The Business & Liability Research Network (BLRN) goes live with an inaugural conference on 'Business Resilience'.

The multidisciplinary background of various speakers and the interactive workshops have paved the way for future research projects and conferences in the field of business and liability issues. Interested parties are explicitly invited to join BLRN.

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 magnficus, 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.

Day 1 – Long term value creation and technology as a driver of change

The Perfect System Syndrome

The opening was followed by our keynote speaker Jaap Winter (partner at Phyleon governance & leadership), who spoke about business resilience and human effort. The main message of his lecture was that the environments of large organizations we work for have become toxic for us as human beings. This is because corporations are vehicles with agency problems that focus on producing shareholder value. Corporations have turned into balance sheets, that focus on indicators of success and profit maximization. Because of this focus, according to Jaap Winter, indicators of success have become targets for people to achieve, which creates incentives to turn to fraudulent/corrupt behavior in order to achieve these targets. Corporations have been turned into bundles of assets. The people within these organizations have turned into living assets and instruments to make the outcomes happen. Humans have thus been turned into things to be controlled instead of people who can discipline themselves. As a result, we create countless sets of rules and control mechanisms to make sure that people do not make mistakes. This in turn has created a new mentality: if I stay inside the scope of the rules, I'm fine. Moral muscles are no longer trained and human meaning gets lost amidst targets to achieve efficiency, growth and financial outcome. This causes people within these organizations to start losing their intrinsic motivation, even more so because remuneration has exploded and been linked to performance outcomes. Research has shown that people cannot handle high levels of performance based payment. This incentivizes them to become

corrupt and thus serious fraudulent behavior is to be expected. All of these developments are a cause for worry because large organizations have a significant impact on society.

Jaap Winter also touched upon the development of Artificial Intelligence that raises new questions. Companies that use algorithms – such as Facebook – see people as bundles of data, turning humans into resources for production purposes. We keep designing society in a way that human failure is not an option, and in this process we are making ourselves obsolete. With the potential of Artificial Intelligence is continually improving, we are on our way of creating systems so perfect that no one will need to be good (the "Perfect System Syndrome").

All the while, nobody is challenging the laws of the capitalist system that large organizations function in. Winter argues that we should question this system of capitalism and think about what drives us as human beings. He argues that we need to rely on imperfect human effort to make companies stronger, because the focus on removing imperfections counterintuitively results in the removal of the strength in businesses. When judging the behavior of directors in the field of directors' liability he also sees a shift from substantive norms to procedural norms. For example, in the Dutch Meavita-case, where the Enterprise Chamber of the Amsterdam Court of Appeal criticized the Supervisory Board of Meavita for *not having a profile* for management appointments, instead of judging the *actual action of hiring* poor managers. This reduces human, context-sensitive legal judgements to applying procedures. Are judges now heading in the same direction that these large organizations themselves are heading towards? The keynote speaker concluded his address by signaling an urgent need to (re-) humanize corporations and Artificial Intelligence to create enough scope for human judgement, inspiration and morality otherwise we will set ourselves up for failure.

Long term value creation

Subsequently, Pieter Bouw (former CEO of KLM) spoke about the need to focus on long-term value creation to limit the negative impact of primarily focusing on short-term financial results and to enhance sustainable development and inclusiveness. When looking at the different markets that listed companies operate in, many of them have become globalized (e.g. the financial markets and the markets for top talent for knowledge). When looking back over the past few centuries, we see a shift from companies where the entrepreneurs know each other at a local level (e.g. the East Indian Company) to unknown investors worldwide (e.g. large investment funds). At the same time, we have noticed a shift from strong personal involvement with a company to a primary focus on short term returns. These shareholders do not own the company, but they own the shares. Governments want society to respect human beings and long term value creation and aim to stimulate companies to benefit society. This behavior can be stimulated by shifting from rule-based thinking to principle-based thinking, because rules do not stimulate the moral muscles of people but principles do. In the Netherlands, directors are responsible for the strategy of the company. They need to act in the best interest of the company and the enterprise affiliated with it. The extent of shareholder control should be limited to assisting management in focusing on these long-term

corporate interests. This will safeguard the continuity of the company and thereby safeguard the interest of its stakeholders. Protective measures are only to be used in case of a real threat. They need to be an *ultimum remedium*, and if they are used they need to be temporary as well as proportional, so that there is time to weigh stakeholder interests.

Panel discussion long term value creation

In the subsequent panel discussion on long-term value creation as a possible leading principle in takeovers, Daan Schipper (Rabobank) highlighted that Rabobank is looking for long term prospects, to promote sustainable development in the food and agricultural sector. Creating value for society is what drives Rabobank and its customers. In the takeover context, he argued that sustainability and focus on long-term value should be part of a company's valuation. It can make a company into a more interesting prospect for a takeover on the one hand, but on the other hand it makes a company less of a bargain. Tineke Lambooy (Professor of Corporate Law at Nyenrode Business University) discussed the importance of non-financial elements of disclosure in takeover situations. She highlighted four of these elements: HR policy, environmental impact, bribery and social policies. In a position paper, the potential buyer should elaborate on the value of the combined two companies in the long-term future. Jaap van Manen (former Chairman, Corporate Governance Code Monitoring Committee) focused on the debate about hostile takeovers and named two aspects that are a reason to worry. First, hostile takeovers provide no room for real dialogue between the target and the acquirer and second, there is usually no due diligence in such a situation. This seems not beneficial to the ideal of long-term value creation.

When the discussion turned to the role of the government in takeover context, Ji Li (Professor of Law at Rutgers University) created an analogy with the United States (US). The US review all proposed cross-border takeovers in the light of national security. Ji Li noticed that this creates tension, because this system requires investors to make difficult predictions about a certain investment. He therefore pleads that the EU does not adopt a similar approach in takeover contexts. Niek Zaman (Professor of Notarial Corporate Law at Leiden University) responded by saying that there should be reciprocity as well. The EU should be able to invest in China as much as China is currently able to invest in the EU. Ji Li agreed on the reciprocity principle and highlighted that the US screening system is now increasing volatility in the relations between countries. Tineke Lambooy highlighted that international investment law aims to protect foreign investors in the host state. Governments that want to regulate foreign investments, will need to prove that the proposed measure has a clear objective and the means to achieve the objective are proportional. If we were to allow screening under Dutch law, there should be a clear standard for it.

Technology as driver of change

After a short coffee break, Iris Wuisman (Professor of Company Law at Leiden University) presented a lecture about technology as a driver of change for future business structures.

More specifically, she discussed the possible influence of Artificial Intelligence (AI) on the composition and decision-making of the board of directors, blockchain technology as a tool for corporate governance and, in addition, emerging organizational structures that are created on the blockchain, using their own corporate governance regimes.

She started with the role of AI in the boardroom. First, this would probably implicate using AI as a tool for decision-making by human directors. However, as a new generation of AI is on its way she addressed that we might even have AI as a full-fledged statutory director on the board within the near future. The abilities of the AI machines will determine their functionality and how they can be used in relation to the management of a business enterprise on board-level. When looking at decision-making, it is a process that involves a variety of components; What is the relevant knowledge, which actors are involved, what is the relevant data, how do we judge this data and what action has to be taken? AI can be helpful at gathering and crunching the data and can also make predictions quite accurately. But when it comes to evaluating the outcomes of the data analysis and the ability to make considered decisions or arrive at sensible conclusions - AI machines still fall short of human beings. This is due to the fact that humans have certain capabilities that AI machines do not have yet or at least not to a similar extent. However, AI is starting to develop increasingly human like abilities, such as empathy. As a result, we will see a shift from AI as an assistant to AI as a form of autonomous intelligence. When looking at AI as an assistant, it will still be the human director that makes the decision. Legal acts will still concern the human director. As AI will become more widely accepted in society, using AI as an assistant in the decision-making process might turn into an obligation or principle of good governance under the duty of care. But with the processing of big data, also comes the question: how did the machine come to its conclusion? We are then touching upon the area of hidden biases in the information that has been fed to the machine. Certain information might also be missing from the dataset.

When the machine is learning independently, it can change the input itself and can become a black box. When the AI machine configures a black box where the logic of the algorithm is unclear this will have an influence on the ability of a director to reasonably foresee that his acts based on the AI generated information would cause the damage and in turn this might affect the liability standards which are used to determine whether a director has breached his or her duty of care. If AI starts to take decisions on its own, it will become autonomous. The question arises whether under current law a robo-director already can become a statutory director. We are faced with the question whether AI machines should be able to have legal capacity and subsequently be subject to liability claims. And if they can act as statutory directors whether company law will need to be amended.

In the second part of her presentation, Iris discussed how blockchain technology can be used for current corporate governance practices and she spoke about the emergence of blockchain based organizations. At the moment, blockchain technology and smart contracting make it possible to set up a decentralized autonomous organization (DAO). DAO's can be used in a

variety of ways for instance as investments fund or as a collaboration between self-employed workers. The governance system of such an organization consists of several layers, concerning not only the level of the people organizing themselves but also the protocol-level or levels when there are more than one. The allocation of rights and obligations of the involved parties is now mostly designed without reference to, and taking into account, any company law rules. As with AI, these developments would also trigger an analysis of the compatibility of our current company law regimes on the one hand and the way company law can play a role in shaping these technological developments on the other hand.

Panel discussion technology

In the panel discussion on the impact of technology on business structures, moderated by Morshed Mannan (PhD candidate, Leiden University), Marloes Pomp (project leader of thirty blockchain projects involving Dutch government-organisations) kicked off with a striking example of how the Dutch government is exploring the possibilities of blockchain. She recommended learning by doing and encouraged legal experts to start experimenting with blockchain. Online translators can help to read and work with the code. Marloes also discussed the legal status of tokens, which give access to platforms (e.g. go to another level of a game). Investment tokens can be compared with shares, according to Marloes Pomp. Legally speaking, we have difficulty defining these tokens, they are not shares, they are not bonds but are in a certain way equivalents. It is a new category. How can these instruments influence corporate governance? Tokens can carry voting rights that might interfere with voting rights of shareholders/bondholders. They may influence business decisions. As tokens are constantly evolving and coming under increasing regulatory scrutiny, their long-term impact on corporate governance remains to be seen. Ivona Skultétyová (lecturer and researcher at Tilburg University) discussed the interface between programmers and the legal world, by stating that lawyers are needed to create smart contracts and programmers are needed to write the code for the blockchain structures. She also encourages lawyers to start developing their knowledge on blockchain, because we will need people who are an expert on both in the near future. From the audience, the interesting question arises on how we can make sure that, in the context of decision-making by directors, the right information will be found and used in the limited amount of time. Iris Wuisman explained that the outcome of using AI is the information you put into the model. This involves a risk of biases ('garbage in, garbage out').

Workshop long term value creation

After lunch, the participants were divided in two groups to attend smaller workshops. The first workshop on long term value creation dealt with this topic within a takeover context. Thy Pham (Assistant Professor of Company Law at Leiden University) spoke about the question ‘Under which conditions can long term value creation be a legitimate defense against hostile takeovers?’ First, the misperception that long term value creation is endorsed in the corporate governance code was discussed. Second, the new proposed statutory time-out by the former

Dutch Minister of Economic Affairs was mentioned, mainly in the context of the underlying argument of protecting Dutch companies against foreign take-overs. Martijn van Kogelenberg (assistant professor Private Law at Universiteit Utrecht) spoke about pathways towards economic sustainability, mainly touching upon issues regarding planned obsolescence. Subsequently, Titiaan Keijzer (PhD-Candidate Corporate Law at Erasmus University Rotterdam) spoke about the importance of mild directors' liability regimes, mainly focusing on the business judgement rule and Benjamin Graham's Value Investing Model. Ji Li discussed the impact of national security screening on foreign direct investment, focusing on his research on state-owned Chinese companies trying to enter the US market.

Workshop technology

The second workshop, on technology, was held by Erik Vermeulen (Professor of Business & Financial Law at Tilburg University) discussing the prospects of future lawyers in an era of rapid technological change. He explained that his job as legal counsel is being threatened, because it can easily be automated. Within Philips Lighting, a research on automation came up with four categories of automation within the legal tech market: e-discovery, legal research, predictability in court and contract analytics. Will this disrupt our legal domain and the future of lawyers? Erik Vermeulen does not think it will happen that quickly, but surmises that technology is a very interesting opportunity for law firms. He highlighted that we need to create a dialogue to make the technologists aware of the things that need to be taken care of by the code (e.g. how to implement legal concepts such as force majeure in technological frameworks and automated processes?). The workshop was concluded by arguing that old economics do not work anymore in the new world. Profits are not the most important thing anymore. If companies such as Tesla are examined according to the old profit-driven models Tesla seems to preform poorly, but their valuation is higher than other automotive companies. This is because Tesla is not just a car production company, but rather an energy company that is rapidly expanding its presence in the energy production and storage market, betting on a global shift towards renewable energies. Tesla is also precipitating move from ownership-driven consumption to subscription-driven consumption. This is part of a broader effort by post-industrial and banking companies to reorganize their business models into becoming 'platforms' that dispense services.

Not based on profits, because they are losing money. But Tesla is not a car company, it is another type of company. If everybody has an electric car, they will need electricity – we need a smart grid. Tesla is betting on that and creating a lot of ideas on this so their model will be based on subscription.

Day 2 – Directors' liability and insolvency

Directors' liability in the twilight zone

The second day of the conference was opened by Michal Barlowski (senior partner at Wardyński & Partners), who spoke about directors' liability in the twilight zone. His lecture is based on his work as chair of a working party on directors' liability of the Conference on European Restructuring and Insolvency law (CERIL) where distinguished insolvency lawyers from all over Europe try to further topics in the field of insolvency law, such as directors' liability. In Europe, the 'twilight zone' in the eve of a formal insolvency proceeding is not clearly defined and the question is whether it can be defined. Michal Barlowski wondered whether we should have new regulations so that we have a common understanding on when such twilight zone begins. When entering this stage, directors may incur additional liability, not because they caused insolvency, but because they did not take the right measures to avert insolvency. In the twilight zone, there is a shift from acting in the interest of the company and the enterprise affiliated with it and its shareholders towards acting in the interest of stakeholders (creditors) who are still in the money. However, currently there are no specific obligations for directors during preventive proceedings in this twilight zone. Michal Barlowski also spoke about his comparative research on directors' liabilities in the twilight zone, touching upon many relevant questions such as 'Who can be a director?' (in the context of shadow and *de facto* directors), 'What are the powers of the directors?' and 'What is the right of representation'. He concluded that there is no real need to reform the legal framework regarding directors' liability in the EU because of the existence of some common denominators for establishing liability such as breach of law, breach of diligence and gross negligence.

The decision-making process

Subsequently, Reinout Vriesendorp (Professor of Insolvency Law at Leiden University) spoke about the decision-making process of directors and events or behaviour that can or should (not) establish liability. Reinout Vriesendorp argued that issues regarding liability mainly arise if a business is in financial distress and when insolvency is looming. Insolvency practitioners must consider whether or not to sue directors, but then their actions may be criticized, especially in view of hindsight bias. However, the decision-making process as such occurs in foresight and as we know, directors do not have a crystal ball to take the right decisions. So how do directors know if these decisions have been made accurately? Predictability (the right or wrong decision, leading to (no) liability) is important, but in most situations impossible.

Therefore, when considering the liability question, the courts fall back on the decision-making process, which can only be reconstructed (in hindsight) based on available evidence. But what if that is not pointing in one clear direction? Reinout Vriesendorp argues for a desirable alternative approach. The law should indeed provide directors with foreseeability and predictability but it cannot guarantee total certainty. Although directors need to deal with a certain degree of uncertainty, it can still be helpful if they are aware how insolvency practitioners and courts will judge their behaviour. Based on the ancient Roman law maxim "Honeste vivere" he advocates the use of trust as a starting-point when dealing with the topic of directors' liability: a director should not be liable unless there is fraud or abuse of corporate opportunities involved.

Panel discussion directors' liability and insolvency

In the panel discussion on directors' liability and insolvency, duties and liabilities of directors during the pre-insolvency phase were discussed among various insolvency experts. Yvette Borrius (partner at Florent) argued that insolvency practitioners cannot pick out only one or two transactions performed by the director and contest them. Her advice was to have experts as insolvency practitioners and judges who are more capable of assessing those questions in a proper way and in the correct context (e.g. the Dutch Enterprise Chamber). Mincke Melissen (senior judge at the Court of Appeal Amsterdam) agreed with this statement and added that judges must deal with hindsight bias in almost every case. She advised that it is very important to hear the director, not just the insolvency practitioner. Why did (s)he decide as (s)he did? Insolvency practitioners only see the aftermath of a chain of events. Stephan Madaus (Professor of Insolvency Law, Civil Law and Civil Procedure at the Martin Luther University of Halle-Wittenberg) agreed with Reinout Vriesendorp that the basis must be to trust directors in their decision-making. It is the purpose of the business to make risky decisions -- if the decision turns out to be a bad one, the only money you lose is what you put into it. If we do not want this risk, the legislator should take steps to clarify directors' liability. Thy Pham (Assistant professor of Company Law at Leiden University) defended the open textured legal norms in the context of directors' liability by arguing that they contribute to legal certainty. Her empirical research showed that risk-taking was not a statistically relevant factor in determining directors' liability. Jan Adriaanse (Professor of Turnaround Management at Leiden University) spoke about bankruptcy cause investigation and the problems with investigating and assessing decisions that have been made in the past. He argued that the question that has to be answered first is 'What happened?' instead of 'Who did it?'.

Workshop behavioral implications of failure and directors' liability

After the coffee break, the participants were divided in two groups to attend smaller workshops. The first workshop on behavioral implications of failure and directors' liability was introduced and moderated by Reinout Vriesendorp. Jessie Pool (PhD-fellow Corporate and Insolvency Law at Leiden University) discussed the directors' duties in the pre-insolvency stage

in view of the current EU proposal for a Restructuring Directive. She argued that, to pursue early restructuring, directors' duties in the pre-insolvency stage should be clarified *ex ante*. The first step in this clarification process is, according to Jessie Pool, defining 'vicinity' of insolvency. Subsequently, duties of directors in this 'twilight zone' were discussed. The conclusion of this discussion was that defining directors' duties is contrary to entrepreneurial freedom. David Gibbs (Lecturer in Company and Commercial Law at University of East Anglia) explained his research on determining directors' derivative liability, mainly focusing on the institutional complementarities perspective. Finally, Niek Strohmaier (PhD-Candidate, Business Studies at Leiden University), with his background in empirical psychological research, explained the implications of hindsight bias on assessing the directors' behavior before bankruptcy. The conclusion of this part of the workshop was that hindsight bias is always a risk in determining directors' liability.

Workshop bankruptcy cause investigation

The parallel workshop, on bankruptcy cause investigation, dealt with several topics regarding business failure investigation. Jan Adriaanse started the workshop by explaining the two dominant schools of thought regarding business failure: the deterministic view and the voluntaristic view. He argued that his business failure drift model is all about assessing, weighing and reconstructing the facts. Gert-Jan Boon (researcher at Leiden University) touched upon legal issues concerning cause investigation, discussing the new duty of the insolvency practitioner to investigate and assess any inconsistencies that may have caused the bankruptcy. First, article 18 of the EU proposal for a Restructuring Directive was discussed. The audience concluded that we should be careful about protocols and prevent a tick-the-box mentality. Second, big data and AI were discussed as tools in the investigation process. Problems of big data, such as how realistic the image obtained is and who needs to pay for the investigation were touched upon. The workshop concluded with the observation that, although big data analysis and AI can help us with finding and structuring information, humans in the end make the stories and colour the picture.

To conclude, 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 issues. Interested parties are cordially invited to join the Business & Liability Research Network.