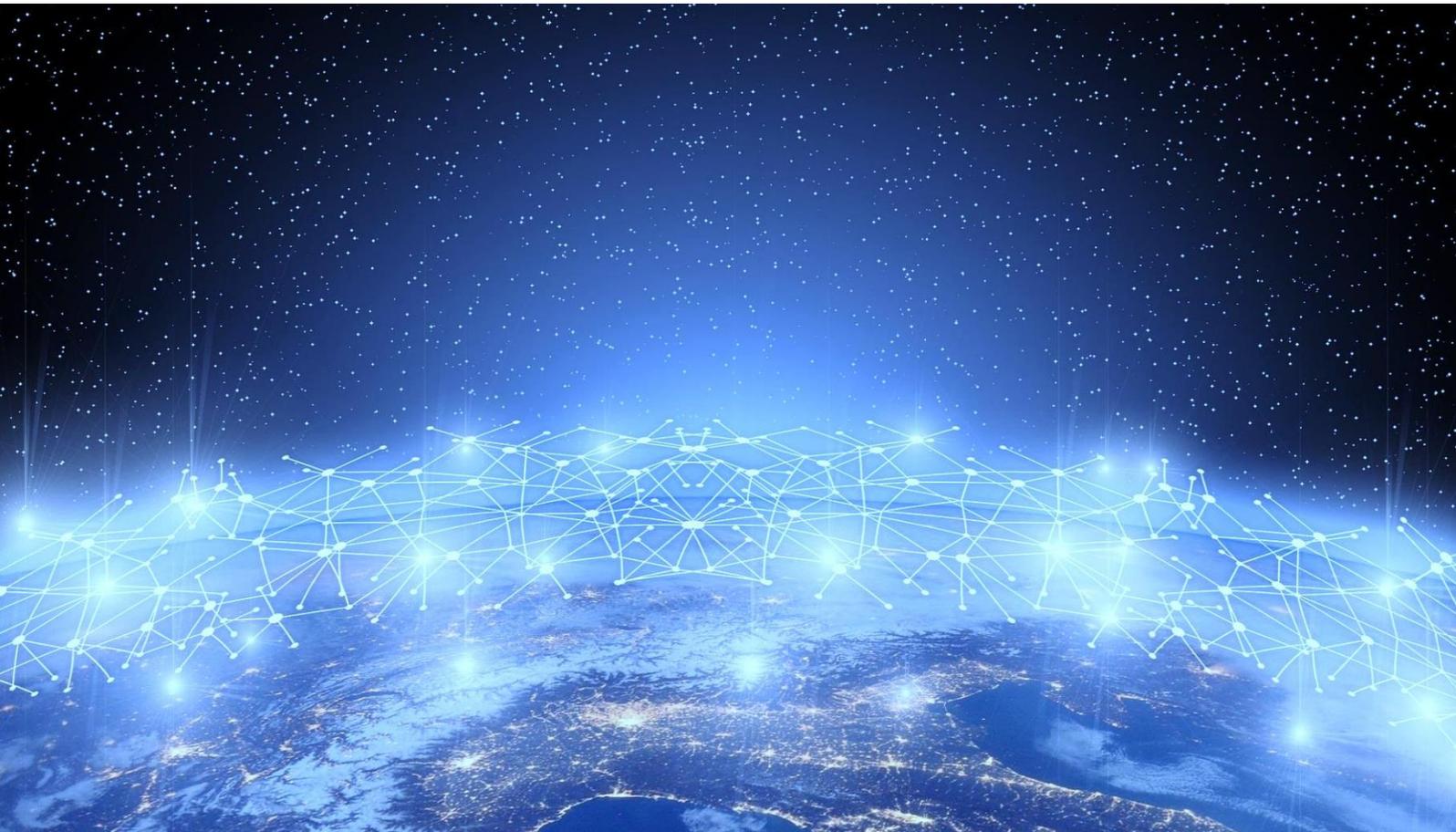
PhD Candidate

Research vision

The Business & Liability Research Network's (BLRN) vision is that company law should be aligned with socio-economic developments requiring a continuous observation of interactions between the law in the books and the law in action. This resulted in a fruitful cooperation between the Department of Company Law and the Department of Business Studies of the Leiden Law School.

Our unique approach allows us to provide state of the art research that focuses on entrepreneurial activity and liability risks, as well as high-end education and training in that field. We are covering start-up initiatives all the way to semi-public enterprises and large multinationals, both under good and bad financial conditions.

We truly are progressive in how we approach law and business, and are in the forefront of entrepreneurship with good liability and insolvency law practices. BLNR implements its vision through three main research areas (good corporate governance; distress & insolvency; and future business structures), a multidisciplinary team and a clear understanding of its contribution.



Research area:

Good corporate governance

Accountability and liability are often mistreated as communicating vessels. Perhaps the public interest in controlling directors' behaviour lies in the understanding that companies have a profound impact on the welfare and prosperity of individuals and nations.

Legal interventions are believed to incentivise directors to maximise wealth creation and due care considerations in running the company's affairs. 'Behavioural law'; the analysis of legal rules from a perspective informed by insights about actual human behaviour is particularly promising in light of the fact that non-market behaviour is frequently involved.

Business decisions, typically, are highly constrained by actors in the political arena (institutions and/or stakeholders of the company), how a company is structured and in which industry a company operates. The research object is to explore empirically, who (when and by what means) determines directors' accountability for business decisions, and normatively, who should be the authority to do so and why?



Research projects

In the research area of good corporate governance, BLRN is currently doing research on the topics of:

1. Sustainability and M&A
2. Vital businesses and public interests
3. Coherent application of GTC in international trade
4. Corporate groups and liability risks

1. Sustainability and M&A

In no other corporate context than a hostile takeover, sustainable value creation is so mercilessly challenged. Empirical findings show however that an increasing number of Dutch listed companies have incorporated sustainability as a statutory objective in their articles of association. Sustainability has also been adopted as a corporate governance principle in the amended Dutch Corporate Governance Code 2016. Moreover, in recent international hostile takeover attempts, boards of directors of companies, such as Akzo Nobel and Unilever used sustainability arguments to resist takeover attempts.

When confronted with a hostile takeover conflict, judges may choose to include sustainability arguments in their decision making. However, little is known about “if”, and if so “how”, and “why” judges include sustainability arguments in their deliberations. Studies on how judges perceive sustainability and take this principle into account when considering the issue of corporate interest in a hostile takeover context, are non-existent. This

research project addresses this omission and aims to significantly advance theoretical and legal understanding of the relevance of sustainability in business and legal decision making on hostile takeovers. Better understanding of the role of sustainability in judicial deliberations may contribute to further elaboration and integration of sustainability in the corporate governance framework.

2. Vital businesses and public interests

The Dutch legislator has undertaken efforts to protect the Dutch public interests as part of an adjusted state economic policy against takeovers that are undesirable from a societal perspective because of possible risks for national security or public order. Starting point of this project is an analysis with a company law focus of the proposed Bill on unwanted influence on telecommunication, that could serve as a format for a more general Act that would encompass other sectors of the Dutch economy.

3. Coherent application of GTC in international trade

This research investigates general terms and conditions (GTC) in light of international trade. It questions whether coherence is possible and desirable in the application of general terms and conditions. Special attention is given to the choice of forum clause, choice of law clause, arbitral agreements, and obligations arising from the United Nations Convention on

Contracts for the International Sale of Goods (CISG). The aim of the research is to provide more legal certainty in the application of GTC in the patchwork of the aforementioned legal domains. The ultimate question whether it is possible to provide more legal certainty for companies and individuals, and therefore reduce the amount of disputes?

4. Corporate groups and liability risks

Corporate groups (and groups that are built up of other legal persons than corporations, e.g. foundations or

associations) are an important element in today's economy. A group may consist of just two corporations, but can also consist of well over a thousand corporations. Groups pose several questions that are addressed by this research project. It aims at investigating the way in which groups are governed internally and the consequences that failure to set up proper group governance may have in terms of accountability and liability. Liabilities could include liability of a parent company for the debts of its subsidiary companies or liability of the directors of a parent company for failure to install sound group governance.



Research area:

Distress and insolvency

Creation of a good business environment, promotion of trade and investment are among the top priorities for many governments. Due to risks intrinsically connected to entrepreneurial activities, companies may experience financial difficulties and become insolvent. When it happens, the question of whom to blame frequently arises. The answer which often comes to mind is the debtor's management.

The need to develop rules for effective restructurings, and value-saving insolvency proceedings may require adopting separate rules for situations of financial distress, as opposed to 'business-as-usual' course of affairs. An important part of such rules should be the rules on director's duties and liabilities in insolvent or near-insolvent companies.



Research projects

In the research area of distress and insolvency, BLRN is currently doing research on the topics of:

1. Effect of bankruptcy on employment retention: Does Strategic Bankruptcy Create Value?
2. Standards for bankruptcy investigations
3. The essence of business failure
4. Cognitive biases in legal decision making
5. Debiasing in insolvency matters
6. Psychological implications of bankruptcy: The Story Behind Bankruptcy: when business gets personal

1. Effect of bankruptcy on employment retention: Does Strategic Bankruptcy Create Value?

Although an extensive body exists of research on strategic bankruptcy, the definition and evidence about whether such filings really preserve and/or create value – even as a paradoxical survival mechanism – remain ambiguous. The aim of the study is to investigate whether strategic bankruptcy and financial distress affect employment retention – through the lenses of real options and debt overhang theory. Using a sample of bankruptcies in the period 2012 until 2015, employment retention post-bankruptcy was evaluated as a consequence of the bankruptcy mechanism and the severity of financial distress pre-bankruptcy.

The results indicate that the type of bankruptcy (either strategic or non-strategic filing) plays an important role in determining the employment retention

rate after bankruptcy. Moreover, robust covariance matrix estimation analysis shows that the severity of financial distress pre-bankruptcy plays a marginal role in the employment retention rate post-bankruptcy. Therefore, strategic bankruptcy in its current form may be the best – and only – real option against uncooperative and opportunistic stakeholders in the absence of statutory composition legislation. As to the timing of bankruptcy filing, the results indicate that accelerated filing is the preferred option when bankruptcy becomes unavoidable. The capital advice to managers in practice, however, remains to restructure and recover before attempting bankruptcy restructuring as the severity of both direct and indirect bankruptcy costs should not be underestimated.

2. Standards for bankruptcy investigations

If a debtor with a business is declared bankrupt and an ‘insolvency office holder’ (IOH, such as an administrator, bankruptcy trustee, receiver etc.) is appointed, one of his tasks/duties is to investigate the causes of the bankruptcy: why did the business fail? One of the reasons for such investigation is the quest for possible irregularities that might have caused the bankruptcy and could lead to liability of related third parties, such as (de facto) directors, shareholders, financiers or others. Although the outcome of such investigation could have serious implications and consequences for those third parties, the way and manner it need to be conducted is hardly regulated and in practice often on a case-by-case basis. The aim of this project

is to review the existing regulatory framework ('law in the books') in a number of jurisdictions and to check how practice works ('law in action').

3. The essence of business failure

Business failure is usually considered to be the abnormal outcome of businesses. However failure is not uncommon. Failure (or more general disappearance) is one of the great unmentionables in the world of business. However, the process of business turnover is the essence of capitalism, the formula of success (and failure) is unknown.

Failure at the individual (business) level is the key to success of the system as a whole; entrepreneurial delusion is profitable at the society level. In the end markets win because evolution is "cleverer" than firms. Business life is just too complex. There are no simple rules – no holy grail - for these decisions. In spite of this, most micro economics and management textbooks give the impression that running a business is easy and that maximizing and success are simple. Business failure textbooks contain simple "frameworks" for classifying failure and curing firms in decline. There is a difference however; micro-economic textbooks contain one universal rule: equate price with marginal costs. Curing and classifying business failure textbooks contain (too) many rather simple different frameworks and step-by-step procedures. However these causes are very trivial, state the obvious, overlap, contradict, are influenced by the Halo effect, assume that failures must have causes and thus that somebody is too blame.

What are the reasons that failure is so endemic, why is it not noticed in thoughts, theories and policies that reflect optimism

and survival bias, and is it a positive or negative phenomenon? This study combines empirical, normative, theoretical, methodological and philosophical views. Additionally it considers biological (extinctions) and scientific (falsification) analogies. Approaches from micro economics, meso economics, management strategy, theory of the firm, finance, turnaround management, corporate and insolvency law are taken into account.

4. Cognitive biases in legal decision making

Legal professionals are trained to consider the facts to incorporate only relevant factors in their judgments and decision. Advances in psychological research, however, have pointed out that judgment and decision-making processes can be subject to cognitive errors and mental shortcuts, so-called 'heuristics and biases'. These heuristics often evolved to facilitate and speed-up cognitive processes, but they can also lead people's judgments to go astray under conditions of uncertainty or time-constraints. In such cases, seemingly



irrelevant factors can significantly influence people's judgments, causing people to deviate from the rational norm.

This research investigates to what extent cognitive biases influence legal professionals' judgments in the context of business failure and director liability. The difficulty in such cases is that judgments need to be made in hindsight. That is, while the outcome of a certain course of events is known. When evaluations of ex-ante decisions are influenced by ex-post information, this is called 'outcome bias'. Special attention is given to how judgments, concerning for example foreseeability, proximate cause, and ultimately liability, are influenced by ex-post information. In addition, the research investigates whether individual factors, such as personality and beliefs influence the impact of outcome information on judgments and which mechanisms can be deployed to protect oneself from biases.

5. Debiasing in insolvency matters

Related to the previous project, studies reveal that the IOH and judges dealing with insolvency investigations and subsequent litigation based thereon, f.i. director's/shareholder's liability, are likely to be subject to and influenced by the risks of cognitive biases such as outcome bias and hindsight bias (see other CBL project 'Cognitive biases in legal decision making' by Niek Strohmaier). The goal of this project is to find or (further) develop (existing) methods and skills for the actors in such processes to (i) become aware of such biases and their consequences for their judgment and (ii) minimize the impact thereof.

6. Psychological implications of bankruptcy: The Story Behind Bankruptcy: when business gets personal

The number of bankruptcies in a specific period, and levels of debt, are well documented but little is known about the consequences of bankruptcies beyond the



numbers. In this study, Dutch entrepreneurs who went through debt rescheduling after personal bankruptcy, were interviewed in order to gain an understanding of the private, personal and social implications of bankruptcy.

Recently, systematic investigations of the implications of bankruptcy have been published. However, research has not yet taken the phenomenological experience of the bankrupt entrepreneur into account. Insights into these experiences are of critical importance for obtaining a comprehensive understanding of the impact of the bankruptcy process, and for engaging in a meaningful reform of bankruptcy law. During the interviews in this study, the entrepreneurs reflected on the early days of their business venture, the

moment of first detecting the prospect of business failure, their personal experiences during business failure, and the aftermath of bankruptcy and debt rescheduling.

The findings indicate that a bankruptcy experience can be compared to losing a loved one: a psychological process similar to mourning. The findings show that a lack of empathy, respect and transparency by formal institutional representatives such as judges, trustees and administrators is seen by the entrepreneurs as 'emotional punishment', and can be considered as a major source of their grief. Because of this grief, the bankruptcy and debt rescheduling experience can be extremely stressful causing severe psychological and physical distress. Implications for theory and practice are discussed.



Research area:

Future business structures

In recent years, digital technologies have begun to affect the boundaries and governance of business organizations. The use of online platforms, blockchain technology and artificial intelligence not only enable the sale of goods and services, they also challenge widely-accepted norms of company law and raise novel doctrinal and practical questions of their own. Online platform companies that are 'born global', deploy internet technology, have dual-/multi-class share structures and make extensive use of outsourced, self-employed labour, diverge significantly from the traditional (capital) corporation, the creation of which many company law rules were designed to facilitate.

While trust in institutions and individuals have been critical for building commercial ties between strangers over centuries, the development of blockchain technology since the 2008 financial crisis has created new possibilities for establishing such ties using technological means, without reposing trust in particular organizations or individuals. From a company law perspective, the organization of consensus protocols and the creation of unincorporated organizations built on consensus protocols (e.g. decentralised (autonomous) organisations), fits uneasily within existing business entity forms and problematizes the relationships of trust within business organizations. Without the benefit of publicity – of corporate form and of individuals involved – it becomes unclear which law applies to such organisations, including the relevant rules of liability if the organisation malfunctions. At the same time, this begs the question whether existing business structures have to be re-imagined in light of these technological changes and evolving societal expectations.

The growing use, and increasing sophistication of, artificial intelligence (AI) systems takes these developments a step further, as it enables human beings to gradually cede decision-making authority to AI systems and represent humans in performing certain actions. This not only raises the financial and ethical stakes of trusting technology, it generates uncertainty as to the attribution of liability and the binding nature of these representative acts when something goes wrong.

The researchers involved in this area investigate the impact these technological advances are having on the operation and governance of business organizations, using a variety of interdisciplinary approaches drawing from law & technology scholarship and business studies (among others). This informs the (legal) recommendations they make on how business and liability law may best address these advances.

Research projects

In the research area of future business structures, BLRN is currently doing research on the topics of:

1. Decentralized (autonomous) organizations
2. Artificial intelligence and company law
3. Platform cooperatives

1. Decentralized (autonomous) organizations

One of the most significant applications of blockchain technology has been the creation of 'smart contracts'. They are paradigm-shifting for the formation, enforcement and execution of contracts. This is because their clauses are written in code on a blockchain that is immutable and less susceptible to ambiguity, they are

recorded across globally-distributed network nodes rather than being concentrated in a single server or a document and they dispense with trusted third parties (e.g. courts) by enabling transactions (e.g. transfer of money, opening a door) to be automatically self-executed if certain conditions or obligations are met. It is also revolutionary in its expansion of potential counterparties, from mediating the interaction between human beings to including machine-to-machine and human-to-machine transactions. However, the potential of smart contracts is not limited to washing machines automatically ordering detergent when running low or hotel doors locking and unlocking depending on whether its inhabitant has paid the daily room-rate. Smart contracts can be programmed to execute a series of complex transactions upon the fulfilment of



certain conditions or the occurrence of certain events, thereby emulating the functioning of organizations. While still in its formative years, the decentralized business organizations that have appeared till date share some common features. Firstly, as with many start-ups, they identify a problem or a gap that needs to be addressed and posit a 'solution' that utilizes blockchain technology and applications built on top of it to coordinate concerned stakeholders and execute transactions. Decentralized investment vehicles like The DAO were formed to provide a crypto alternative to conventional venture financing and to bypass the high commissions of crowdfunding platforms. Others, like the developers of Colony, seek to create workplaces that embody and operationalize non-hierarchical management by using smart contracts to distribute business ownership according to individual contributions rather than solely prioritize capital contributions. Secondly, to accumulate capital and meet the initial capital and labour costs when financing options are limited, many decentralized organizations issue 'tokens' to contributors of work and cryptocurrency that variously confer governance rights and, once the token gains wider acceptance, financial rights in the organization. (They, however, differ in the consensus protocols used to determine allocation of said rights.) Thirdly, they often blur the boundaries between the stakeholder groups of a corporation, with an individual filling the role of an investor, worker and manager, either simultaneously or over the course of the organization's lifetime. While management functions can be widely distributed in such organizations, it is conceivable that as artificial intelligence become increasingly sophisticated, several

of these functions can be taken over by algorithms, thereby allowing the entity to be truly autonomous.

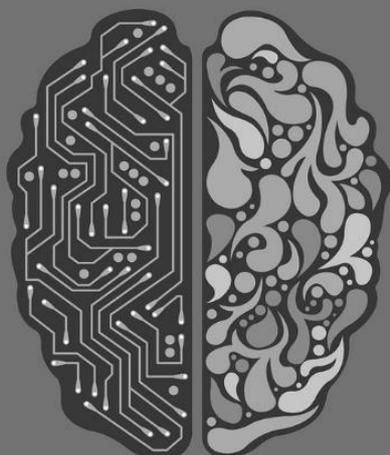
For corporate lawyers and economists, the evolution of businesses on the blockchain raises fundamental questions as to how they should be governed, the legal form that attaches to them by default and the congruence of such forms with the business's objectives. With this in mind, we ask: What is distinctive about distributed blockchain governance? What legal forms should be adopted by decentralized organizations? Conversely, should the law amend or provide new legal forms to optimally arrange the rights and obligations of decentralized (autonomous) organizations? These are the overarching research questions of this project. Given the exploratory nature of this research, these questions will be approached through a combination of literature reviews, legislative analysis and the close study of a purposive sample of decentralized autonomous organizations.

2. Artificial intelligence and company law

As AI systems increasingly interact with society, a number of fundamental (legal) questions arise: whether AI-systems can perform legal acts, such as the conclusion of valid and binding contracts, for itself or for a principal (a person who grants power to represent to the AI system) under Dutch or EU law, whether legal forms with legal personality such as corporations and foundations can be used for this purpose and whether it would be desirable to grant certain rights and obligations (legal subjectivity) to AI systems.

All of these questions are relevant for identifying legal relationships and are necessary for addressing the liability issues that arise as a consequence of AI's interaction with society. This includes issues as to the attribution of liability as well as its effective enforcement. By answering them, it becomes possible to provide proper and just responses to these technological developments, which will balance the need to foster innovation with ensuring a fair and reliable legal system.

The research required to approach such far-reaching questions is, by necessity, multidisciplinary. For instance, to analyse, evaluate and comment on an appropriate legal framework for AI systems, whether geared towards autonomous AI systems or the use of AI systems as boardroom 'tools', it is necessary to have a deeper knowledge of how AI systems affect the decision-making of human users and collaborators who interact with them. Exploring normative questions on whether it is desirable to confer legal capacity and regulation to an AI system necessitates research from technological, psychological, ethical and legal perspectives. Hence, collaboration with computer scientists specialised in artificial intelligence, (social and organisational) psychologists and experts in ethics is imperative.



3. Platform cooperatives

Platform companies are enterprises that deploy a business model that is predicated on intermediating informational and value exchanges between user groups through the use of an online platform that users can access through their smartphone or web browser. While this intermediation reduces search costs, it only presents a partial picture of a platform's economic activities. This business model relies on network effects, whereby the value of the platform appreciates the more users make use of it. To maximize these network effects, the companies that use platforms also deploy technologies to gather personal data so as to identify individual preferences and hold user attention. The operation of network effects, in conjunction with 'lures' for users and the scarcity of users, leads to only a few major platforms emerging. This, in turn, raises concerns about platform companies abusing their dominant position in a market.

In addition, empirical research on the operation of online platforms reveal the myriad ways in which platforms commodify human actions and behaviour for the purpose of generating ad revenues and/or stimulating use of the platform so as to increase commissions paid to the platform. Some have described this as being a form of invisible, immaterial labour, that along with tangible, physical, precarious forms of labour provided by users, is crucial for the platform economy to function. Beyond the business model itself, several of these US-origin platform companies are listed on US stock exchanges with dual or multi-class shares. This confers on founders (generally speaking) a disproportionate influence on the strategies and governance of online

platforms, far outstripping the influence of those who create value for the platform by using it.

Some of these issues are being addressed under existing laws (e.g. labour, competition) or through the introduction of tailored regulation. However, some scholars and activists have presented a counter-narrative to platform capitalism that seeks to “open up new avenues for solidarity” in the global platform economy. Cooperatives have had an intuitive appeal for those seeking to resist, and provide alternatives to, platform capitalism for many years. Sparked by a series of conferences on digital labour and platform

cooperatives, and the essays of influential academics and practitioners, the platform cooperative movement seeks to provide an organisational alternative to platform companies.

As cooperatives, and indeed cooperative law, were designed for local conditions, the introduction of the platform element raises novel doctrinal and practical questions for business law. Investigating this topic requires an interdisciplinary approach, drawing on socio-legal methods to understand the causes and motivations for this emerging phenomenon as well as to identify the (legal) problems that may arise as a consequence.



Events

International opening conference on 'Business Resilience'

On 25 and 26 January 2018, the opening conference of the Business & Liability Research Network took place at Leiden University, the Netherlands. Academics and practitioners came together to debate fundamental aspects of business resilience: long-term value creation, technology and (directors') liability. The conference was inaugurated by the rector magnificus, Carel Stolker, who endorsed the multidisciplinary dimension of the conference and future researches of BLRN. The conference was a joint initiative of Company Law and Business Administration, Leiden University.



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BLRN's conference on **Business Resilience** has led to new insights, such as how behavioural biases should be taken in to account when assessing directors' liability, how the focus on long-term value creation and sustainability should be part of a company's valuation in a takeover context and the impact of technology on both business & law firms. The multidisciplinary background of various speakers and the interactive workshops pave the way for future research projects and conferences in the field of business and liability.

Blockchain, smart contracts & decentralized autonomous organisations

On 9 April 2018, the first BLRN Seminar was organized by the Future Business Structures team. Aron Fischer Ph.D., freelance mathematician and researcher of Colony and Ethereum Foundation's Swarm team, delivered an absorbing presentation on the Ethereum blockchain, smart contracts and decentralized autonomous organizations (DAOs) at Leiden Law School. These headline-grabbing topics can be approached from the perspective of different scientific disciplines, but given the nature of the audience, largely composed of lawyers, legal researchers and law students, Aron focused on the legal and governance questions raised by these technologies.



The first half of his presentation was devoted to demystifying blockchain technology and bringing the participants onto the same page concerning its use cases. He began by discussing Bitcoin and cryptocurrencies but was quick to point out the more intriguing implementations of a blockchain, beyond forming consensus about sending money. With Ethereum, consensus can be reached on something far more complex - the complete state of a simulated, decentralized computer. The 'Ethereum World Computer' provides users with the infrastructure to create any software programs they wish – from games to registries - without fear of censorship or downtime. The software deployed on Ethereum are 'smart' contracts, characterized by their capacity to hold capital, based entirely on programmed rules, and self-execute transactions once certain conditions are met. Aron provided illustrations of smart contracts abstracted from real-world examples, from multi-signature wallets that are akin to joint bank accounts to escrow agreements that handle transactions between pseudonymous

parties that don't trust each other. More recently, there have been 'decentralized applications' (DApps) that encode rules of trading, corporate bylaws and voting systems into smart contracts, creating tantalizing possibilities for how business is conducted and governed in the future.

While highlighting the numerous possibilities afforded by the Ethereum, Aron was pragmatic about the limitations of the technology. It continues to be expensive and time-consuming to use blockchain, making it difficult to scale, smart contracts contain bugs, which have disastrous consequences for those with capital locked in, and there are frequent attempts to game the system. The rough-and-tumble reality of the Ethereum ecosystem raises novel questions regarding liability and damage, risk mitigation and enforcement, which members of the 40+ audience flagged. For researchers, it provides a unique opportunity to observe privately ordered 'fixes' of these challenges, such as an 'escape hatch' that allows a group of developers to signal the existence of a bug and prevent the self-execution of a smart contract. At the same time, there has been much discussion regarding formal dispute resolution on the blockchain, through the creation of institutional mechanisms, such as on-chain arbitration, or by allowing the blockchain itself to act as an arbiter by consensus.

The second half of the presentation looked towards the next step in blockchain's evolution – decentralized autonomous organizations. Aron spoke about Colony and the initiative to build a blockchain-based platform to coordinate decentralized collaboration. Inspired by the success of a group of Redditors in competing in Elon Musk's Hyperloop challenge, Colony seeks to lay the foundation for organizations that are self-governed, non-hierarchical, un-bureaucratic and meritocratic. To do so, Colony is developing user-friendly protocols in which administrative, evaluative and work tasks can be apportioned and rewarded once complete. In these nebulous organizations, financial and governance rights are not solely the function of capital investment but turn on meritocratic and dynamic reputation. Aron concluded the presentation by explaining how reputation accrues to a user and the weighted voting mechanism used, as and when needed.



The seminar benefited from an engaged group of participants who asked thought-provoking questions late into the evening; ranging from how blockchain will impact the future of energy markets to how the intellectual property created by Colony organizations may be protected.

Round table symposium ‘Government and private governance’

On 10 October 2018 Cees de Groot and Jelle Nijland organized a round-table-symposium ‘Government and private governance’ for experts in the field of private governance issues. This day was made possible by the LUF. The main objective of the symposium was to brainstorm with experts from various backgrounds, including the (healthcare) practice, Ministry of Finance, legal profession and academia.

Government and private governance

The experts had discussions about the various mechanisms by which the government forces companies in the private and semi-public sector to adjust their (internal) governance to safeguard a public interest and to identify and appreciate the motivation, the structure and the usefulness of this influence. During this fruitful day, many lively discussions took place on different private governance issues. This included questions such as whether or not independent governing bodies should have legal personality, and if so, what legal form would be most appropriate, and how these entities should be supervised. State participation in private governance, for instance, by holding golden shares was also discussed in relation to possible liability for the State, European legislation on state aid, the influence of market forces and politically sensitive topics, such as remuneration for directors.

Restructuring of Corporate Groups

Restructuring of corporate groups was discussed at the joint conference of the European Law Institute (ELI) and the Business & Liability Research Network of Leiden University took place in Leiden (the Netherlands). During this conference, developments at both the national and European levels were discussed. The ELI’s Instrument on Rescue of Business in Insolvency Law (ELI Business Rescue Instrument) drafted under the leadership of Prof Em Bob Wessels and Prof Stephan Madaus was the starting point for discussions on the treatment of insolvent corporate groups.

Professor. em. Bob Wessels (Leiden University) introduced the ELI Business Rescue Project. This project – led by himself and prof. Stephan Madaus (Halle-Wittenberg University, Germany) – resulted in 115 recommendations on a legal framework enabling further development of coherent and functional rules for business rescue in Europe. The recommendations were presented in the ELI Business Rescue Instrument, which was adopted unanimously in 2017.

Dealing with insolvent corporate groups

Stephan Madaus introduced the recommendations, contained in Chapter 9 of the ELI Business Rescue Instrument on the issue of corporate groups. He highlighted that different approaches can be distinguished, from no or limited coordination up to substantive consolidation.

Insolvent members of corporate groups in Europe are traditionally treated on an entity-by-entity basis. Domestic rules on corporate groups remain rare in the EU. This was also illustrated by prof. Joeri Vananroye (Katholieke Universiteit Leuven, Belgium), who elaborated on the possibilities for corporate group restructurings under Belgian law. Prof. Reinout Vriesendorp (Leiden University) highlighted that further research needs to consider the role of directors of insolvent corporate group members in the European context.

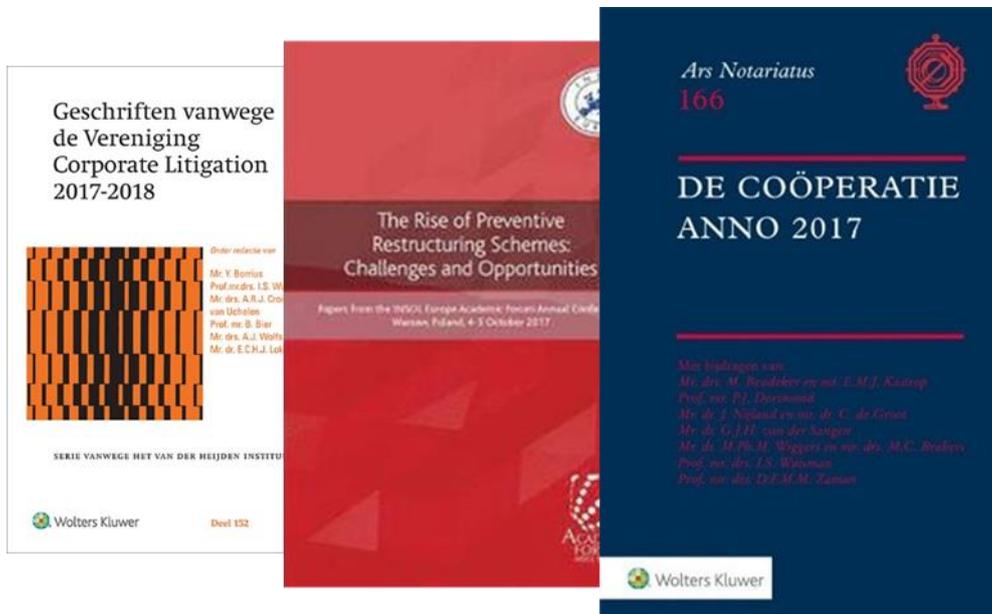
Improving restructuring

A joint presentation was given by Jessie Pool, Ilya Kokorin and Gert-Jan Boon (researchers at Leiden University), who discussed the existing legal mechanisms to facilitate efficient resolution of group distress. First, they considered the European Insolvency Regulation (EIR 2015) and concluded that, due to the voluntary nature of group coordination proceedings and an easy opt-out from them, such innovation may have limited effect. Different alternatives were considered, including the appointment of the same insolvency practitioner, establishing an enterprise COMI and using synthetic or “reversed” synthetic proceedings. But currently these options are either unavailable or face significant (practical) difficulties. Insolvency protocols were suggested as the most flexible tool. However, to make their adoption more prevalent, training for judges and insolvency practitioners is needed.



From left to right: Joeri Vananroye, Ilya Kokorin, Stephan Madaus, Bob Wessels, Jessie Pool, Reinout Vriesendorp, Gert-Jan Boon

Publications



Highlighted publications

Good Corporate Governance

N.T. Pham, T.L.M Verdoes, M.L. Lycklama a Nijeholt & J. Nijland, 'Shifting Paradigm? Long-Term Value Creation as a Normative Principle in a Hostile Takeover: Evidence from the Netherlands', *European Journal of Interdisciplinary Studies* 2018, Volume 4, Issue 2, p. 91-102.

This article provides additional insight on the effectiveness of long-term value creation as a legally enforceable norm in the corporate governance system and provides a framework to anchor long-term value creation in takeover decisions.

Since the 2008 financial crisis, a growing number of voices in the business world, government and academia, have urged Western economies to move towards a long-term sustainable growth agenda. Boards have a vital part to play in the development of responsible companies. Corporate governance should encourage boards to do so. This could be viewed as a reaction to the negative effects of capital markets and the resulting short-termism. One key method to encourage sustainable value creation in companies is by incorporating long-term value creation as an open norm in corporate governance systems. In the case of a hostile takeover, the risk of short-termism is exacerbated. As a guiding principle, long-term value (LTV) creation should prevent hostile takeovers that could harm the success of the company concerned. In this research paper, the authors argue that the recent shift in Dutch case law and revision of the Corporate Governance Code in the Netherlands may serve as an important catalyst for 'sustainable' takeover decisions. Through ground-breaking judgments by the Dutch Supreme Court and Enterprise Court, Cancun and Akzo Nobel, LTV has

acquired the status of an enforceable norm. The authors investigated whether this legal norm is empirically substantiated. The research results allow them to make well-grounded statements about the effectiveness of enforcing LTV in future hostile takeover situations.

Distress and Insolvency

Vriesendorp R.D. & Strohmaier N. (2018), *Rechterlijk (voor)oordeel*. In: Borrius Y., Wuisman I.S., Croiset van Uchelen A.R.J., Bier B., Wolfs A.J., Lokin E.C.H.J. (Eds.) *Geschriften vanwege de Vereniging Corporate Litigation 2017-2018*. Serie vanwege het Van der Heijden Instituut no. 152 Deventer: Wolters Kluwer. 491-501.

This article deals with judicial decision-making and the potential unconscious influence of human errors, following a discussion and experiment performed at the 2017 fall meeting of the Dutch Association of Corporate Litigation. Two perspectives on judicial decision making are highlighted. First, professor Raimond Giard emphasized the role and importance of a sound methodology when conducting liability investigations. Second, Vino Timmermans focused on preventing biased judicial decision-making by developing tools for judges to prevent accusations and allegations of that sort. To illustrate the role that biases in judgments and decision-making can have, a short experiment designed by Niek Strohmaier and Reinout Vriesendorp was conducted. In this experiment, half of the participants received a short and fictitious directors' liability case with instructions stating that the director in the case was accused of mismanagement and they were asked to give their opinion on the matter. The other half of the participants received the same case, but, without any further details and instructions. The findings were somewhat counterintuitive. Those who did not receive any specific instructions indicated to be more likely to investigate the director's conduct than those who did receive the framed instructions. Potential hypotheses to explain these findings are put forward.

To conclude, Reinout Vriesendorp elaborated on the limitations of human memory, followed by a discussion of reasoning errors that can enter the 'ladder of inference'. This prompted the conclusion of a call for action. Judges and lawyers should be aware of the risk of confirmation bias and tunnel vision to be able to only consider the facts.

Future Business Structures

W. Reijers, I.S. Wuisman, M. Mannan, P. De Filippi, C. Wray, V. Rae-Looi, A. Cubillos Vélez, L. Orgad, 'Now the Code Runs Itself: On-Chain and Off-Chain Governance of Blockchain Technologies', *Topoi: An International Review of Philosophy* (online).

The invention of Bitcoin in 2008 as a new type of electronic cash has arguably been one of the most radical financial innovations in the last decade. Recently, developer communities of blockchain technologies have started to turn their attention towards the issue of governance. The features of blockchain governance raise questions as to tensions that might arise between a strictly "on-chain" governance system and possible applications of "off-chain" governance.

In this paper, the authors approach these questions by reflecting on a long-running debate in legal philosophy regarding the construction of a positivist legal order. First, they argue that on-chain governance shows striking similarities with Kelsen's notion of a positivist legal order, characterised by Schmitt as the machine that runs itself. Second, they illustrate some of the problems that emerged from the application of on-chain governance, with particular reference to a calamity in a blockchain-based system called the DAO. Third, they reflect on Schmitt's argument that the coalescence of private interests is a vulnerability of positivist legal systems, and accordingly posit this as an inherent vulnerability of on-chain governance of existing blockchain-based systems.

Overview of publications

Good Corporate Governance

M. Darouei & H. Pluut, 'The paradox of being on the glass cliff: why do women accept risky leadership positions?', *Career Development International* 23(4), p. 397-426.

J. Nijland & C. de Groot, 'De ledenaansprakelijkheid bij de coöperatie', in: J. Nijland & D.F.M.M. Zaman (red.), *De Coöperatie anno 2017* (Ars Notariatus nr. 166), Deventer: Wolters Kluwer 2018, p. 61-75.

N.T. Pham, T.L.M Verdoes, M.L. Lycklama a Nijeholt & J. Nijland, 'Shifting Paradigm? Long-Term Value Creation as a Normative Principle in a Hostile Takeover: Evidence from the Netherlands', *European Journal of Interdisciplinary Studies* 2018, Volume 4, Issue 2, p. 91-102.

H. Pluut, M. Büttgen & J. Ullrich, 'Testing a model of spousal influence on employees' career paths in dual ladder systems', *European Journal of Work and Organizational Psychology* 27/6 (2018), p. 777-792.

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H.L. Aalbers, J.A.A. Adriaanse, J.I. van der Rest & F.E. van Wersch, 'Bankruptcy and Post-Bankruptcy Employment Retention: Evidence of the Dutch Insolvency Field', in: J.L.L. Gant (ed.), *The Rise of Preventive Restructuring Schemes: Challenges and Opportunities*, Nottingham: INSOL Europe 2018, p. 41-54.

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I. Kokorin, 'Все кредиторы равны, но некоторые равнее других. К вопросу о субординации корпоративных займов при банкротстве в России, Германии и США (All creditors are equal, but some are more equal than others. Subordination of shareholder loans in insolvency. Russian, German and the US experience)', *Вестник экономического правосудия Российской Федерации (Review of Commercial Justice)*, 2018, No. 2(48), p. 119-137.

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B. Wessels & I. Kokorin, *European Union Regulation on Insolvency Proceedings: An Introductory Analysis*, Alexandria: American Bankruptcy Institute 2018.

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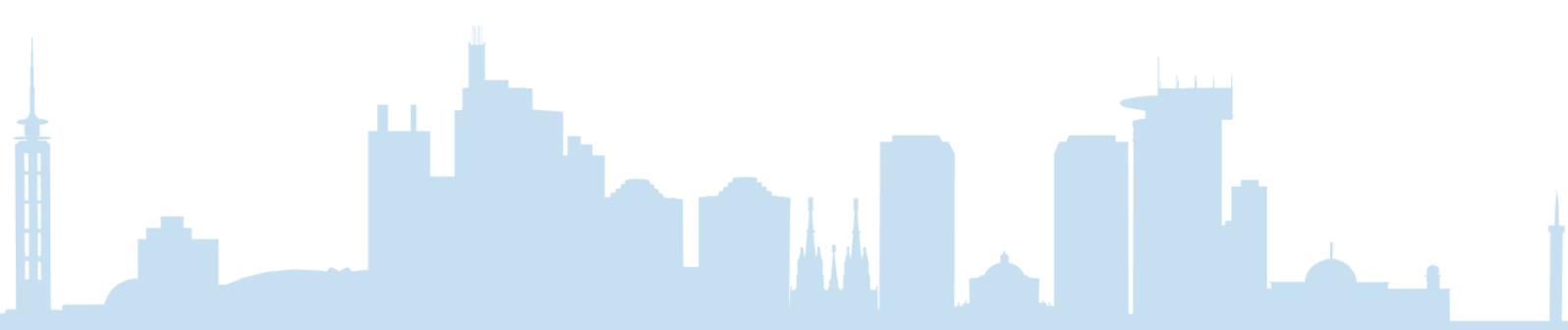
Future Business Structures

I.S. Wuisman, 'Twitter: naar een multi-stakeholder coöperatie en de commons', in: J. Nijland & D.F.M.M. Zaman (red.), *De coöperatie anno 2017* (Ars Notariatus nr. 166), Deventer: Wolters Kluwer 2018, p. 87-98.

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D.F.M.M. Zaman, C. de Groot & M. van Steensel, 'Foundations in the Netherlands: present and proposed legislation and their role in the economy', in: B. Weitemeyer, R. Hüttemann, P. Rawert & K. Schmidt (red.), *Non Profit Law Yearbook 2016/2017*, Hamburg: Bucerius Law School Press 2017, p. 217-275.



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