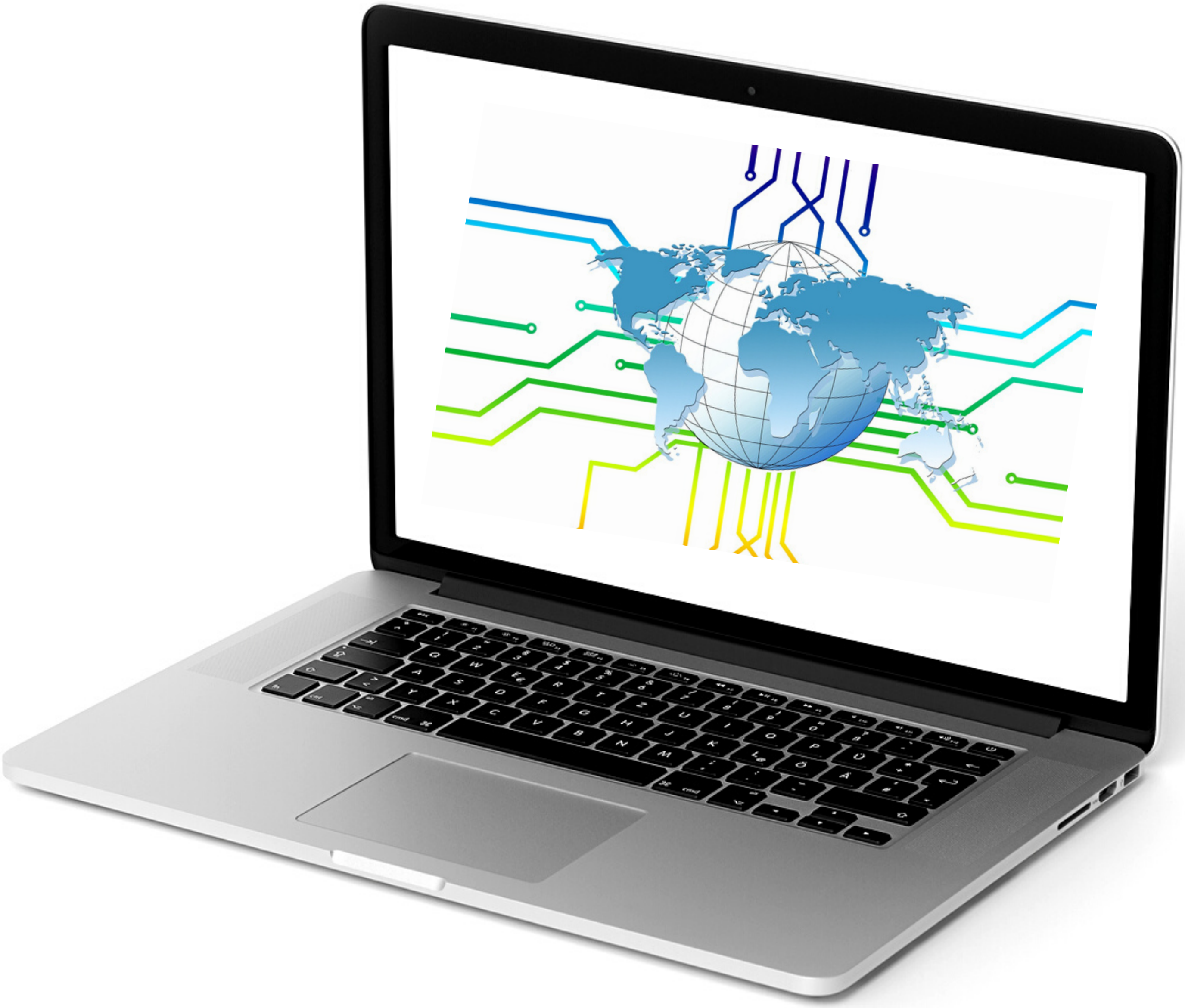
gcgc Global Corporate Governance Colloquia

ecgi european corporate governance institute

THE COVID-19 CRISIS AND ITS AFTERMATH CORPORATE GOVERNANCE IMPLICATIONS AND POLICY CHALLENGES

24-Hour Global Webinar hosted throughout:
Australia, Japan, South Korea, Singapore, China, Israel,
Germany, Sweden, United Kingdom, and USA

16 APRIL 2020



Conference Report

CONTENTS

Introduction

It is already clear that the COVID-19 pandemic will have dire economic consequences, and collective thought is being applied to what policies can better ensure societies' resilience and their quick and dynamic recovery once the crisis is over. Corporate governance scholars can help devise sound and effective policies for this purpose.

On 16 April 2020, the European Corporate Governance (ECGI) together with the Global Corporate Governance Colloquia (GCGC) hosted a 24-hour global webinar, convening scholars, practitioners and policymakers with the aim of sharing evidence-based insights for the common good. The event consisted of ten 2-hour sessions commencing at 9:00am in Monash University, Melbourne, Australia, moving through Japan, South Korea, Singapore, China, Israel, Germany, Sweden, the United Kingdom, and the USA, to finish in Stanford University, California. Videos of the sessions are published on the ECGI and GCGC websites. More information about these organisations is available at the end of this report.

Executive Summary

The COVID-19 crisis is more complex and extreme than the 2008 crisis, due to its two-track nature involving both health and finance. However, it similarly has the potential to produce radically different outcomes across different jurisdictions, impacting on national sovereignty. This will largely depend on the strength of each jurisdiction's health system and its commitment to effective social mitigation policies, along with the capacity and willingness of individuals to accept constraints on their traditional freedoms. Effective health and financial regulatory cooperation and coordination at both a national and international level are considered imperative. There is unlikely to be a simple end to the health crisis, and financial responses will inevitably lead to higher inflation during the recovery period. It is not a short-term crisis but it will also create a range of opportunities for innovation and corporate acquisitions, along with the potential restoration of trust in banks and public institutions, depending on the prioritisation of health and finance decisions which will inevitably arise.

Discussing whether the regulatory techniques, which were effective in protecting Australia from the full impact of the global financial crisis, would be equally effective in the COVID-19 crisis, the opening session of the conference observed that the global financial crisis involved demand disruption, which could be mitigated by public spending, in the form of a very large stimulus package, whereas the COVID-19 crisis is **primarily a supply shock**, which cannot be addressed in the same way.

The panelists acknowledged recent changes to Australia's foreign investment review rules now enable the government to scrutinise all foreign investment transactions, indicating that **sovereign interests** are paramount despite a simultaneous commitment to globalisation. This issue arose in a subsequent session which observed the pandemic as a 'negative blow' to globalisation, likely to result in the enactment of protectionist regulations, pointing to Regulation (EU) 2019/452 of 19 March 2019 which established a framework for the screening of foreign direct investments into the EU. These mechanisms are likely to be reinforced during the crisis. Going further, it was offered that the present crisis could put on hold the introduction of rules to improve corporate governance in controlled firms, reduce global mergers and acquisitions, reduce market supervision and increase state ownership around the world.

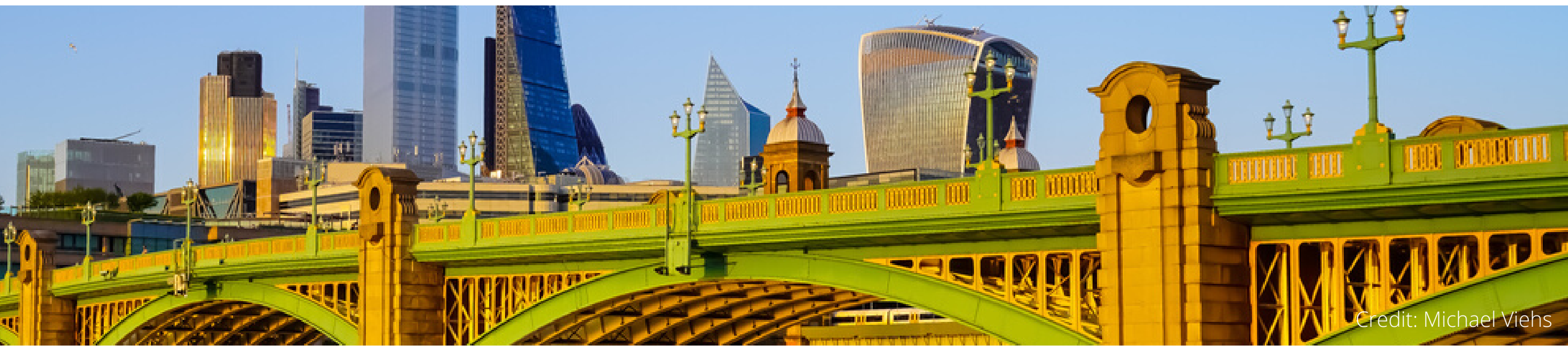
In Australia, the 2019 Banking Royal Commission and debate around climate change and sustainability had already weakened the idea that directors' primary duty is to maximize profits for shareholders, even at the expense of other **stakeholders**. This idea also underpins some current international developments, involving the imposition of temporary restrictions on the payment of dividends by banks. It was observed that in the current crisis, Australian banks have acted as a community backstop in relation to social dislocation affecting landlords and tenants, and that the concept of "fairness" would be a key aspect of the continued debate on public versus private interests and responsibilities.

Another pertinent issue relates to the risk of personal **liability to company directors** for their corporation's debts under Australia's somewhat Draconian insolvent trading laws, which have recently been relaxed by the government in the face of COVID-19. The panelists observed that **competition** has also been significantly impacted, pointing to the Australian Competition and Consumer Commission (ACCC) which has provided a number of urgent interim authorisations, permitting companies in particular sectors (e.g. supermarkets, banks, medical technology companies) effectively to engage in cartel conduct. The current crisis has therefore escalated existing cooperation initiatives (e.g. eradicating slavery) in the private sector, and also, cooperation between the government and the private sector although difficult prioritisation decisions remain.

Moving to Japan and Korea, the second session of the conference considered implications for planning, CSR, contracts and succession. While pandemic-type risk appears similar to that of earthquakes or typhoons as its estimated frequency is low and the damage it causes can be enormous, the effectiveness of **Business Continuity Planning** (BCP), unlike in those natural disaster situations, might be limited, as a pandemic causes damage principally to the labour force, noting that the recovery speed from the damage must be controlled to prevent further infections.

A recurring theme throughout the conference was the inevitable challenge between investors' demand and stakeholders' (or sometimes between different stakeholders') welfare. One aspect of **corporate social responsibility** (CSR) is mitigating negative externalities from business activities beyond legal requirements. In the current context, one of the major negative externalities to be mitigated is the spread of COVID-19. Interestingly, this has resulted in CSR in Japan to include the inducement of companies to close or cancel their shops and events voluntarily or to let their employees work from home, since Japanese law does not grant the government powers to impose curfews due to historical reasons. How voluntary it is, however is debatable, as directors who decide to keep their business open may not be fully protected by the business judgement rule, when for example the company is sued by their employee or customer who is infected by COVID-19.

Addressing the universal question of the applicability of the **material adverse change** (MAC) clause in contracts, the delivered answer is typically "it depends on the contract wording", with perhaps the most important consideration to be whether the contract includes "carve-out" clauses, which exclude "general" political,


Credit: Michael Viehs

economic or business conditions or changes from the MAC. The COVID-19 outbreak may belong to such “general” conditions, and thus in the deals with the carve-out provision, it is very unlikely to allow exit. The conference heard that M&A deals in the U.S. typically include carve-out clauses, while such clauses are very rare in the deals in Korea, Japan, and some European countries. However, it should be also recognised that, even in the deals without the carve-out clauses, courts in many jurisdictions do not easily allow a party to MAC-out. This was further discussed in a later US session.

The pandemic has created an opportunity for some, not least in relation to **succession planning.** In Korean Chaebol firms, where a controlling family owns a controlling block, family succession to the next generation is a crucial issue. It is challenging to inherit the business, because the tax rate on stock gifting in Korea is 60% of the value of stock. Thus, controlling families tend to gift stock when the stock price is at the bottom, which is now the case. Many controlling families plan to avail of this opportunity, and one family even cancelled the already announced gift and then announced a new gift at the reduced stock price caused by the COVID-19. Such gift cases do not harm the minority shareholders; they just harm the government—saving tax. Another opportunity for gift tax savings is the merger between the two firms—where one is listed and the other is non-listed—within the same corporate group.

Other considerations include the extent to which bailouts may inadvertently empower or subsidize controlling families in the countries where the controlling families are dominant, and the extent to which the National Pension Fund can or should be used to rescue stock market investors.

Moving to China, the third session heard that the Shanghai Stock Exchange took the initiative in 2019 to embrace companies with different shareholding structures and developing stages. Recently however, for both the regulator and stock exchanges, applying issuers must answer questions about the impacts of COVID-19, while new challenges now loom involving **cross-border securities issuance** and **trade activities**. With regard to private sector businesses, **conflicts of interest** among various stakeholders and how those interests have shifted post outbreak were again highlighted. Additionally, companies that contribute to the effort to curb the pandemic are considered by management to be contributing to CSR. This was echoed in the Singapore presentations in the same session, where it was argued that firms can benefit by stepping up on their social responsibilities as these activities can create valuable **social capital** with all of their stakeholders.

Another focus in Singapore was on the increasing importance of local and private assets managers in encouraging entrepreneurship by facilitating **active and liquid markets** for local entrepreneurs to exit, especially in the tech sector. Looking to past studies, it was suggested that the advisory role of boards, its size, and busy-ness are more important factors for resilience than its independence during a crisis. In a later session it was added that directors should take up their role as the ***stewards of the firms’ purpose*** during the crisis and beyond. There was caution surrounding the activity of share buy-backs noting flaws in the legal system which can be abused, thus amounting to **market manipulation**. This arose in a later (US) session where the question arose as to whether buy-backs are a form of self-dealing if the board collectively owns stock, or if a subset of directors’ own lots of stock and do not recuse themselves from the decision? It was also offered in this session that COVID-19 could be promoting the global rise of the **state as a dominant shareholder** and a muted market for corporate control.

Moving to Israel for the fourth session, the plight of start-ups in a time of crisis was considered. **Start-ups** are left particularly exposed and characterised as weak (lacking in reserves), risky (un-bankable), and statistically the least likely of business categories to survive. Furthermore, decreased valuations make them easier targets for acquisition by larger, cash rich, tech companies. The session explored the implications for this sector in Israel, Germany and the US.

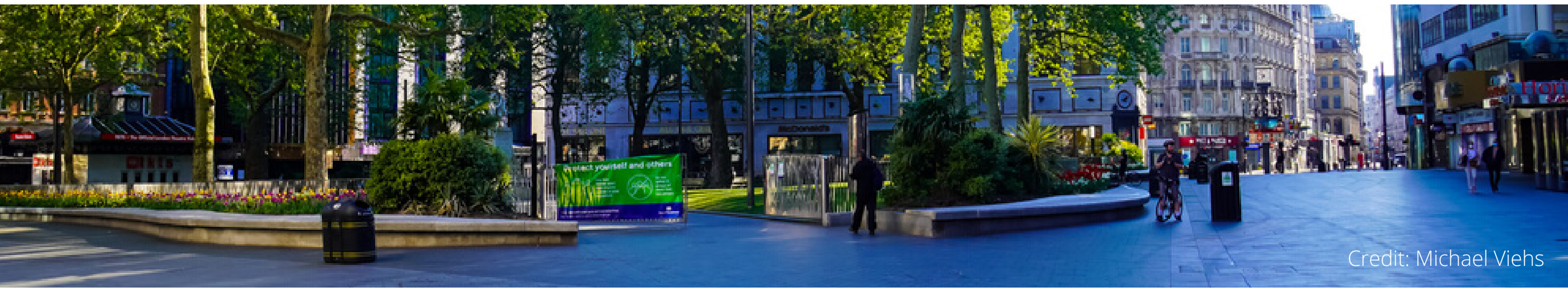
The significant growth of the start-up technology sector in Israel has now left it exposed to a credit crunch as foreign investors withdraw as a result of the pandemic. The proposal for government intervention in this sector, currently consists of: (i) streamlining the existing infrastructure of grants by the Innovation Authority to smaller companies; (ii) providing loans with downside protection to large companies; and (iii) incentivising institutional investors to make debt or equity investments alongside venture capital investors in medium size firms. Another learning from the pandemic is to design more technology-driven solutions for managing epidemics in the future.

In Germany, the government recently announced a EUR 2 billion fund for start-ups which will provide additional funding for new financing rounds as co-investments with private investors. By that, the government avoids the problem of giving money directly to start-ups and the political problem of which one to choose. In addition, the fund provides private investment funds with additional public funding while facilitating finance for start-ups that do not have venture capital investment.

In the US, the general trend is for venture capital (VC) firms to "sit tight and see what happens" as this will also present a significant opportunity for those that are well capitalised to enter the market. In order to avail of funding under the Paycheck Protection Programme (PPP), some companies have been busy removing negative covenants, and removing all their control rights, while other VCs, even though eligible, decline to avail of this source of support on moral grounds as they do not wish to be seen taking money that they do not really need.

Examining the broader issue of **directors' duties**, the session also took note of the Australian government's recent initiative to introduce a statutory amendment suspending directors' liability for "insolvent trading", i.e., incurring obligations while the company is facing insolvency, with similar proposals being made in a growing number of countries. The panel considered this initiative as well as the broader theme of suspending or changing director duties in a time of systemic crisis that is likely to lead to financial distress and failure in numerous firms. The new safe harbour is intended to alleviate managers' fears about conducting business in struggling companies.

The session also opened the topic of **bankruptcy** with an overview of the amendments to bankruptcy laws in Italy, France and Germany, noting how jurisdictions around Europe have responded by adjusting their bankruptcy laws in similar and yet different ways. Similarly, the panel considered the UK regime of wrongful trading and the government's intention to suspend this type director liability, while other bases of liability remain intact. A broader review of director duties is currently under way. As in other sessions, a common concern was shared for other stakeholders in addition to creditors.



Credit: Michael Viehs

Moving to Germany, the fifth session acknowledged the response of the European Central Bank (ECB) in its efforts to safeguard its price stability mandate and financial stability more broadly. This includes: (1) **broad-based asset purchases** to address illiquidity and heightened volatility in core segments of euro area financial markets; (2) **enhanced targeted longer-term refinancing operations** (TLTROs) and a comprehensive set of collateral easing measures, ensuring that banks remain reliable carriers of the ECB's monetary policy and continue lending to the real economy; and (3) central banks' **traditional role as a lender of last resort** to solvent banks which induced the ECB to offer banks liquidity over longer horizons at the negative rate of the ECB's deposit facility without any conditions attached. There was also some caution that without a coordinated fiscal policy response, imbalances in the performances of the economies of euro area member states will increase.

The second part of the session called for a framework to support SMEs in the COVID-19 crisis not by credit but through a mechanism which resembles equity financing. This would provide cash in return for a tax surcharge on profits, or an equivalent payment, as soon as the crisis is over and the firms are profitable again. The implied equity-like payment structure would reduce the leverage of affected companies, and if implemented at the European level, for example through a **European Pandemic Equity Fund** (**EPEF**), the stability of banks and the financial system of the euro zone would increase, in comparison to a lending scheme of similar size. This proposal also addresses the risk-sharing question posed in one of the later sessions. However, it was noted that alleviating a debt overhang problem in the capital structure of firms, would require a wealth transfer from the taxpayer to existing equity-holders which would give rise to issues such as voting rights, agency conflicts, criteria and conditions.

Moving to Sweden, the sixth session considered the Swedish response to the pandemic and how to potentially exit from the imposed restrictions across Europe. The data inconsistencies across countries were highlighted as a concern, along with the **benefit of high trust** for public institutions which is required in order to implement a softer lockdown. The significant decline in financial performance across industries suggests obvious behavioural changes even under a soft lockdown. It was noted that economic considerations typically form little or no part of health authorities' analysis and so it falls to Swedish politicians to integrate the various expert perspectives. It was also suggested that foreign attention of Swedish policies may have overstated policy differences, while emphasising how an economy can benefit if productive capacity is maintained through a temporary crisis. With vaccine and treatments potentially further out of scope than an economy can endure, the benefits of immunity (perhaps for a year, possibly longer) combined with anti-body testing were raised. The coordination of policy at EU level was also recommended.

Credit: Michael Viehs

A second panel considered the perspectives of an institutional owner, corporate management and an employee trade union, in light of the various responses at this stage of the crisis. They underlined the urgency and uncertainty of the situation which requires a high level of stakeholder coordination and transparency, for example from the health authorities, in providing an adequate basis for future scenario modelling. They also cautioned against knee-jerk **protectionist policies** and political action which could cause indirect damage to business liquidity and access to capital markets. It was suggested that more could be done, such as assuming the fixed cost base of businesses in certain circumstances, as in Denmark, noting that it will be too late to rescue businesses after they have been made bankrupt, though not all businesses will survive. They also considered the **risk-sharing** implications for the costs of the crisis. This was also raised in a later session, that is, dividing the effects of shock to reduce impact on any one member of economy/polity with a view to minimising efficiency losses introduced by pandemic.

Switching to the UK, the next session delved into three key aspects (1) Impact of the COVID-19 crisis on **small and medium enterprises (SMEs)**; (2) Business response to the pandemic with special focus on **nature of ownership**; and (3) Short-term and long-term **legal and regulatory changes**.

The session highlighted the importance of SMEs for economic recovery. Although they typically have lower cash reserves and reduced access to credit than larger firms, they are also more flexible and less integrated in the global supply chain. Some of the initiatives that are being implemented to support SMEs at EU level, and also in Portugal and the UK were discussed. This includes expanding the asset purchase programme by the European Central Bank (ECB), fine-tuning the collateral framework to allow banks to post more collateral to the ECB including loans given to SMEs, and adapting the regulatory and supervisory framework to avoid a collapse in lending to SMEs. It was emphasised that a targeted, local approach which provides accelerated payments is key to their survival, noting that the average cash buffer for SMEs (in the US) is 27 days.

A further panel in this session pointed to the importance of **corporate purpose** in determining the response of business during and after the pandemic, and the role that ownership, governance and measurement play in that regard. It also pointed to the care that should be taken in drawing conclusions too rapidly from the limited amount of evidence that is available to date. On the topic of **conflicting interests**, the role of long-term owners was underlined to be crucial in balancing the interests of all stakeholders. The topic of **gender diversity** was also raised, pointing to evidence that women have more empathetic traits towards other stakeholders.

Other recommendations include the **introduction of profit measures** which are able to capitalise investments made into critical human, social and natural capital, and positively impact share prices, while accepting a notion of materiality that is dynamic and closely linked to a corporation's purpose. Furthermore, businesses should act responsibly with the public funds they receive for their revival and recognise their social license sufficiently. The three business responses to this crisis may include: (1) in the short term, the production of necessary health equipment; (2) in the medium term, recognising changes in lifestyle and consumer preferences in a post-crisis scenario; and (3) for the long term, creating value propositions that lead to inclusive and sustainable growth, noting that companies with a purpose can better respond to this crisis and pave way for greater societal benefits.

A final panel is this session outlined key areas of corporate law which should be tweaked to help corporations to weather the current storm, in the form of **special temporary default rules**, suggesting that requirements for issuance of new equity or debt should be relaxed during the crisis. Echoing previous comments, it was offered that the extreme uncertainty business leaders are going through requires that laxer director liability standards be applied for decisions taken during the crisis. Addressing the exposed position of many firms, it was recommended that **takeover defences** must be temporarily allowed to thwart low-ball hostile bids which would distract managers from their task of steering their companies through the crisis. The panel also predicted that the crisis will have an impact on corporate ownership, predicting a **return to conglomerates**, or *'keiretsu'*-type arrangements which provide an element of mutual insurance against, and facilitate coordination in, a crisis.

Crossing the Atlantic to the United States, the eighth session considered the **response of the Federal Reserve** to the crisis, offering several recommendations for current and future improvements. These included direct loans from the government, via the IRS framework, with specific eligibility criteria; restructuring the financial system; new disclosure rules to circumvent manipulative short-selling and; the advent of ***'systematic stewardship'*** to broaden the concerns of management while still focusing on the financial return to investors, for example in providing adequate government capacity and public goods creation, thereby reducing systematic risk. The session also examined the scenario for Material Adverse Change (MAC) clauses in the US, noting that the uncertainty around the judicial resolution of **MAC litigation** may even be a feature not a bug, providing a framework and impetus for renegotiation.

Addressing the recurring theme of conflicts, the next session focused on **bankruptcy**, noting that contracts remain the most important tool for constraining these conflicts. Since creditor-shareholder conflicts are most acute when the more distressed or financially at risk a company is, the pandemic will sharply increase conflicts of that kind. Practically speaking, decisions to enter bankruptcy or even to take risky decisions that might be *ex-ante* against creditor interests will not be second-guessed by courts, even if the company is clearly insolvent and even if the actions harm creditors. Depending on how long the pandemic lasts, some companies may well engage in self-dealing while insolvent, without realising it. Furthermore, Section 363 of the Bankruptcy Code's silence on rules for sales out of bankruptcy permits judges to "make up" those rules, which govern in roughly one third of bankruptcies, which can be a big problem if the federal government is a major creditor of a bankrupt company.

The session examined at length how overwhelmed or **clogged bankruptcy courts** could lead to stagnation and possibilities of debtor opportunism. Bankruptcy assesses the debtor's need to stop payments to creditors and to affirm or reject a relationship with a supplier or customer, but a supplier may be more vital to the economy than to the debtor. Therefore, the court's capacity to make supplier relationships superior to most pre-bankruptcy obligations would help to get commerce going again, but this depends on the courts not being clogged.

A further problem that was highlighted is if most public firms end up with a major case of "debt overhang," it could result in capital structures exacerbating a tendency to low investment and low re-hiring. The solution is usually to recapitalise, however if courts are clogged, in-bankruptcy recapitalisations will be harder and slower, and out-of-bankruptcy recapitalisations will also be impeded, because the threat of a bankruptcy filing helps to bring the parties together to a deal. There is also a risk that a significant number of SMEs will be (perhaps needlessly) liquidated, unless bankruptcy proceedings adapt. One recommendation was to use the new (untested) small business process which softens absolute priority as conventionally understood, and makes restructure more possible, as a template that picks up the new filings of viable businesses. It was also noted that bankruptcy can get administrative priority for new contracts, thereby facilitating new commerce when there is a macro incentive to facilitate it.

On the issue of volume, noting that resources will already be impeded by the pandemic, the recommendations included appointing more judges and trustees; reallocating cases across bankruptcy courts; segmenting types of bankruptcies in different courts; or devising system-wide interventions to address the mass of bankruptcies. Based on past data, bankruptcy courts would have to work 60-hour workloads (at historic pace of clearances) for the next year to clear the surge that is now expected, with a lag from unemployment claims of 1-2 quarters.

Another point raised was that current COVID-19 policies treat bankruptcy law as a last resort for stressed businesses and consumers, which is a sensible approach for small businesses and consumers, but not for large corporations. One way to ease clogging is to offer liquidity, forbearance and forgiveness to households and small businesses; stabilise now, and restructure later. Further, the small-business financing offered by the Fed and under the CARES Act, should not exclude financing for firms in bankruptcy. For large corporations, however, bankruptcy should be a front-line policy tool and government action should save businesses (and jobs), but not investors.

The session also observed that Chapter 11 is very costly for small and medium-sized businesses (up to 30% of firm value) and a substantial majority of them do not successfully reorganise. They are also more likely to liquidate if the court is congested, while the reorganisation of large firms is more costly and takes longer. The market for **"debtor in possession" (DIP) financing** is under huge stress. Debtors, especially medium-sized companies, may have difficulty obtaining financing in the current environment. The question was posed whether federal government should buy a slice of DIP (bankruptcy) loans? Another proposal was to introduce "cookie cutter" pre-packaged bankruptcies, which would be somewhat similar to a "Super Chapter 11" proposal by Joseph Stiglitz but would not require any legislative change. It was further suggested that 1978 bankruptcy law is out of date and has left too much discretion to bankruptcy judges. Another suggestion was the modification of the trust indenture act or an adoption of Chapter 16. The panel called on the government to address congestion and "flatten the bankruptcy curve"—as much as possible, in order to improve outcomes, perhaps using a form of bankruptcy triage to address the volume.

Additional observations included that in this time of crisis, judges will routinely be ruling on whether probability of performance is high enough, but they will routinely be overoptimistic, which will induce more Chapter 11 filings than would otherwise occur. There is also likely to be a lot more short-term contracting over the crisis, as contract parties seek to avoid the risk of "assumption" in bankruptcy. "Fire-sales" of insolvent businesses will likely increase, into an illiquid market, which could lead to the spiralling down of asset prices within a given industry, even for solvent but illiquid companies. There will also be more collusive auctions of companies that enter bankruptcy. A final observation was that foreign bankruptcy regimes often favour liquidation over rehabilitation and very few regimes allow DIP financing to help viable companies restructure. In Germany, UK, and Australia, they are changing the rules already, but more may be needed.

The final session of the conference offered some **crisis management** learnings from a practical perspective. The discussion brought together some of the key issues from earlier sessions, such as the conflict of interests between investors and stakeholders, the importance of business continuity planning, an effective board, stewardship of the firm's purpose, and the opportunity for social capital.

It was offered that having a trusted Crisis Management team in place before the crisis happens is key to effective crisis management, and then to rely on the company values. Support employees first, then customers. The current crisis is unique in many ways and is a corporation's chance to help customers to create opportunities. The Board's role in Risk Management becomes more critical during and following a crisis, with experience. The Board should help to design programmes to anticipate crises, for example, setting a programme for a distributed workforce continuity plan. Boards will have to consider new technologies (for example, DocuSign instead of a wet signature), executive compensation constraints and other possible adjustments to a new business reality.

Never waste a crisis. Fast track solutions to help customers. Progress is happening faster, keep the momentum after the crisis passes. There is an opportunity for government and business to work together to innovate faster and help address problems for society. In a crisis, empathy and the humanitarian part of leadership is elevated and it creates more inclusion. Corporations should embrace this opportunity for inclusion. For employees, in the interest of safety, usual practices will need to be changed as social distancing will stay with us.

Lastly, no one anticipated that the whole world would be impacted at the same time and now Boards must be ready for it. Companies must become more flexible with managing an at-home workforce. Companies must get creative to react to this extreme situation, which will cause people to struggle, and then evolve.

The second part of the session considered the conditions for **insider trading** as a result of the pandemic, noting that it has created an unprecedented set of opportunities for insider traders due to: (1) the frequent occurrence of discrete events that generate material non-public information capable of being used to generate significant, risk-adjusted economic trading profits; (2) the frequent public release of such information after a suitable lag time in which insider trading can occur; (3) significant market volatility (market swings) caused by the release of the information; (4) a social and economic climate in which people are not paying close attention to the trading activity of others but are preoccupied by concerns about the COVID-19 virus itself; (5) the crisis hit Wall Street and Main Street at the same time - it did not migrate to Wall street or from Wall Street to Main Street, and thus there are insider trading activities in both the financial and the non-financial sectors of the economy.

To summarise, the amount of criminal insider trading activity will be determined by the standard equation (anticipated severity of the punishment X the risk of being caught), adjusted for the supply of trading opportunities which is huge right now. There has been insider trading during the crisis in abundance by both politicians and private sector corporate actors. The politicians generally have been selling, while the corporate officers and directors have been buying. Due to incentive effects the buying by insiders is good for society and for shareholders, the selling by politicians creates very bad incentives. The following policies were therefore recommended for adoption: (1) No trading at all during pandemic by politicians and others subject to the rules articulated in the Stop Trading On Congressional Knowledge Act; (2) Rules for Insiders, defined as, officers, directors, 10% shareholders, with no selling by officers and directors during pandemic (buying is fine), as long as it is publicly announced, and increase the frequency of Item 4 disclosures by officers, directors and 10% shareholders under Section 16(a) of the Securities Exchange Act of 1934 as amended, from once every six months to weekly.

The **interaction between corporate governance and real governance** was considered in the closing statements of the conference. This highlighted the long running tension whereby governments use corporate governance as a tool to ensure that all groups are considered by companies, and to use them for a broader range of outcomes. The problem then arises at a time of crisis, where the corporate governance model lacks the capacity for excess and is not designed to provide for the circumstances that have arisen, and the government is not adequately structured to fill that need for extra capacity and response. Other issues touched upon included the issue of locking up voting control in a relatively small group of investors that can make money without a management fee, and the significant remit of politicians and executive committees in allocating vast resources with conflicts of interest and weak oversight.

The conference closed with some words of gratitude for the speakers, attendees and organisers, noting that the goal of connecting a community of scholars, policymakers and practitioners to circulate and stimulate ideas for the common good had certainly been achieved.

Session 1: Australia

MONASH University

gcgc Global Corporate Governance Colloquia

Monash University 09:00-11:00 (AEST)

Welcome: **Jennifer Hill** (Monash University and ECGI)

Panel 1: The differential health, economic and financial effects of the COVID-19 crisis

Moderator: **Jennifer Hill** (Monash University and ECGI)
Panelists:
John Laker (ING Australia, International Monetary Fund (IMF), Australian Prudential Regulation Authority (APRA))
Diana Nicholson (King & Wood Mallesons)
Stephen Turner (Monash Biomedicine Discovery Institute)
Malcolm Edey (The University of Sydney, Reserve Bank of Australia, OECD Financial Markets Committee, Basel Committee on Banking Supervision)

Panel 2: The impact of the COVID-19 crisis on boards of directors and regulators

Moderator: **Jennifer Hill** (Monash University and ECGI)
Panelists:
Priscilla Bryans (Herbert Smith Freehills)
Sylvia Falzon (Suncorp Group, Regis Healthcare and Premier Investments Ltd)
Kevin McCann (Telix Pharmaceuticals Ltd, Macquarie Bank)
John Price (Australian Securities and Investments Commission (ASIC))

The first session of the ECGI-GCGC 24 Hour Marathon Global Webinar, was hosted by **Monash University**, Melbourne, Australia. This session was chaired by **Jennifer Hill**, Bob Baxt AO Chair of Corporate and Commercial Law at Monash University Law School.

Panel 1 "The differential health, economic and financial effects of the COVID-19 crisis"

Jennifer Hill noted that the COVID-19 pandemic represents the second so-called "global" crisis in little over a decade. Yet, although the 2008 financial crisis is typically described as "global", its effects were much more severe in some parts of the world than others. For example, its impact was far greater in North America and Europe than in Australia and many parts of Asia. The COVID-19 crisis is a more complex type of crisis, due to its two-track nature involving both health and finance, however, it too has the potential to produce radically different outcomes across different jurisdictions. One of the aims of Panel 1 was to consider how those two aspects – health and finance – will interact in determining to what extent particular jurisdictions are able to weather the crisis relatively well.

Steve Turner, Co-Head of Infection and Immunity Program; Head of Microbiology at the Monash Biomedicine Discovery Institute, started the discussion by focusing on the origins of COVID-19. He noted that scientists are still uncertain about precisely how the virus jumped from animals to humans and then spread so rapidly. He discussed factors that would be highly relevant in determining the ultimate health outcomes of the COVID-19 crisis in any given country. These factors included the strength of that jurisdiction's health system and its commitment to effective social mitigation policies. He noted that jurisdictions, which moved quickly to introduce strict mitigation policies, such as social distancing, home isolation, travel bans, enhanced testing and contact tracing, have to date fared much better in controlling the spread of the virus.

Panel 1 then moved to consideration of the economic and financial issues of the COVID-19 crisis, comparing its effects with those of the 2008 global financial crisis. The Panel specifically considered whether the regulatory techniques, which were effective in protecting Australia from the full impact of the global financial crisis, would be equally effective in the COVID-19 crisis.

John Laker, Chair, ING Australia; member of the Experts Panel of the International Monetary Fund (IMF); former Chair, Australian Prudential Regulation Authority (APRA), and **Malcolm Edey**, Adjunct Professor of Economics, The University of Sydney; former Assistant Governor, Reserve Bank of Australia, Chair of the OECD Financial Markets Committee and member of the Basel Committee on Banking Supervision, who were both deeply involved in Australia's regulatory responses to the global financial crisis, led off this part of the discussion. John Laker noted that although Australia entered the 2008 financial crisis in a very strong economic position, it had one major vulnerability. The Australian banking system was overly dependent on off-shore wholesale funding, which froze early on in the crisis, causing major shocks to the financial system. Nonetheless, he observed that, unlike financial institutions in many other jurisdictions, Australian banks did not transmit and amplify those shocks. The Australian government also engaged in a series of aggressive monetary and fiscal responses during the global financial crisis to mitigate the effects of the shocks.

Although the speakers noted a number of similarities between the global financial crisis and the COVID-19 crisis, Malcolm Edey highlighted one important difference. He stated that the global financial crisis involved demand disruption, which could be mitigated by public spending, in the form of a very large stimulus package. The COVID-19 crisis, on the other hand, is primarily a supply shock, which cannot be addressed in the same way.

Another aspect of the COVID-19 crisis considered by Panel 1 was the potential threat to national sovereignty, if some countries emerge from the crisis in a much stronger economic condition than others. Within this context, **Diana Nicholson**, Partner, King & Wood Mallesons, discussed recent changes to Australia's foreign investment review rules, which now enable the government to scrutinise all foreign investment transactions. She stated that during the COVID-19 crisis, sovereign interests will be paramount, since governments around the world have an obligation to protect their own citizens, and that Australia's recent foreign investment reforms reflect this principle. At the same time, however, she considered that Australia is still fundamentally committed to the concept of globalisation.

Panel 1 discussed the role of supra-national institutions designed to address problems during the global financial crisis and the COVID-19 crisis. Steve Turner stressed the critical role played by the World Health Organization (WHO) in facilitating collaborative international research, implementing health policy and seeking to understand COVID-19 and develop therapies or a vaccine. John Laker and Malcolm Edey also stressed the importance of effective financial regulatory cooperation and coordination at both a national and international level.

Finally, the Panelists offered their predictions for Australia in the aftermath of the COVID-19 crisis. Steve Turner did not think that there would be a clean end to this health crisis, and that, absent of the discovery of a vaccine, COVID-19 would continue to be a health challenge. Malcolm Edey considered the government's financial response to the supply shock caused by the COVID-19 crisis would inevitably lead to higher inflation during the recovery period. Diana Nicholson agreed that COVID-19 would not be a short-term crisis, recognising, nonetheless, that it would also create a range of opportunities for innovation and corporate acquisitions. John Laker closed the session by noting that there is simply no playbook for COVID-19, which is a far more extreme crisis than the 2008 global financial crisis. He stated that a critical factor in the financial recovery would be behavioural – namely, the capacity and willingness of individual Australian citizens to accept constraints on their traditional freedom to protect the community as a whole.

Panel 2: The impact of the COVID-19 crisis on boards of directors and regulators

Jennifer Hill noted that there has always been a tension in corporate law from the time of Berle and Means' classic 1932 text, The Modern Corporation and Private Property, between a private and public theory of the corporation. This tension became much more apparent in Australia in recent times as a result of (i) the 2019 Banking Royal Commission, which investigated misconduct in Australia's financial services sector, and (ii) the COVID-19 crisis.

Against this theoretical backdrop, Panel 2 examined the effect of COVID-19 on the role of directors and regulators. **Priscilla Bryans**, Partner, Herbert Smith Freehills, began the discussion by considering the impact to date of the COVID-19 crisis on boards and the responsibilities of directors. She noted that the duty of Australian directors to act with care and diligence is premised on the idea that directors must act reasonably given all the circumstances, including those circumstances arising due to COVID-19. She also pointed out that the COVID-19 crisis has escalated a debate that was already well underway in Australia concerning another duty of directors - the duty to act in the best interests of the company. She stated that the Banking Royal Commission and debates around climate change and sustainability had already weakened the idea that directors' primary duty is to maximize profits for shareholders, even at the expense of other stakeholders. She also considered how this idea underpins some current international developments, involving the imposition of temporary restrictions on the payment of dividends by banks.

Kevin McCann, Chair, Telix Pharmaceuticals Ltd; former Chair, Macquarie Bank, argued that the challenges facing company directors during the COVID-19 crisis are far greater, and more complex, than during the global financial crisis, and highlighted an increasing tension between public and private interests in the corporate sphere. He noted that, during the COVID-19 crisis, Australian banks have acted as a community backstop in relation to social dislocation affecting landlords and tenants. **John Price**, Commissioner, Australian Securities and Investments Commission (ASIC), considered that the crisis would increase the ongoing debate about public versus private interests and responsibilities, and that the concept of "fairness" would be a key aspect of this debate. He emphasised the tension between the best interests of the company, and the best interests of existing shareholders, in relation to matters such as raising new capital, which could dilute the interests of current shareholders.

The Panelists discussed the unprecedented role that the business conduct regulator, the Australian Securities and Investments Commission (ASIC), has played in relation to the COVID-19 crisis. Priscilla Bryans and John Price examined the specific problems for boards in relation to their continuous disclosure obligations under Australian law. The Panelists also raised the issue of risks to company directors of personal liability for their corporation's debts under Australia's somewhat Draconian insolvent trading laws, which have recently been relaxed by the government in the face of COVID-19.

Panel 2 explored the fact that there has been a notable degree of collaboration between traditional competitors in certain industries. During the COVID-19 crisis, for example, the Australian Competition and Consumer Commission (ACCC) has provided a number of urgent interim authorisations, permitting companies in particular sectors (e.g. supermarkets, banks, medical technology companies) effectively to engage in cartel conduct. **Sylvia Falzon**, Non-Executive Director, Suncorp Group, Regis Healthcare and Premier Investments Ltd, confirmed that this was occurring in the private health sector where she acts a company director, and that competitive interests have been put aside in favour of ensuring that there is general community access to healthcare. Priscilla Bryans noted that although the current crisis has escalated cooperation in the private sector (and also, cooperation between the government and the private sector), this was already occurring prior to the crisis in relation to matters, such as eradication of sweatshops and global slavery in supply chains.

Finally, Panel 2 discussed a range of situations in which difficult prioritisation decisions would be necessary, in both the public and private sectors. In the context of healthcare, for example, Kevin McCann stated "cancer doesn't stop because of COVID-19". What happens when one highly visible health problem crowds out other continuing health problems? According to the Panelists, another important prioritisation issue will inevitably be government decisions as to which companies should, and should not, be bailed out in the aftermath of the crisis. It was noted that the sustainability and benefits to the community of particular businesses would be critical factors for government bail-out decisions. The Panelists also discussed the potential for Australian banks to reclaim their reputation, which was seriously damaged during the Banking Royal Commission. The Panel considered that community trust could only be restored by the banks prioritising the needs of their customers over shareholders.

Session 2: Korea | Japan

SNU Law

gcgc Global Corporate Governance Colloquia

東京大学 THE UNIVERSITY OF TOKYO

Seoul National University and University of Tokyo
10:30-12:30 (JST/ KST)

Welcome: **Ok-Rial Song** (Seoul National University School of Law), **Tomotaka Fujita** (Graduate Schools for Law and Politics, University of Tokyo)

Business continuity planning during the COVID-19 crisis

Tomoyo Matsui (Graduate Schools for Law and Politics, University of Tokyo)

The COVID-19 pandemic crisis as a MAC

Kyung-Hoon Chun (Seoul National University School of Law)

Prevention of pandemic and CSR in times of COVID-19

Gen Goto (Graduate Schools for Law and Politics, University of Tokyo)

COVID-19 crisis and family succession

Woochan Kim (Korea University and ECGI)

Discussants: **Jungyeun Kim** (Incheon National University), **Sang Yop Kang** (Peking University and ECGI), **Jon Jungbien Moon** (Korea University), **Kon Sik Kim** (Seoul National University and ECGI), **Joon Hyug Chung** (Seoul National University), **Hidefusa Iida** (University of Tokyo), **Takahito Kato** (University of Tokyo), **Hiroyuki Kansaku** (University of Tokyo), **Hideaki Miyajima** (Waseda University)

The second session was hosted by **Seoul National University** and **The University of Tokyo**. This session was chaired by **Ok-Rial Song**, Professor of Law, Seoul National University School of Law and **Tomotaka Fujita**, Professor of Law, Graduate Schools for Law and Politics, University of Tokyo.

Tomoyo Matsui, Professor of Corporate Law, Graduate Schools for Law and Politics, University of Tokyo spoke on *"Business continuity planning during the COVID-19 crisis."* Business Continuity Plan (BCP) is a measure that is commonly taken in large corporations around the world. How BCP is required varies according to countries (UK Civil Contingencies Act, COSO integrated framework principle 9, etc.), but the basic approach for its implementation at corporate level is that of risk assessment and control. Corporations make up heatmaps, make priorities between various kind of risks and tackles them in order.

Pandemic-type risk looks similar to that of earthquakes or typhoons as its estimated frequency is low and the damage it causes can be enormous. However, Professor Matsui argues that the effectiveness of BCP, unlike in those natural disaster situations, might be limited, as a pandemic causes damages to manpower and the recovery speed from the damage must be controlled to prevent infection.

She also pointed out another problem that managers of corporations might suffer between investors' demand and stakeholders' (or sometimes between different stakeholders') welfare. At ex-ante, the damage tends to be undervalued and managers may not be able to afford the right level of budget and workers to plan and prepare for pandemics in time, as investors would not prefer to keep over-sized risk management team in normal conditions. At ex-post, the emergency situation might damage severely some stakeholders' welfare and no-one has the right answer to the ethical choice between, say, employees' health and consumers' need of basic services.

Gen Goto, Professor of Law, Graduate Schools for Law and Politics, University of Tokyo, talked about *"Prevention of pandemic and CSR in times of COVID-19."* One aspect of corporate social responsibility is mitigating negative externalities from business activities beyond legal requirements. In the current context, one of the negative externalities that needs to be mitigated the most is the spread of COVID-19. While many countries tackle this task by direct regulation, i.e. locking down, CSR in Japan means inducing companies to close or cancel their shops and events voluntarily or to let their employees work from home, since Japanese law does not grant the government powers to impose curfew due to historical reasons. The first question discussed by Professor Goto was whether companies should close their businesses voluntarily, even when it is against their short-term interest. He suggested that directors who decided to keep their business open might not be fully protected by the business judgement rule when for example the company was sued by their employee or customer who was infected by COVID-19. He also noted that it would make sense for the public to incentivise businesses to internalise the externality by compensating their losses by tax payers' money. Comments and questions on the extent of the business judgement rule and the moral hazard effect from such compensation were made in the discussions following the presentation.

Kyung-Hoon Chun, Professor of Commercial Law, Seoul National University School of Law, spoke about *"Covid-19 as a MAC"*. Many deals include a MAC clause, which allows a buyer to walk away from the contract ("MAC-out"). Then, it can be disputed whether the buyer can MAC-out by the reason of COVID-19. Many law firms globally published memorandum on this issue, and the answer is basically "it depends on the contract wording." The most important element to pay attention to is whether the contract includes "carve-out" clauses, which exclude "general" political, economic or business conditions or changes from the MAC. The COVID-19 outbreak may belong to such "general" conditions, and thus in the deals with the carve-out provision, it is very unlikely to allow MAC-out. M&A deals in the U.S. typically include carve-out clauses, while such clauses are very rare in the deals in Korea, Japan, and some European countries. However, it should be also recognised that, even in the deals without the carve-out clauses, courts in many jurisdictions will not easily allow the MAC-out.

Woochan Kim, Professor of Finance, Korea University Business School presented on *"COVID-19 and Family Succession"*. In Korean Chaebol firms, where a controlling family owns a controlling block, family succession to the next generation is a crucial issue. It is very hard to inherit the business, because the tax rate on stock gifting in Korea is 60% of the value of stock. Thus, controlling families tend to make a stock gifting when the stock price is at the bottom, which is in fact the case in COVID-19 pandemic. Many controlling families plan to do this, and a family even cancelled the already announced gift and then announced a new gift by the new low stock price caused by the COVID-19. Such gift cases, however, do not harm the minority shareholders; they just harm the government—saving tax. There is another case, which may transfer wealth from minority shareholders to the controlling family. It is the merger between the two firms—one is listed and the other is non-listed—within the same corporate group. In this merger, the valuation of the listed company should be based on the stock market price, and recent stock price drop will decrease the valuation of the one merging listed company, while the valuation of non-listed company is not affected. The sons of the family own most shares of such non-listed company, and so the merger ratio determined by the recent stock market price may transfer the wealth from minority shareholders of the listed company to the sons owning the non-listed company. Also, the merger saves the gift tax.

Sang Yop Kang, Professor of Law, Peking University, School of Transnational Law presented on "Bailout for Corporations in Trouble". In the wake of the COVID-19 pandemic, many industries have been hurt, and the government may consider bailouts in such industries. Such attempts, however, may empower or subsidize controlling families in the countries where the controlling families are dominant. Thus, the COVID-19 outbreak causes a dilemma for governmental policy: (1) reforming family-controlled corporate groups v. (2) resolving the pandemic-related economic downturn. The government faces another bailout problem in relation to the stock market, namely bailout for stock market investors. The Korean National Pension Fund is a quasi-government agency and the largest institutional investor in Korea. The government has an incentive—particularly for political reasons—to rescue stock market investors using the National Pension Fund. In this case, however, the wealth is transferred from the entire citizens to the investors in the stock market.

Session 3: Singapore | China

NUS National University of Singapore

gcgc Global Corporate Governance Colloquia

National University of Singapore
12:00 – 13:00 GMT+8 /CST

Welcome: **Luh Luh Lan** (National University of Singapore and ECGI)

COVID-19: The start of history for Asian corporate law?
Dan Puchniak (National University of Singapore)

Capital requirements, share buybacks and resilience
Hans Tjio (National University of Singapore)

Asset managers and private entrepreneurial activities post-COVID-19
Johan Sulaeman (National University of Singapore)

Is the glass half full or half empty? Corporate social responsibilities in crisis times
Weina Zhang (National University of Singapore)

Role of the board in times of crisis and disruption
Luh Luh Lan (National University of Singapore and ECGI)

The third session was hosted by **National University of Singapore** and **Peking University**. This session was chaired by **Luh Luh Lan**, Associate Professor, National University of Singapore, Business School and Law School.

Dan Puchniak, Associate Professor, National University of Singapore, Faculty of Law, talked about how Asian corporate law which is unique and different from the traditional Anglo-saxon corporate law has been growing steadily and taking shape over the last decade and he predicts that it will grow stronger after the COVID-19. Asia has earned its position as the world's engine of economic growth. It has achieved this with family-controlled firms, state-owned-enterprises, and corporate groups at its core. Despite its miraculous economic success, Asia has continued to transplant much of its formal corporate law and governance from the United States and United Kingdom (Anglo-America). This is true even in Asian jurisdictions that originally inherited their corporate law from continental Europe. On one level, considering the colonial past of many Asian jurisdictions, the United Kingdom's role as a global corporate governance leader, and America's dominance as a superpower, this makes sense. On another level, it is bizarre. Anglo-American corporate governance was built on dispersed shareholders and has now evolved into a system dominated by institutional investors – both of which have never defined corporate governance in any Asian jurisdiction. The result has been the development of a thin veneer of formal corporate law in Asia that has ostensibly converged on the Anglo-American model – while, in reality, corporate governance in Asia functions very differently. Before COVID-19, this thin veneer was already cracking. More than ever, emboldened Asian jurisdictions have been substantially adapting Anglo-American transplants to function for their own purposes and, more recently, proposing Asian alternatives to the Anglo-American model. COVID-19 may shatter this veneer if it propels regionalism over globalism, weakens Anglo-American leadership, and, yet, Asia's economic rise continues. COVID-19 also appears to be promoting the global rise of the state as a dominant shareholder and a muted market for corporate control, both hallmarks of Asia's corporate governance success. Professor Puchniak posed the question; is this the start of history for Asian corporate law?

Johan Sulaeman, Dean's Chair and Associate Professor, National University of Singapore, Business School talked about the importance of local and private assets managers in encouraging entrepreneurship by facilitating active and liquid markets for local entrepreneurs to exit, especially in the tech sector. He sees that the trend will grow stronger post-pandemic where the traditional obstacles can be overcome with technological advances and entrepreneurial activities. His discussion focused on the role of private asset managers in encouraging entrepreneurial activities. Most of the attention in this context has been on the active role of venture capital (VC) funds in providing early funding for entrepreneurs. Professor Sulaeman highlighted the role of other types of asset managers -- from private equity (PE) funds, pension funds, to mutual funds -- in encouraging entrepreneurship. This role was quite important before COVID-19 as his recent research indicates that firms facing more intense information frictions (e.g., high-tech firms, low/negative earnings, low tangible assets) benefit from the availability of local asset management capital. These asset managers facilitate active and liquid markets for local entrepreneurs to exit. While this facilitation could be due to more intense information production or merely hype, it has the effect of encouraging entrepreneurial activities (e.g., more new firm formations) in the high-tech sector. This facilitation would be even more beneficial in the post-pandemic world, where issues associated with isolation, mistrust, and lack of coordination across countries and states can be overcome with technological advances and entrepreneurial activities.

Luh Luh Lan, Associate Professor, National University of Singapore, Business School and Law School referred to a study conducted on disruptive events affecting US listed companies from 1999-2016 and argued that to a firm facing disruption, the advisory role of the board may be more important to the monitoring role. Also, board attributes such as director busyness and board size may be more useful to firm resilience as compared to board independence during times of crisis. The COVID-19 outbreak has brought unprecedented challenges to corporations and their boards – frozen liquidity, inability to performed contracts, operations and system breakdowns from disruptions. To understand what is the role of the board during times of crisis and disruption and whether there are particular board attributes more important and better suited to deal with crisis situations than others during such times, we turn to a paper "The Advisory and Monitoring Roles of the Board: Evidence from Disruptive Events" by Ettore Croci (Università Cattolica Milan), Gerard Hertig (ETH Zurich), Layla Khoja (Singapore-ETH Centre) and Luh Luh Lan (NUS). In this paper, we study the contribution of directors to firm resilience by assessing the relative importance of their advisory and monitoring roles. Based on manually collected US data, we document that three variables affect market reactions around disruptive events: board independence exacerbates the negative share price effect, whereas the reverse is true for director busyness and board size. These reactions imply that, in times of crisis, advice-oriented boards fare better than monitoring-oriented boards. We also provide evidence that market reaction is worse for boards with more industry experts and that, in the long run, both board independence and director busyness decrease market value.

Hans Tjio, CJ Koh Professor of Law, National University of Singapore, Faculty of Law, asked for a re-look at the rationale relating to share buybacks. He referred to a recent Singapore case which suggests that law surrounding share buybacks can be abused and share buybacks can amount to market manipulation. Share buybacks have been accelerating around the world. This was once seen as a form of market abuse,and arguably should be again even if optimists believe that there is no objective basis to valuation. A recent Singapore High Court case suggests that it can be a form of market manipulation although the Court of Appeal disposed of the case on the basis that the statutory requirements for a buyback were not met. But those requirements have been liberalised over the past 30 to 40 years. A line though should be drawn in the sand if the share and capital lock-in is to continue to mean anything. Repurchased shares should not be permitted to be kept on the balance sheet. While the share has both contractual and proprietary aspects, financiers should not be allowed to pick and choose which it prefers.

Weina Zhang, Senior Lecturer of Finance, National University of Singapore, Business School, suggested that during times of crisis such as the COVID-19 pandemic, firms can benefit by stepping up on their social responsibilities as these activities can create valuable social capital with their stakeholders, both internally and external. She called on local government to support such actions by giving appropriate appraisals and business incentives to achieve a win-win outcome. Since January 2020, COVID-19 has hit hard on many countries. Firms are facing imminent danger of drastic reduction in demand and being forced to close due to various measures (circuit breaker and lock-down) imposed by governments. Instead of waiting for government subsidies to make up lost business opportunities, many firms have stepped up social responsibilities. These include keeping fixed or even lowered product prices despite the heightened demand, providing donations in cash or in-kind, volunteering their employees, as well as providing office space and assets for quarantines and medical provisions. These activities are beneficial for firms as they create a valuable part of social capital with their stakeholders, both internally and externally. The public and government agencies could also encourage more firms for such giving-back by giving appraisals and offering business incentives. As with an old saying 'a friend in need is a friend indeed', ultimate reward should be reaped by firms with social value at the core of their business.

光华管理学院
Guanghua School of Management

gcgc
Global Corporate Governance Colloquia

Peking University
13:00 – 14:00 GMT+8 /CST

Welcome: **Li Jin** (Peking University)

Transparency and information disclosure: accounting irregularities of listed overseas Chinese firms

Liyan Wang (Peking University)

[Title TBC]

Li Jin (Peking University)

Pursuing the new order for Chinese capital market

Li Guo (Peking University Law School)

Li Jin, Chair Professor of Finance, Guanghua School of Management, Peking University, provided an overview of corporate governance in China from the perspectives of the private sector business, highlighting conflicts of interest among various stakeholders and how those interests have shifted post COVID-19. He then posted several challenges for the intellectual community after the crisis: how to better handle early warning signs? should we trade off human safety and lives with economic growth? should we continue to embrace globalisation?

Liyan Wang, Professor of Accounting, Guanghua School of Management, Peking University, provided a review of the new trends of ESG information disclosure in Hong Kong Capital Markets from 2020, based on his observation and discussions with auditors in 2 mainland listed H-shire firms. He believes that there should be an improvement to the quality and transparency of ESG information. He also suggested that environmentally sensitive industries are playing an important role in anti- COVID-19 practices. For example, headquartered at Wuhan, HX firm's cement plants in four provinces have been providing extra capacity for disposing hospital waste within cement kilns. This is being considered by senior management as a CSR practice.

Li Guo Professor of Economic Law, Peking University Law School, presented on *"Pursuing the New Order for Chinese Capital Market"*. With the latest revision to its Securities Law effective on March 1, 2020, China reset its IPO mechanism on the disclosure-based registration system. As a pilot, the Science and Technology Innovation Board (STAR Market) at Shanghai Stock Exchange took the initiative in 2019 and has embraced those companies with different shareholding structures and of different developing stages. Recently, both the regulator and stock exchanges added questions about the impacts of COVID-19 in their inquiries to the applying issuers. On the other hand, with respect to the representative civil litigation against fraudulent disclosures, a new format was introduced where the government sponsored investor protection organisations could serve as the leading plaintiff if entrusted by 50 impaired investors, and the other investors will join in this group automatically unless opt-out explicitly. Also in the current financial turmoil, new challenges loom which involve the cross-border securities issuance and trade activities.

Session 4: Israel

TEL AVIV UNIVERSITY

gcgc
Global Corporate Governance Colloquia

Tel Aviv University
09:30 – 11:30 IDT

Welcome: **Assaf Hamdani** (Tel Aviv University and ECGI)

Panel 1: Startups, scaleups and governments

Moderator: **Assaf Hamdani** (Tel Aviv University and ECGI)
Panelists:
Eugene Kandel (Hebrew University and ECGI)
Kerem Nevo (Wix.com)
Georg Ringe (University of Hamburg and ECGI)
Steven D. Solomon (Berkeley University and ECGI)

Panel 2: Support in time of crisis: Director duties

Moderators: **Assaf Hamdani** (Tel Aviv University and ECGI)
Panelists:
Amir Licht (IDC Herzliya and ECGI) &
Kristin van Zwieten (University of Oxford and ECGI)
Roberto Bonsignore (Cleary Gottlieb Steen & Hamilton)
Ian Ramsay (University of Melbourne)
Robin Dicker QC (South Square)

The fourth session was hosted by **Tel Aviv University** and **Interdisciplinary Center Herzliya**. This session was chaired by **Assaf Hamdani**, Professor of Law, Tel Aviv University.

The first panel addressed the questions: Are start-up s different from other small businesses hit by the crisis? Is there a need for government intervention? Are there differences across countries? Are there differences between early and growth stage companies? What are the governance and other long-term implications?

Eugene Kandel, Professor of Economics and Finance, Hebrew University of Jerusalem, and Start-up Nation Central, spoke about *"COVID-19 and the Israeli Tech Ecosystem"*. Measured as a percentage of the economy, the Israeli innovation ecosystem is the largest in the world. The Israeli government is now facing a challenge how not to lose this sector. After the crisis, Israeli tech will be more valuable. There will be dramatic changes in the way we work, travel etc. which present many opportunities for innovators. Moving the supply chains back home will increase costs and the demand for productivity. With $8.5 billion investments solely in 2019, tech has been growing tremendously in Israel. However, over 85% was from foreign funds that withdrew from Israel due to the crisis, creating a strong liquidity crunch, and thereby a need for government intervention. Well-designed government intervention can generate enormous returns for the government and solve the adverse selection problem. The proposed model in Israel consists of: (i) streamlining the existing infrastructure of grants by the Innovation Authority to smaller companies; (ii) providing loans with downside protection to large companies; and (iii) incentivising institutional investors to make debt or equity investments alongside VCs in medium size firms. Lastly, it is important to retrain people to modernise government by using more tech and designing more technology-driven solutions for managing epidemics in the future.

Georg Ringe, Professor of Law & Economics, University of Hamburg, spoke about *"Start-up s and start-up s support in Germany"*. There is a debate in Germany whether start-up support is worth doing and what the exact design should be. A survey found that the crisis threatens the existence of up to 80% of the start-up s in Germany. Those supporting government measures to assist start-up s claim that start-up s are weak since they lack reserves. They are very risky and not yet profitable meaning start-up s are "not bankable" and are unable to obtain credit. Normally VCs are those that provide financial support, but they are located abroad, and are reluctant to commit to future funding rounds due to the crisis. Skeptics claim that start-up s should not be helped since they are bad investments (90% of start-up s go bankrupt anyways) and there is a risk of political influence of which ones to pick. Also, they claim that the government will essentially give money to those who don't need it: VC firms. How to support start-up s? Government support programs run through commercial banks that normally start-up s can't approach. Since most companies are not bankable, the use of the loan system would not be effective. Also, a future debt burden will reduce the attractiveness to financing rounds. The German government announced a 2 billion Euro fund for start-up s. It will provide additional funding for new financing rounds as co-investments with private investors. By that, the government avoids the problem of giving money directly to start-up s and the political problem of which one to choose. In addition, the fund provides private investment funds with additional public funding and it also facilitates funding to start-up s that do not have VCs.

Steven Davidoff Solomon, Professor of Law, University of California, Berkeley School of Law, spoke about *"VC's in the US"*. The US has entered this crisis with valuations that were already shaky, after a debate about unicorns and whether they are properly valued. The COVID-19 crisis affects VC-backed companies less severely than small businesses that closed down without the prospect of reopening. While business plans for large companies have been revised, most of them were sufficiently capitalised to last a year or two. And yet, there is still a significant amount of dry powder in terms of equity investments that can go into these companies. Therefore, we are beginning to see some refinancing in the market (e.g. Airbnb). The general trend for VC's is "sit tight and see what happens". In fact, many VC's may have been helped by this crisis; for example, cloud companies, Amazon and other well capitalised companies that have billions of dollars, the expectations are that those companies will enter as valuations stabilise. Consequently, the situation for VC companies is not that pessimistic. While the government and Federal Reserve's activity have not supported VC's directly, the companies are relying on the Paycheck Protection Program, a $350 billion program (part of the 2 trillion CARES act) to get a loan which is entirely forgivable. In order to be eligible to this loan there is affiliate provision – you cannot have more than 500 employees, and if you have an investor that is an affiliate, they count the employees all across the portfolio companies. The VC companies have been busy removing negative covenants, removing all their control rights so they can take this loan. Some VCs, even though qualified, refuse to take the loan on moral ground since they don't want to be seen taking money they do not really need.

Kerem Nevo, Head of Government Relations, Wix, and Growth Companies Forum spoke on *"The crisis from the perspective of larger tech companies"*. The Israeli growth forum is a group of tech companies at the growth stage. Growth companies took many years to build, and they are very important because they have a significant impact on the economy. In order to facilitate an efficient plan, it is important to understand the specific issues that these companies face, and other sectors don't. For example, full recovery for these companies depends on other countries' recovery and not necessarily that of Israel. Growth companies not only suffered substantial reduction in revenues, but also a decrease in valuation and hence equity investments. The concern is that these companies will become cheap targets for acquisition by larger, cash rich, tech companies.

The second panel was moderated by **Amir Licht**, Professor of Law, Harry Radzyner Law School, Interdisciplinary Center Herzliya, and **Kristin van Zwieten**, Clifford Chance Associate Professor of Law and Finance, University of Oxford. The panel which was titled *"Support in Time of Crisis: Directors' Duties"*, was motivated by the Australian government's initiative, which has already introduced a statutory amendment suspending directors' liability for "insolvent trading", i.e., incurring obligations while the company is facing insolvency, and similar proposals made in a growing number of countries. The speakers in the panel considered this initiative as well as the broader theme of suspending or changing director duties in a time of systemic crisis that is likely to lead to financial distress and failure in numerous firms.

Ian Ramsay, Professor of Law, University of Melbourne Law School, reviewed the recent amendment against the general background of insolvent trading liability, noting the general perception in Australia of this legal regime as exceptionally severe. The new safe harbour thus is meant to alleviate managers' fears about conducting business in struggling companies. **Roberto Bonsignore**, Partner, Cleary Gottlieb Steen & Hamilton based in Milan, noted that staying open for business, running a company and funding operations in the current emergency raise issues that cannot be dealt with under the ordinary bankruptcy frameworks. He gave an overview of amendments to bankruptcy laws in Italy, France and Germany, and discussed how Jurisdictions around Europe have responded by adjusting their bankruptcy laws in similar and yet different ways. **Robin Dicker QC**, a partner at South Square in London, reviewed the UK regime of wrongful trading and the government's intention to suspend this type director liability. He noted, however, that this is only one basis for potential liability, while other bases remain intact. The proposed changes come while a broader review of director duties is currently under way. In the Q&A phase, several participants made comments that reflected a common concern for other stakeholders in addition to creditors, and the panelists addressed them in turn.

Session 5: Germany

Goethe University Frankfurt
11:00 – 13:00 CEST

Welcome: **Tobias Tröger** (Leibniz Institute SAFE, Goethe University Frankfurt and ECGI)

Panel 1: Central Bank responses: Transmission mechanisms

Moderator: **Tobias Tröger** (Leibniz Institute SAFE, Goethe University Frankfurt and ECGI)
Panelists:
Isabel Schnabel (European Central Bank)
Lucrezia Reichlin (London Business School and ECGI)

COVID-19 and financial stability 3.0: Try equity - risk sharing for companies, large and small

Speaker: **Jan Pieter Krahnen** (Center for Financial Studies (CFS), Leibniz Institute SAFE, Goethe University Frankfurt and ECGI)
Discussants:
Yishay Yafeh (Hebrew University of Jerusalem and ECGI)
Andreas Engert (Freie Universität Berlin and ECGI)

The fifth session was hosted by **The Leibniz Institute for Financial Research, LIF SAFE and Goethe University, Frankfurt.** This session was chaired by **Tobias Tröger**, Professor of Private Law, Commercial and Business Law, LIF SAFE and Goethe University Frankfurt.

The first panel which was moderated by **Hans-Helmut Kotz**, Harvard University and LIF SAFE, shed light on *"The ECB's response to the COVID-19 pandemic"*. Financial conditions, not only in the Euro area, have tightened significantly in response to the global outbreak of the corona virus and thus put pressure on central banks to avoid adverse macro-financial feedback loops.

Isabel Schnabel, Member of the ECB's Governing Council, explained what the ECB had done to safeguard its price stability mandate and financial stability more broadly. She highlighted that the ECB pursued two overarching objectives. First, it sought to restore the orderly functioning of euro area financial markets which were hit by an extraordinary degree of volatility, fast de-risking and a liquidity crunch. Second, the ECB wanted to ensure that its accommodating monetary policy was still transmitted to all parts of the Euro area, supporting both firms and households. Ms. Schnabel showed that the ECB in calibrating its response could rely on a toolkit of previously tested monetary policy instruments and opted for a set of three mutually reinforcing and complementary monetary policy measures. The first component relates to broad-based asset purchases to address illiquidity and heightened volatility in core segments of euro area financial markets. The second component, consisting of the enhanced targeted longer-term refinancing operations (TLTROs) and a comprehensive set of collateral easing measures, ensures that banks remain reliable carriers of the ECB's monetary policy and continue lending to the real economy. The third component relates to central banks' traditional role as a lender of last resort to solvent banks which induced the ECB to offer banks liquidity over longer horizons at the negative rate of the ECB's deposit facility without any conditions attached. Ms. Schnabel presented tentative evidence that the ECB's response by and large achieved its goal. They provide a reliable backstop for firms and households mitigating the challenges of the crisis and keep the bank lending channel uncloaked. In her conclusion, she also pointed out that ultimately the recovery will depend on the right combination of monetary policy and effective fiscal and regulatory policy.

In response to Ms. Schnabel's presentation, **Lucrezia Reichlin**, Professor of Finance, London Business School, posed a key question: what will happen if the ECB remains the only game in town despite the fact, also highlighted by Ms. Schnabel, that for supporting credit and aggregate demand budgetary policies must also be put in place? Professor Reichlin explained that a key take-away from the European sovereign debt crisis is that the macro effects of monetary policy are small at the zero lower bound and that therefore the ECB will need the support of fiscal policy. She delineated further that without a coordinated response in the latter respect, imbalances in the performances of the economies of euro area member states will increase. This in turn will put pressure on the ECB to act asymmetrically. As Professor Reichlin showed, this touches on the political limits of ECB actions: if the ECB's responsibility is to preserve financial stability and this also implies stabilising yield curves of sovereign debt, the allegation of financing governments and insolvent institutions looms large.

In the second part of the session, **Jan Pieter Krahnen**, Professor of Finance at the Goethe University Frankfurt and the Leibniz Institute SAFE, proposed to support small and medium-sized enterprises (SMEs) in the COVID-19 crisis not by credit but through a mechanism which resembles equity financing. To reach SMEs without access to capital markets, Professor Krahnen and a team of international financial economists propose to support companies with cash which would give the government an equity-like claim, rather than using conventional debt, or debt guarantees: Supported companies would receive a cash payment and have to pay a tax surcharge on profits, or an equivalent payment, as soon as the crisis is over and the firms are profitable again. The initial cash investment would be channeled to firms with healthy business prospects, where an assessment is based on outside expertise, e.g. local banks or public agencies. Furthermore, a "buy-out option" could be exercised after a few years, much like in private equity transactions, allowing firms to abandon the tax surcharge against a one-off premium payment.

The implied equity-like payment structure would reduce the leverage of affected companies. If implemented at the European level, for example through a European Pandemic Equity Fund (EPEF), the stability of banks and the financial system of the euro zone would increase, in comparison to a lending scheme of similar size. Moreover, designing the scheme at the EU level could help to counterbalance an otherwise growing disparity of productivity levels across EU countries. The necessary equity capital for this fund should be raised jointly by the EU member states – and possibly be leveraged by private investors. This would share not only the risks of economic gloom, but also the returns of a solid economic recovery, especially in the SME sector, across the EU. Further details of the fund design, concerning investment and funding were also addressed, such as problems of moral hazard and adverse selection (see references). If the contractual details are set properly, the fund should be able to realise a positive level of expected return.

While the two commentators **Yishay Yafeh**, Professor of Finance, Hebrew University Jerusalem, and **Andreas Engert,** Professor of law, Freie Universität Berlin, welcomed the proposal, it was pointed out that alleviating a debt overhang problem in the capital structure of firms requires more than just a willingness of governments to make equity investments in exchange for a market return. Rather, a wealth transfer from the taxpayer to existing equity-holders would be needed if owners of SMEs were supposed to retain a significant share in their firms. Other difficulties with the proposed programme include the criteria by which firms would be selected to receive capital, and the fact that the proposal would grant the government a claim which resembles preferred-equity in the sense that the government would have priority in future payments (through the tax system) but no voting power. This raises the possibility of agency conflicts between the government and firm owners who may take actions to reduce their future tax liability. Other issues include the ability of the government to impose restrictions on the use of the support money for salaries or dividends. In general, the overall benefits and costs of using debt-like and equity-like instruments for government support should be considered.

Session 6: Sweden

Swedish House of Finance
13:30 – 15:30 CEST

Welcome: **Bo Becker** (Swedish House of Finance and ECGI)

Panel 1: The Swedish COVID-19 policy response

Moderator: **Bo Becker** (Swedish House of Finance and ECGI)
Panelists:
Johan Giesecke (Karolinska Institute, Public Health Agency of Sweden)
Anna Kinberg Batra (Moderate Party of Sweden)
Per Krusell (Institute of International Economics, Stockholm University)

Panel 2: Corporate governance and stakeholders in the crisis

Moderator: **Per Strömberg** (Swedish House of Finance and ECGI)
Panelists:
Liv Forhaug (CEO Martin & Servera)
Petra Hedengran (Chief Counsel and Head of Corporate Governance, Investor AB)
Martin Linder (President, Unionen, Swedish trade union)

The sixth session was hosted by **The Swedish House of Finance at the Stockholm School of Economics**. This session was chaired by **Bo Becker**, Cevian Professor of Finance, Stockholm School of Economics.

The first panel reflected on *"What is the current situation in Sweden?"*. Swedish lockdown has been softer than in several neighbouring countries, but the decline in activity, as measured by Google mobility data, appears similar. **Johan Giesecke**, Professor Emeritus of Medicine at Karolinska Institute, former head epidemiologist at the Public Health Agency of Sweden, and former head of research, ECDC, pointed out that reported death numbers are slightly higher than in neighbouring countries but that the statistics can be tricky to interpret. For example, how are deaths outside of hospitals counted, and how many are tested. The panel highlighted the benefit of high trust for public institutions, and how this makes a soft lockdown more effective. **Jonathan Macey** of Yale University questioned the feasibility of softer lockdown policies in, for example, a US context. **Per Krusell**, Professor of Economics, Institute for International Economic Studies, IIES, Stockholm University, estimated that the Swedish economy currently runs at a reduced rate of around 30%, which corresponds to a 10% loss of annual GDP if the lockdown remains in place for three months. Economic considerations typically form little or no part of health authorities' analysis, according to Giesecke – "epidemiologists are not economic experts"– and politicians have to integrate the various perspectives. **Anna Kinberg Batra**, Former Head of the Moderate Party of Sweden, highlighted that foreign attention of Swedish policies may have overstated policy differences. Professor Krusell and Ms. Kinberg Batra also pointed out how an economy can benefit if productive capacity is maintained through a temporary crisis. Ms. Kinberg Batra pointed to the potential importance of this for political dynamics going forward.

The panel also considered *"How to exit from lockdowns, quarantines and closings?"* All three panelists agreed that this is very important, and perhaps also an overlooked policy challenge. Giesecke raised the benefits of immunity (perhaps for a year, possibly longer) combined with anti-body testing, which can show who has previously had COVID-19. Vaccines and effective treatments may be further out than we can endure a closed down economy. Kinberg Batra pointed to the challenges in coordinating policy at the EU level, and the panel discussed the risk of ineffective country-by-country openings of the economy. Every crisis has some lessons for us all. *What lessons can be learned from this crisis?* The panel agreed that perhaps it's too early to tell. Giesecke expressed pessimism about learning. Panelists compared to the lessons drawn in Sweden from the 1991-93 crisis, after which a broad political consensus developed about the value of stable public finances.

The second panel *"Corporate Governance and Stakeholders in the Crisis"* was moderated by **Per Strömberg**, SSE Centennial Professor of Finance and Private Equity, Stockholm School of Economics.

The panel considered the perspectives of an institutional owner, represented by **Petra Hedengran**, General Counsel, Head of Corporate Governance, Investor AB; of corporate management, represented by **Liv Forhaug**, CEO, Martin & Servera Group, and of an employee trade union, represented by **Martin Linder**, President, Unionen, in light of the various responses at this stage of the crisis. They collectively underlined the urgency and uncertainty of the situation which requires a high level of stakeholder coordination and transparency, for example from the health authorities, in providing an adequate basis for future scenario modelling. They cautioned against knee-jerk protectionist policies and political action which could cause indirect damage to business liquidity and access to capital markets. It was suggested that more could be done, such as assuming the fixed cost base of businesses in certain circumstances, as in Denmark, noting that it will be too late to rescue businesses after they have been made bankrupt, though not all businesses will survive. They also considered the risk-sharing implications for the costs of the crisis. This was also raised in a later session, that is, dividing the effects of shock to reduce impact on any one member of economy/polity with a view to minimising efficiency losses introduced by pandemic.

Session 7: United Kingdom

UNIVERSITY OF OXFORD

gcgc
Global Corporate Governance Colloquia

Imperial College London

University of Oxford and Imperial College London
15:00 – 17:00 BST

Welcome: **Colin Mayer** (University of Oxford and ECGI)

Panel 1: Supporting SMEs during the pandemic

Moderator: **Claudia Custodio** (Imperial College and ECGI)
Panelists:
Diana Bonfim (Bank of Portugal)
Karen Mills (Harvard Business School)
Juanita Gonzalez Uribe (LSE)
Ramana Nanda (Imperial College)

Panel 2: Business responses to the pandemic

Moderator: **David Kershaw** (LSE and ECGI)
Panelists:
Renée Adams (University of Oxford and ECGI)
Mary Johnstone Louis (University of Oxford)
Colin Mayer (University of Oxford and ECGI)
Judith Stroehle (University of Oxford)

Panel 3: Corporate law during and after the pandemic

Moderator: **David Kershaw** (LSE and ECGI)
Panelists:
John Armour (University of Oxford and ECGI)
Luca Enriques (University of Oxford and ECGI)
Maribel Saez (Universidad Autonoma de Madrid)

The seventh session was hosted by **Imperial College London** and **University of Oxford**. This session was chaired by **Colin Mayer CBE**, Peter Moores Professor of Management Studies, Saïd Business School, University of Oxford. It delved into three key aspects (1) Impact of the COVID-19 crisis on small and medium enterprises (SMEs); (2) Business response to the pandemic with special focus on nature of ownership; and (3) Short-term and long-term legal and regulatory changes.

Panel 1: Supporting SMEs during the pandemic moderated by **Claudia Custodio**, Associate Professor of Finance, Imperial College Business School.

Diana Bonfim, Senior Economist in the Economics and Research Department, Banco de Portugal, highlighted that SMEs primarily face a liquidity risk, which, if not addressed, could manifest itself in insolvency. While larger firms are better equipped to handle liquidity risk as they have higher cash reserves or better access to credit, SMEs are less integrated within the global supply chain, more flexible and thus, more apt at capturing new opportunities. She discussed the EU-level policy actions, such as expanding the asset purchase programme by the European Central Bank (ECB), fine-tuning the collateral framework to allow banks to post more collateral to the ECB including loans given to SMEs, and adapting the regulatory and supervisory framework to avoid a collapse in lending to SMEs. She also noted that, at the national level (and specifically in Portugal), the response includes a bank-led distribution model for providing loans with state guarantees to SMEs in the most affected sectors, a moratorium on loan repayment by firms (and households), financial support to workers temporarily furloughed by their employer (under the condition that the jobs are maintained), and tax relief measures among others.

Karen Mills, Senior Fellow, Harvard Business School, former Administrator of the U.S. Small Business Administration from 2009 to 2013, and former member of the U.S. President's National Economic Council, suggested that after problem identification, the right instruments must be employed to address the liquidity issue. SMEs have, on average, around 27 days of cash buffer. Thus, the proposed instruments must be quick in terms of effecting the transfer and industry-specific. An innovative approach, such as the use of fintechs for the distribution of cash benefits to SMEs, should be adopted. She stated that if a V shaped recovery is plausible, then SMEs are key to such economic recovery.

Juanita Gonzalez Uribe, Assistant Professor of Finance, London School of Economics and Political Science, explained that the financial crisis in 2008-09 and the present COVID-19 pandemic are very different and thus, a novel approach is required to address it. Being aware of the intensity of the present crisis, UK's Coronavirus Business Interruption Loan Scheme (CBILs) has the main objective of retaining the workforce behind SMEs and has relaxed various conditions compared to the loan scheme put in place during the 2008-09 crisis. Perhaps partly because of such relaxations, preliminary data shows that demand for CIBLs has been much stronger than demand for the loan guarantees implemented by the UK government during the 2008-09 crisis. She stated that the danger of such relaxations, however, is the increase in risk-taking by borrowers and lenders. Only time will tell whether the benefits from streamlining these support programs will compensate for the potential long-term difficulties when the loans come due for repayment in the future.

Ramana Nanda, Visiting Professor of Entrepreneurial Finance, Imperial College Business School, discussed the findings of a survey in the US regarding how SMEs perceive various reliefs to highlight that there is heterogeneity even among SMEs and a targeted yet local approach which provides accelerated payments is the need of the hour.

Panel 2: Business responses to the pandemic, moderated by **David Kershaw**, Professor of Law, London School of Economics and Political Science.

Colin Mayer, Peter Moores Professor of Management Studies, Saïd Business School, University of Oxford, emphasised that business should act responsibly with the public funds they receive for their revival and recognise their social license sufficiently. The three business responses to this crisis may include: (1) in the short term, the production of necessary health equipment; (2) in the medium term, recognising changes in lifestyle and consumer preferences in a post-crisis scenario; and (3) for the long term, creating value propositions that lead to inclusive and sustainable growth. He suggested that companies with a purpose can better respond to this crisis and pave way for greater societal benefits.

Mary Johnstone Louis, Senior Research Fellow and Programme Director, Saïd Business School, University of Oxford, discussed the implications of the crisis on corporate purpose with the lens of corporate ownership. She highlighted that in the wake of the present crisis the role of long-term owners will be far more crucial in balancing the interests of all stakeholders. In order to be effective, corporate purpose must be reflected in governance and directors should take up their role as the stewards of the firms' purpose during the crisis and beyond.

Renée Adams, Professor of Finance, Saïd Business School, University of Oxford, made the point that we do not yet have enough data to fully understand corporate responses to the pandemic. She illustrated this point by showing that in stark contrast to a claim made in an article in the Wall Street Journal, corporate insiders do not seem to be selling out their companies' stocks. Instead, corporate insiders are buying shares, which is a positive signal. With regard to gender diversity on corporate boards, she suggested that there is evidence that women have more empathetic traits towards other stakeholders even when they are corporate leaders. Thus, businesses should do their best in promoting gender diversity especially in times of crisis.

Judith Stroehle, Research Fellow, Saïd Business School, University of Oxford, focused on the need to adopt new metrics for corporate performance. She explained the drawbacks of the three most common metric systems – accounting, stock valuation and ESG reporting and suggested introducing profit measures which are able to capitalise investments made into critical human, social and natural capital. Such investments need to be able to filter through to the valuation of firms on the stock market while accepting a notion of materiality that is dynamic and closely linked to a corporation's purpose.

In summary, this part of the session pointed to the importance of corporate purpose in determining the response of business during and after the pandemic, and the role that ownership, governance and measurement play in that regard. It also pointed to the care that should be taken in drawing conclusions too rapidly from the limited amount of evidence that is available to date.

Panel 3: Corporate law during and after the pandemic moderated by **David Kershaw**, Professor of Law, London School of Economics and Political Science.

Luca Enriques, Professor of Corporate Law University of Oxford, Faculty of Law, outlined key areas of corporate law which must be tweaked to help corporations to weather the current storm, in the form of special temporary default rules. He suggested that a 'survival first' mode implies that requirements for issuance of new equity or debt must be relaxed during the crisis. Further, the extreme uncertainty business leaders are going through requires that laxer director liability standards are applied for decisions taken during the crisis. Finally, takeover defenses must be temporarily allowed to thwart low-ball hostile bids which would distract managers from their task of steering their companies through the crisis.

John Armour, Hogan Lovells Professor of Law and Finance, University of Oxford, Faculty of Law, discussed the effect of macroeconomic instability posed by the COVID-19 crisis at the firm level and the country level. He stated that 'leaner' firms are less capable of withstanding shocks. At a country level, apart from sectoral problems, leaner firms are less able to adapt and produce items of strategic importance as a national response to the crisis is needed. Given the long tail risks that managers take while taking policy decisions, he predicted that firms that offer high-powered incentives to its senior executives will face greater disruption. He also envisaged that the crisis will have an impact on corporate ownership, predicting a return to conglomerates, or *'keiretsu'*-type arrangements which provide an element of mutual insurance against, and facilitate coordination in, a crisis.

Maribel Saez, Professor of Commercial Law, Universidad Autonoma de Madrid, called the COVID-19 crisis a 'negative blow' to globalisation, that is likely to result in the enactment of protectionist regulations. This tendency towards protectionism was already there (as an example, see the Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the EU), but it will be reinforced during the crisis. She discussed how 'corporate nationalism' will empower local insiders and controlling investors, at the cost of hampering the interests of minority shareholders and foreign activist funds. This crisis is also likely to put on hold the introduction of rules to improve corporate governance in controlled firms, reduce global mergers and acquisitions, reduce market supervision and increase state ownership. But some factors may backfire.

Session 8: USA (Part 1)

COLUMBIA LAW SCHOOL

gcgc Global Corporate Governance Colloquia

Columbia University
12:15 – 13:00 EDT

Welcome: **Jeffrey N. Gordon** (Columbia Law School and ECGI)

The Fed to the rescue: Unprecedented scope; stretched authority
Lev Menand (Columbia Law School)

The role of the Fed in containing the fallout: Made central but now exposed
Kathryn Judge (Columbia Law School and ECGI)

What Wall Street got from the CARES Act
John C. Coffee (Columbia Law School and ECGI)

How to help small businesses survive COVID-19
Todd Baker (Columbia Law School)

COVID-19 as a force majeure in corporate transactions
Eric Talley (Columbia Law School)

Corporate finance in the age of shadow banking
Katharina Pistor (Columbia Law School and ECGI)

Short selling and short selling disclosure in a pandemic
Joshua Mitts (Columbia Law School)

Shareholder value, systematic stewardship, and the missing government
Jeffrey N. Gordon (Columbia Law School and ECGI)

The eighth session was hosted by **Columbia Law School**. This session was chaired by **Jeffrey N. Gordon**, Richard Paul Richman Professor of Law Columbia Law School.

Lev Menand, an Academic Fellow at Columbia Law School, whose research focuses on financial regulation, described and praised the Fed's unprecedented intervention to stabilise credit markets and support the economy but also outlined the basis for deep concern that Congress has not adequately grounded the Fed's emergency interventions authority. He offered that this mismatch between authority and emergency action has costs in terms of efficacy and preparedness, and costs in terms of equity and legitimacy. He further argued that once the crisis is over, Congress should update banking and monetary laws to reflect the current economic reality and eliminate the discrepancy between regulators' authority and actions. His recommendations include creating a standing fund for emergency lending and regulating shadow banks. He also provided a chart that divided the Fed's actions between "liquidity support" for the financial sector (including the "shadow banks"), utilising the playbook that was created during the 2008-09 financial crisis, and "credit support" for the real economy, which opens a new chapter in the use of the Fed's capacity during a crisis.

Kathryn Judge, Harvey J. Goldschmid Professor of Law, argued that the Fed is poorly equipped to mitigate the economic impact of the COVID-19 crisis equitably and facilitate long-term growth. She suggested that the Fed's tools, here expressed through the "Main Street Lending Programme," and the "Paycheck Protection Programme," disproportionately benefit large enterprises and neglect vulnerable smaller players, who are often from historically disadvantaged groups. Professor Judge argued that small and midsize enterprises should be supported because they are a huge proportion of GDP and employment. Smaller businesses tend to be more vulnerable; many are minority-owned. Distributing financing quickly to these areas is more likely to stop the immediate deterioration of these businesses and lead to sustainable broad-based growth in the crisis aftermath.

Professor **John C. Coffee Jr.**, Adoph A. Berle Professor of Law, criticised CARES Act provisions that authorise banks to serve as intermediaries to administer emergency small business loans. Flaws he highlighted include: high administrative costs (bank fees), slow funds disbursal, a bias towards larger enterprises, and no requirement for applicants to demonstrate financial distress. Professor Coffee suggested three ways to improve the programme. First, the government should make loans directly to employers, who would file with the Treasury or a similar government intermediary information about the size of their payroll and indications of distress. Second, limit subsidy recipients to small businesses in distress that otherwise would have to lay off employees. Third, disburse funds via the Internal Revenue Service, because the agency can scale up to high volume quickly, has information about many of these applicants, and has existing effective enforcement mechanisms. Professor Coffee maintained that his proposals would be more effective than the CARES Act observing that simplicity is critical, and simplicity does not come from using banks and a guaranteed loan procedure as a mechanism. Instead, direct loans from the government to the borrower based on applications filed with the government would be quicker and it would allow the government to better aim the subsidy at those who truly deserve it.

Todd Baker, a Senior Fellow in the Richman Center for Business, Law and Public Policy, outlined a four-stage recovery process for small businesses and raised a series of related questions for policy-makers:
The current first stage – payment protection programme loans to small businesses—will, in high probability, be followed by direct government lending support in the form of a direct secure line of credit from the Fed. Policy-makers will then have to decide: Should the programme be indiscriminate, like the PPP, or credit-based? And if the latter, will there be risk-sharing with lenders? And will lenders be picking winners and losers, and on what terms? The third stage will involve supporting a revival in the secondary market for loans. He postulated that as the economy stabilises, policy-makers likely will need to create a small business asset-backed securities liquidity facility modelled on TALF [the Fed's 'Term Asset-Backed Securities Loan Facility'], which would support holders of investment grade securities backed by small business loans. In the final stage, as the small business lending programme and the asset-back securities facility unwind, policy-makers will have to evaluate these programmes' effectiveness. Mr. Baker argued that regulators should consider disbursing payments directly to small businesses in future crises – and avoid using banks as an intermediary. He also argued for evaluating the systemic risk posed by online lenders, which have created a new and unrecognised systemic risk in the small business system. They play a large role and their fragility makes them less resilient than depository banks beyond direct regulatory control.

Eric Talley, Isidor and Seville Sulzbacher Professor of Law, explored research on how/whether parties have anticipated the possibility of a "pandemic" in the drafting of the their "material adverse change/event" ("MAC") clauses in merger documents. He reports an increasing "carve-out" of "pandemics" (or the equivalent) from the events that would constitute a MAC beginning with the H1N1 crisis in 2009 and boosted by subsequent waves of the MERS crisis. Such language was found in nearly 40 percent of deals entered into at the end of the 2010's. For deals that are currently pending, 23.9% percent have pandemic (or equivalent) carveouts. An important caveat, however, is that MAC provisions also "carve-in" a significant portion of pandemic-related risk through "disproportional effects" language, that is, whether the target suffers hardships that are disproportionately more severe than industry peers. Indeed, almost all pandemic or "Act of God" carve-outs are accompaniedby carve-ins that refer to disproportionate effects. Professor Talley cautioned that the content of MAC clauses was far from determining whether current deals would go forward. Delaware courts lean strongly against finding a MAC excuse for closing. Yet many deals contain reverse termination fees (often increasing in the buyer's walk-away rights) as the seller's exclusive remedy. An unwilling buyer may also value delay in these uncertain times as the seller's litigation wends its way through the Delaware courts. The uncertainty around the judicial resolution of MAC litigation may even be a feature not a bug, providing a framework and impetus for renegotiation.

Katharina Pistor, Edwin B. Parker Professor of Comparative Law, discussed how themes developed in her recent book, The Code of Capital, have become manifest during the COVID-19 crisis. In particular, the crisis exposed pre-existing weaknesses in the shadow banking system –including high volatility and a lack of liquidity buffers – and that the devastating economic consequences may lead policy-makers to regulate shadow banks. Professor Pistor argued that without major regulatory reform, financial markets will face increased volatility as the globe confronts climate change and potential future pandemics. "As volatility increases around us," she explained, "we are dealing with a financial system that is structured to be very volatile, and that is probably a pairing that doesn't work well together." Volatility and resilience would be a better pairing. Professor Pistor suggested restructuring the financial system in the face of this uncertainty, including the way that the corporate sector finances itself.

Joshua Mitts, Associate Professor of Law, discussed two proposals regarding short-selling that he and several other legal academics and practitioners recently petitioned the Securities and Exchange Commission to promulgate. The first rule, he explained, would require short sellers to "update a voluntary disclosure once it no longer reflects their current holdings or trading intention" so that the market would not continue to rely on an outdated and inaccurate statement. The second rule would mandate that short sellers who publish a report with the intent to close their short positions quickly thereafter should be required to disclose their intent to do so. Professor Mitts argued that this rule is necessary because short sellers who publish these reports without disclosing this intent are engaged in fraudulent scalping. The rules would include a safe harbour so as not to deter legitimate criticism of public companies. Professor Mitts explained that the spike in manipulative short selling during the COVID-19 pandemic highlights the need for these proposed rules. Several countries, including Belgium, Austria, Greece, and Spain, recently instituted complete bans on short-selling in response to the crisis. Professor Mitts offered that his proposed rules were a better alternative to an outright ban, explaining that it is possible to deter manipulative short-selling while encouraging short-selling more generally.

Jeffrey Gordon, Richard Paul Richman Professor of Law, expressed concern that the norms of corporate governance, in particular the focus on shareholder value, may have contributed to the disturbing shortfall in government capacity revealed by the pandemic, what others have called "the whitest of white swans" in terms of its foreseeability. He noted the correlation in time between the focus on shareholder value and the decline in government regulatory and operational capacity, wondering whether one of the core boundary conditions for the Friedmanite prescription has been lost: that corporate profit-maximizing would stay "within the rules of the game." Management's pursuit of shareholder value has extended beyond the boundaries of the firm in the effort to change the rule of the game through vigorous political engagement. This is the lens through which he examined stakeholder value as an alternative objective for the firm. Although he expressed scepticism about 'stakeholderism' as an operational guide to corporate action, considering the multiple trade-offs always necessary among stakeholders, he conjectured that such disciplined reflection could sensitise the elite group of corporate directors and managers to the necessary role of government and public goods creation. Professor Gordon also offered an alternative route, *'systematic stewardship'*, which would build on the fact that asset managers' core product is diversified stock portfolios which by construction, minimise firm-specific risk leaving a residual of systematic risk. Thus, managers who attend to systematic concerns are serving the interests of beneficiaries through the pursuit of the highest risk-adjusted return, not as a matter of 'socially responsible investing' but just cold hard finance, an implication of modern portfolio theory. What follows is the realisation that appropriate government capacity and public goods creation is an important way to reduce systematic risk. Professor Gordon referenced his forthcoming paper that will develop what systematic stewardship entails for the asset manager, the scope and modalities of asset manager engagement.

Credit: Michael Viehs

Session 9: USA (Part 2)

HARVARD LAW SCHOOL

gcgc Global Corporate Governance Colloquia

Harvard University 14:30 – 16:30 EDT

Welcome: **John Coates** (Harvard University and ECGI)

Macro costs of clogged bankruptcy courts?
Mark Roe (Harvard Law School and ECGI)

The case against (ordinary) bankruptcy
David Skeel (Penn School of Law and ECGI)

Forecasting bankruptcy court congestion
Benjamin Iverson (BYU Marriott School of Business)

The case against CARES
Luigi Zingales (Chicago Booth Business School and ECGI)

Bailouts to bankruptcy
Ed Morrison (Columbia Law School)

Current bankruptcy practice and outdated bankruptcy law
Alan Schwartz (Yale Law School)

Discussants: **Adi Sunderam** (Harvard Business School), **Kristin W. Mugford** (Harvard Business School)

The ninth session was hosted by **Harvard University**. This session was chaired by **John Coates**, John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School and Harvard Business School.

Professor Coates opened with brief remarks about the impact of the pandemic on capital structures and corporate fiduciary duty law. He noted that the effect of the pandemic and shut-downs is to push companies down the credit-rating ladder: high-rated become less so, less-highly rated become junk, junk rated become insolvent. Since creditor-shareholder conflicts are most acute the more distressed or financially at risk a company is, the pandemic will sharply increase conflicts of that kind. Out of bankruptcy, contract remains the most important tool for constraining those conflicts. Fiduciary duty law is a weak constraint. That is because creditors never get the right to sue directors directly, and while they can sue derivatively once a company is actually insolvent, the board still can defend with the business judgment rule and the demand requirement. Practically, decisions to enter bankruptcy or even to take risky decisions that might be ex-ante against creditor interests will not be second-guessed by courts, even if the company is clearly insolvent and even if the actions harm creditors. The most likely source of exposure for boards is if they engage in self-dealing while insolvent. Insolvency may be hard to judge in the current moment, due to the uncertainties of how long the pandemic will last and how it will affect specific companies.As a result, some companies may well engage in self-dealing while insolvent, without realising it. Professor Coates queried: are buybacks a form of self-dealing if the board collectively owns stock?, or if a subset of directors' own lots of stock and do not recuse themselves from the decision? The bottom line, however, is that most of the action for creditors will be in bankruptcy – which was to be the focus of the panel.

Mark Roe, David Burg Professor of Law, Harvard Law School laid out scenarios in which further macroeconomic harms could flow from a court system overwhelmed by bankruptcy cases. They include (a) clogging itself slows down the economy, because firms slow-down in bankruptcy, (b) bankruptcy courts don't do macro - commercial relationships are disrupted in bankruptcy (because debtors can reject pre-bankruptcy contracts and default on debt payments); and (c) debt overhang cripples companies pre-bankruptcy.

On (a), Professor Roe said that ordinary bankruptcy moves large public firms through the process relatively expeditiously, but if the courts are overwhelmed, the clogging could lead to stagnation and possibilities of debtor opportunism. On (b), he pointed to bankruptcies' impact on repayment to financial creditors and its impact on commercial relationships. Bankruptcy assesses the debtor's need to stop payments to creditors and to affirm or reject a relationship with a supplier or customer. But the economy may need the supplier - as part of, say, a long supply chain, even if the debtor does not. For the most part, the court's capacity to make supplier relationships superior to most pre-bankruptcy obligations helps get commerce going again, but this depends on the courts not being clogged.

On (c), Professor Roe argued that a more subtle, but pervasive and serious problem emanates from clogged bankruptcy courts. It is possible that a good part of the S&P500 will be sufficiently weakened in the fall and that debt constitutes a large part of their capital structure. We know that overly indebted firms invest less and hire fewer people. This is exactly what the economy will not need as it tries to recover. If it is only a few firms, it is a local problem, and not an economy-wide problem. But if most public firms end up with a major case of "debt overhang," as the lexicon has it, capital structures could be exacerbating a tendency to low investment and low re-hiring.

The way out from debt overhang for a single company is to recapitalise. But if courts are clogged, in-bankruptcy recapitalisations will be harder and slower. And out-of-bankruptcy recapitalisations will be impeded as well, because the threat of a bankruptcy filing helps to bring the parties together to a deal. Subsequent to his presentation, Professor Roe remarked on bankruptcy for small and medium businesses, noting that the experience is that these overwhelmingly liquidate and do not reorganise, which leads one to consider how it will play out over the next six months or so. By Fall, it could make bankruptcy then worse (major negative feedback). Or bankruptcy could liquidate less than normal. The most likely scenario appears to be that it would worsen the downturn, that is; small and medium-sized enterprises (SMEs) that could and should survive in the fall of 2020 if they could just get through the downturn, will be liquidated. However, this is not the only possibility. Perhaps the baseline (historically heavy liquidation) is indeed approximately efficient - for the small firms that enter bankruptcy. That is to say that the small and medium businesses that liquidate are not viable and so they get liquidated. If bankruptcy were better it would do so less expensively and more efficiently, but in this view, the liquidation outcome is on average correct.

Responding to these remarks, **Alan Schwartz**, Sterling Professor, Yale Law School, indicated that SMEs are smaller and simpler than public companies, making it easy to restructure outside of bankruptcy of insolvent SMEs with a viable business. The firms that fail to restructure and that file for bankruptcy are those with the weakest business prospects. The deep negative feedback, Professor Roe concluded, is that if a bankruptcy wave transpires in the fall of SMEs, they will get liquidated too, even though a large fraction should not, if bankruptcy only knows how to liquidate SMEs and does not adapt.

The new small business sections that soften absolute priority as conventionally understood and make restructure more possible could be a template that picks up the new filings of viable businesses. But since the new small business process is untested, it remains to be seen if it would work well. If it can be made to work and if there are many viable but insolvent SMEs in the fall, then the past liquidationtendency need not carry over to mass COVID-19 bankruptcies, at least if the courts have resources and time to react (and do in fact do the right thing).

Regarding contracting with insolvents (whether in or out of bankruptcy), Professor Roe pointed to Alan Schwartz's comments, that the debtor's right to assume will lead to excess assumptions (compared to some perfect baseline), because there are good reasons for a counterparty to want out if its purchaser or seller is insolvent and in Chapter 11. This can then be projected onto the macro situation in six months. If there is widespread financial stress, more insolvency, and more bankruptcies, contracting relationships will be disrupted and there will likely be less commerce than is best from a macro perspective. Inside bankruptcy, more assumptions then are on average a macro plus. Outside of bankruptcy, however, it's a macro minus because potential counterparties (if they know their K could be assumed when they don't want it to be assumed) decline to do the marginal term contract with the potential bankrupt, resulting in less commerce in the fall, due to fear of excessive assumption. In this scenario, macro feedback is negative and there are more spot market dealings than optimal.

The debtor's right to reject also feeds in here. Since debtors pay pro rata damages, not full damages, in Chapter 11, they have an incentive to reject more than is optimal. Some of this may just lead to a Coasian renegotiation over price. But (1) the renegotiation is costly and takes time and (2) doesn't always succeed. With commerce dwindling in the fall, excess rejections are macro negatives. The only macro positive here for commerce is that bankruptcy can get admin priority for new contracts, thereby facilitating new commerce when there is a special macro incentive to facilitate it.

Ben Iverson, Assistant Professor, Marriott School of Business at Brigham Young University, in referencing prior work [64 Mgt. Sci. 4967 (2018)], agreed with Roe's concerns that a clogged bankruptcy system can lead to: lower recovery rates for creditors; more SME liquidations; longer bankruptcy durations for large firms; more asset sales; more reliance on DIP financing.

He calibrated a simple model suggesting that if historical high correlation between unemployment claims and bankruptcy filings carries into this year, the system is likely to be clogged, even more than in 2008. He noted that the US bankruptcy courts handle large and small corporate bankruptcies, as well as individual / consumer bankruptcies, so if the latter spike (as likely), the effects will spill over onto large firm reorganisations. He also noted that the courts are likely to be slower than in the past, due to the direct effect of COVID-19 on the courts, so even as demand for court time will be spiking, supply of court resources is already lower than usual. He offered some possible solutions, which included: appointing more judges and trustees; reallocating cases across bankruptcy courts, which vary their case loads; segmenting types of bankruptcies in different courts or; devising system-wide interventions to address the mass of bankruptcies. As a bottom-line takeaway he noted that based on past data, bankruptcy courts can be expected to have to work 60-hour workloads (at historic pace of clearances) for the next year to clear the surge that is about to begin, with a lag from unemployment claims of 1-2 quarters.

Ed Morrison, Charles Evans Gerber Professor of Law, Columbia Law School, drew on his previous work with Andrea Saavedra. He noted that current COVID-19 policies treat bankruptcy law as a last resort for stressed businesses and consumers which is a sensible approach for small businesses and consumers, but not for large corporations. Professor Morrison argued that what many small businesses and consumers need now is quick access to liquidity and other forms of forbearance or debt forgiveness, not the debt-discharge of bankruptcy. Even for those who need a debt-discharge, it makes sense to offer them liquidity now and thereby ease the burden on our bankruptcy system, which could be overwhelmed by a flood of filings. In his view, it is better to stabilise households and small businesses immediately and worry about restructuring their balance sheets after the crisis ends.

For large corporations, however, bankruptcy should be a front-line policy tool. Many were financially fragile before the current crisis, due to high leverage or operational problems. For them, government-backed financing should be provided during a bankruptcy process that cures these problems and forces investors, not taxpayers, to bear the costs of cure. Government action should save businesses (and jobs), not investors.

This is a crisis-tested policy response, as seen in the 2008 Financial Crisis when both Chrysler and General Motors received government-backed financing during their bankruptcy cases. To be sure, an increase in filings by large corporations would burden bankruptcy courts but the courts, and the professional bar and consultant industry that supports them, are well prepared to assist these corporations (and fairly represent and protect all parties' interests), as they have done in past crises. What this means is that (1) it is a mistake for current policies, such as the small-business financing offered by the Fed and under the CARES Act, to exclude financing for firms in bankruptcy. This should be fixed in the next round of legislation. Additionally, (2) there is little doubt that bankruptcy will be used heavily in the months ahead, even if it is only used as a back-up policy for consumers and small businesses. Because of this, the government needs to take immediate action to increase the capacity of our courts. That can be done by increasing the number of judges and trustees. More importantly, it can be done by streamlining the bankruptcy process for consumers and businesses.

David Skeel, S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania, School of Law, observed that, although Chapter 11 traditionally has worked well, it has three major limitations as a response to the current crisis: (1) Chapter 11 is very costly for small and medium-sized businesses (up to 30% of firm value) and a substantial majority do not successfully reorganise; (2) Congestion could significantly undermine the effectiveness of the bankruptcy courts. Iverson's work suggests small and medium-size firms are more likely to liquidate if the court is congested, and the reorganisation of large firms is more costly and takes longer; (3) The market for "debtor in possession" financing is under huge stress. Debtors, especially medium-sized companies, may have difficulty obtaining financing in the current environment. Professor Skeel argued that these limitations have at least three important implications: (1) The government needs to reduce the number of coming bankruptcies—to "flatten the bankruptcy curve"— as much as possible. The less congested the courts, the better the likely outcomes. (2) The government has an important role to play in DIP financing. Professor Skeel agreed with Professor Morrison that ineligibility of firms in bankruptcy for federal aid programmes is a problem. Arguing that government needs to be supporting the debtor-in-possession funding market, he asked: should the federal government (Fed or Treasury) buy a slice of DIP (bankruptcy) loans?; (3) Chapter 11 needs to be used creatively: He proposed "cookie cutter" pre-packaged bankruptcies, which would be somewhat similar to a "Super Chapter 11" proposal by Joseph Stiglitz but wouldn't require any legislative change.

Luigi Zingales, Robert C. McCormack Professor Entrepreneurship & Finance, University of Chicago, Booth School of Business posed the question: "What is government intervention amid COVID-19 supposed to do?" He acknowledged that of course, it should deploy resources to cure and address disease, and also support the healthcare system while it copes with the effects of disease. But what beyond this? He suggested that further goals in responding to a COVID-19 type of shock should at least include: (1) to effect risk-sharing, to divide the effects of shock to reduce impact on any one member of economy/polity, ensuring that it is fair, will be better ex ante, and crucial; (2) to minimize efficiency losses that are introduced by the pandemic. This shock has massive cross-distributional impacts: it is very costly for elderly, much less so for younger people. Interventions that have been designed so far are particularly costly (in economic terms) for young people, and less so for older people. Therefore, he added, one consideration is taxing elderly groups (in return for extended life) to benefit younger people (to pay them for losing wages). So far, there is no focus on "how are wegoing to pay for interventions?" or "what is the best distribution of costs?". Professor Zingales noted that his preferred alternative is to use the Social Security Administration to pay out money to assist individuals in the economy. He advocated means-testing for public subsidies to support the economy and redistribute the damage of COVID-19 crisis, stating that not doing so would only invite more rent-seeking from the relatively wealthy parts of the economy.

Alan Schwartz, Sterling Professor, Yale Law School, argued that 1978 bankruptcy law is out of date, and has left too much discretion to bankruptcy judges. Many firms make long-term contracts. Pre-1978, contracts defined an insolvency as a breach. In practice, that meant a supplier could exit - which meant a renegotiation. From 1978, debtors in bankruptcy could "assume" contract and avoid breach upon insolvency. This meant contracts that were inefficient would persist into bankruptcy. To be sure, a debtor had to provide assurances, but they were commonly inefficient, because judges made mistakes about what was sufficient. In crisis, judges will routinely be ruling on whether the probability of performance is high enough, but they will routinely be overoptimistic, which will induce more chapter 11 filings than would otherwise occur.

He noted that there will likely also be a lot more short-term contracting over the crisis, as contract parties seek to avoid the risk of "assumption" in bankruptcy. He argued that because one cannot contract "out" of bankruptcy, renegotiations in the shadow of bankruptcy (including debtor-in-possession financing) have led to in-bankruptcy lenders insisting on strong covenant protection and right to force sale of company. This will increase "fire-sales" of insolvents into an illiquid market. This could lead to spiralling down of asset prices within a given industry, even for solvent but illiquid companies. Professor Schwartz added that there will be more collusive auctions of companies that enter bankruptcy. The absolute priority rule works in combination with debtor-in-possession to further increase fire-sales and depress asset prices beyond expectations. He added, finally, that Section 363 of the Bankruptcy Code's silence on rules for sales out of bankruptcy lets judges "make up" those rules, which governs in roughly 1/3d of bankruptcies, which can be a big problem if the federal government is a major creditor of a bankrupt company.

Adi Sunderam, Marvin Bower Associate Professor, Harvard Business School, made the point that macroeconomic effects of a mass number of bankruptcies are likely to have major social costs, even if bankruptcy for individual firms works reasonably well. He further argued that there is a conflict between the macro goal of preventing a Depression with traditional finance goals of imposing losses on debt and equity, which is complicated by not knowing which firms are insolvent, because the duration of the health crisis is unknown. Airlines and restaurants are one end of the spectrum, but many firms could be insolvent if the crisis lasts more than six months, but may well be solvent if it does not. Additionally, their solvency is endogenous to public policy response to crisis.

Kristin Mugford, Senior Lecturer of Business Administration, Harvard Business School, pointed out that companies with stressed capital structures typically bring in capital at the top of their capital structure, as rescue/DIP financing (outside/inside Chapter 11). This aligns incentives and allows companies that are viable (but perhaps insolvent) to get the liquidity they need to survive and the capital provider to get a reasonable return on their rescue financing. There is a lack of availability of this capital, particularly for firms that are not financed by banks, for example, financed by CLOs or direct lenders, and thus do not easily fit within rescue lending programmes that are built around banks. There is also a lack of this capital in any of the Fed programmes. Term sheets on the Fed Main Street programme contemplate new capital pari passu with existing lenders (rather than more senior), creating adverse selection concerns. Bankruptcy and health care are analogous. Chapter 11 relies on a single set of rules for companies with a variety of issues. Many companies are simply over-levered and need a financial (rather than a comprehensive business) restructuring, particularly in this crisis.

Offering recommendations, She asked; Is there another mechanism that might be added to the bankruptcy code that would efficiently address purely leverage issues, such as a modification of the trust indenture act or an adoption of Chapter 16? Prepacks are the current solution, perhaps other mechanisms that would work better. In healthcare, she noted, doctors are not asked to treat all patients with all illnesses. There is a triage process and some patients are sent to nurses etc. Is there a model to do bankruptcy triage? This might include using seasoned judges for only the most complex cases and reallocating Judges from other sectors to handle the simplest/smallest (but likely most voluminous) cases? Finally, she reminded attendees that the US code is distinct and expressed concern over international legal structures during the crisis, as foreign bankruptcy regimes often favour liquidation over rehabilitation. Very few regimes allow DIP financing to help viable companies restructure. In Germany, UK, Australia, they are changing rules already, but more may be needed.

Session 10: USA (Part 3)

Stanford Law School | gcgc Global Corporate Governance Colloquia | Yale Law School

Stanford University and Yale University
14:00 – 15:20 PDT

Welcome: **Michael Callahan** (Stanford University)

Managing through the pandemic:
Silicon Valley firms general counsels' perspective

In conversation with **Louise Pentland** (PayPal, Hitachi, Nokia)

COVID-19 and insider trading in and out of government

Speaker: **Jonathan Macey** (Yale Law School and ECGI)
Discussant: **Mariana Pargendler** (FGV Law School, São Paulo and ECGI)

The final session was hosted by **Stanford University** and **Yale University**. This session was chaired by **Michael Callahan**, Professor of the Practice of Law Stanford Law School.

Professor Callahan discussed the perspective of managing a Silicon Valley firm through the outbreak of the pandemic, with guest speaker **Louise Pentland**, Executive Vice President, Chief Business Affairs and Legal Officer at PayPal. Ms. Pentland is also a board member of Hitachi and formerly the global Chief Legal Officer at Nokia. While acknowledging that very few were prepared for the scale of such a global crisis, she provided some valuable insights and recommendations for board members in dealing with a crisis of this type.

She advised that key to effective crisis management is to have a trusted Crisis Management team in place before the crisis happens and in a crisis, rely on the company values. Support employees first, then customers. The current crisis is unique in many ways and is a corporation's chance to help customers to create opportunities. The Board's role in Risk Management becomes more critical during and following a crisis, with experience. The Board should help design programmes to anticipate crises, for example, setting a programme for a distributed workforce continuity plan. Boards will have to consider new technologies (for example, DocuSign instead of a wet signature), executive compensation constraints and other possible adjustments to a new business reality.

Never waste a crisis. Fast track solutions to help customers. Progress is happening faster, keep the momentum after the crisis passes. There is an opportunity for government and business to work together to innovate faster and help address problems for society. In a crisis, empathy and the humanitarian part of leadership is elevated and it creates more inclusion. Corporations should embrace this opportunity for inclusion. For employees, in the interest of safety, usual practices will need to be changed as social distancing will stay with us.

Lastly, no one anticipated that the whole world would be impacted at the same time and now Boards must be ready for it. Companies must become more flexible with managing an at-home workforce. Companies must get creative to react to this extreme situation, which will cause people to struggle, and then evolve.

The second part of the session considered the conditions for insider trading as a result of the pandemic. **Jonathan Macey**, Sam Harris Professor of Corporate Law, Securities Law and Corporate Finance Yale Law School, noted that it has created an unprecedented set of opportunities for insider traders due to: (1) the frequent occurrence of discrete events that generate material non-public information capable of being used to generate significant, risk-adjusted economic trading profits; (2) the frequent public release of such information after a suitable lag time in which insider trading can occur; (3) significant market volatility (market swings) caused by the release of the information; (4) a social and economic climate in which people are not paying close attention to the trading activity of others but are preoccupied by concerns about the COVID-19 virus itself; (5) the crisis hit Wall Street and Main Street at the same time - it did not migrate to Wall street or from Wall Street to Main Street, and thus there are insider trading activities in both the financial and the non-financial sectors of the economy.

Professor Macey summarised, that the amount of criminal insider trading activity will be determined by the standard equation (anticipated severity of the punishment X the risk of being caught), adjusted for the supply of trading opportunities which is huge right now. There has been insider trading during the crisis in abundance by both politicians and private sector corporate actors. The politicians generally have been selling, while the corporate officers and directors have been buying. Due to incentive effects the buying by insiders is good for society and for shareholders, the selling by politicians creates very bad incentives. The following policies were therefore recommended for adoption: (1) No trading at all during pandemic by politicians and others subject to the rules articulated in the Stop Trading On Congressional Knowledge Act; (2) Rules for Insiders, defined as, officers, directors, 10% shareholders, with no selling by officers and directors during pandemic (buying is fine), as long as it is publicly announced, and increase the frequency of Item 4 disclosures by officers, directors and 10% shareholders under Section 16(a) of the Securities Exchange Act of 1934 as amended, from once every six months to weekly. **Mariana Pargendler**, Professor of Law, FGV Law School of São Paulo commented on the presentation prior to the concluding remarks for the conference.

The final part of the session, chaired by **Marco Becht,** Professor of Finance and the Goldschmidt Professor of Corporate Governance, Université libre de Bruxelles, and Executive Director of the European Corporate Governance Institute, heard closing comments from **Luca Enriques**, Professor of Corporate Law, University of Oxford, Faculty of Law, **Ronald J. Gilson**, Marc and Eva Stern Professor of Law and Business at Columbia Law School and Meyers Professor of Law and Business emeritus at Stanford Law School, **Ron Masulis**, Scientia Professor of Finance at the UNSW Business School, University of New South Wales, and **Jennifer Hill**, Bob Baxt AO Chair in Corporate and Commercial Law, Monash University.

The interaction between corporate governance and real governance was considered, highlighting the long running tension whereby governments use corporate governance as a tool to ensure that all groups are considered by companies, and to use them for a broader range of outcomes. The problem then arises at a time of crisis, where the corporate governance model lacks the capacity for excess and is not designed to provide for the circumstances that have arisen, and the government is not adequately structured to fill that need for extra capacity and response. Other issues touched upon included the issue of locking up voting control in a relatively small group of investors that can make money without a management fee, and the significant remit of politicians and executive committees in allocating vast resources with conflicts of interest and weak oversight.

The conference closed with some words of gratitude for the speakers, attendees and organisers, noting that the goal of connecting a community of scholars, policymakers and practitioners to circulate and stimulate ideas for the common good had certainly been achieved.

References:

The following is a list of references pertaining to the webinar. Further resources on this important topic continue to be collected on the ECGI website: https://ecgi.global/content/covid-19-and-corporate-governance

Fed to the Rescue: Bankruptcy's Role in the COVID-19 Crisis (Edward R. Morrison, Andrea C. Saavedra)

Wall Street CARES!: Who Gets the Hidden Subsidies Under the CARES Act? (John C. Coffee, Jr.)

The ECB's response to the COVID-19 pandemic (Isabel Schnabel)

How Banks and Fintechs Can Help Small Businesses Survive COVID-19 (Todd Baker, Kathryn Judge)

Easing the economic aftermath of a global pandemic (Mark Roe, John Coates)

Bankruptcy and the coronavirus (David Skeel)

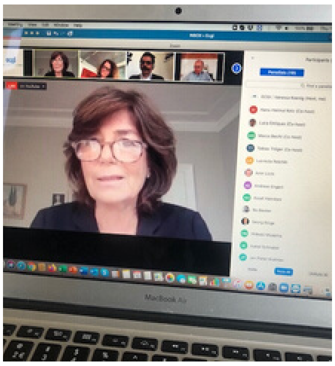
Extreme times, Extreme Measures: Pandemic-Resistant Corporate Law (Luca Enriques)

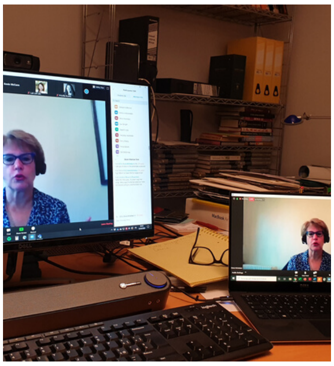
Fed to the Rescue: Unprecedented Scope, Stretched Authority (Lev Menand)

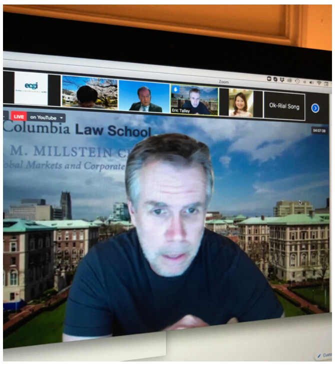
Insider Trading Data Reveals Pandemic Is a Time for Questioning, Not Answering (Renée Adams, Attila Balogh)

Corona and Financial Stability 4.0: Implementing a European Pandemic Equity Fund (Arnoud Boot, Elena Carletti, Hans-Helmut Kotz, Jan Pieter Krahnen, Loriana Pelizzon ,Marti Subrahmanyam)

Videos of each session are available on the ECGI website: https://ecgi.global/videos



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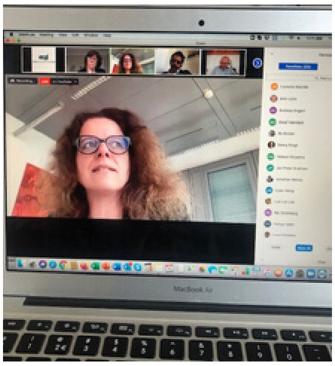

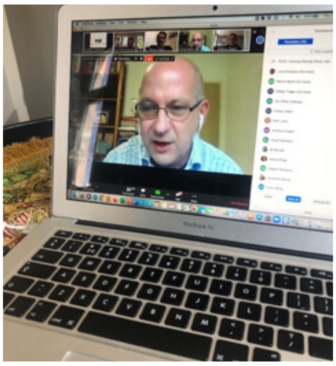

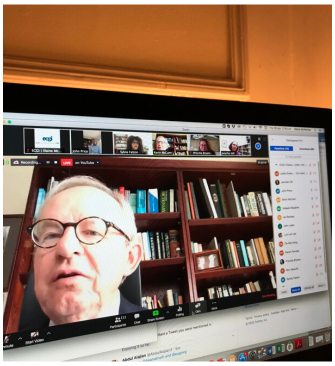

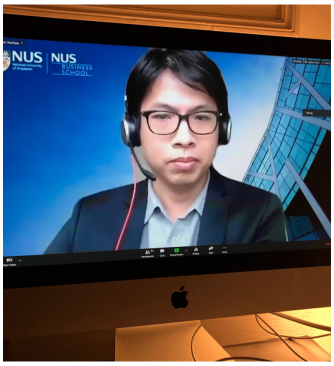
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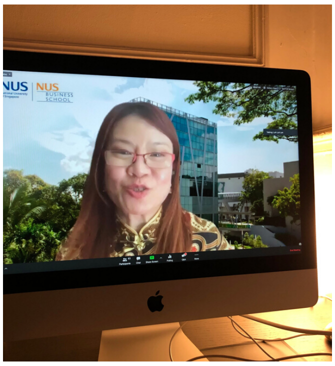
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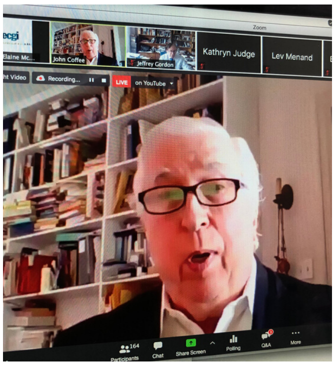
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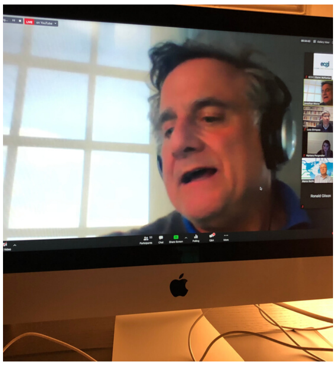

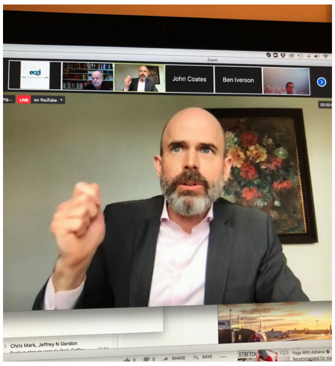
John Coates
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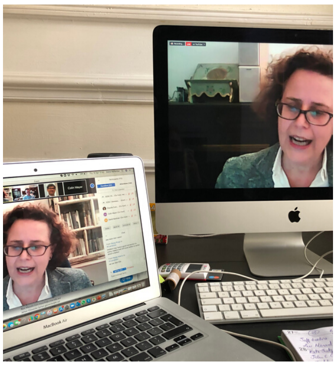

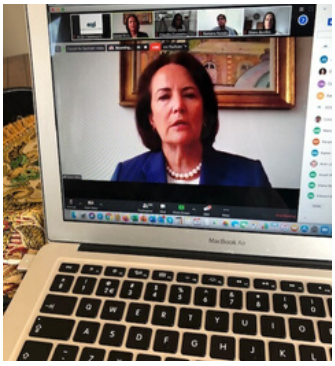

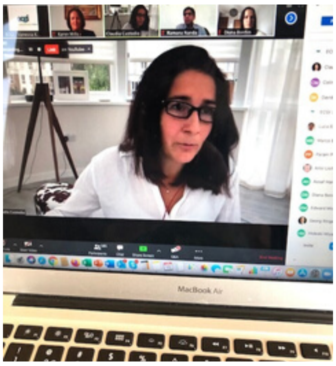

About the European Corporate Governance Institute (ECGI)

www.ecgi.global

The ECGI is an international scientific non-profit association which provides a forum for debate and dialogue focusing on major corporate governance issues and thereby promoting best practice. It is the home for all those with an interest in corporate governance offering membership categories for academics, practitioners, patrons and institutions.

Its primary role is to undertake, commission and disseminate research on corporate governance. Based upon impartial and objective research and the collective knowledge and wisdom of its members, it can advise on the formulation of corporate governance policy and development of best practice. In seeking to achieve the aim of improving corporate governance, ECGI acts as a focal point for academics working on corporate governance in Europe and elsewhere, encouraging the interaction between the different disciplines, such as economics, law, finance and management.

About the Global Corporate Governance Colloquia (GCGC)

www.gcgc.global

The Global Corporate Governance Colloquia (GCGC) is a global initiative to bring together the best research in law, economics and finance relating to corporate governance at a yearly conference held at 12 leading universities in the Americas, Asia and Europe.

This initiative also included the organising support of Monash University, IDC Herzilya and Tel Aviv University.

ECGI would like to thank all of the speakers panelists and attendees for contributing to this event.

Contact:

Elaine McPartlan
General Manager
European Corporate Governance Institute (ECGI)

elaine.mcpartlan@ecgi.org

Marco Becht
Executive Director and Fellow
European Corporate Governance Institute (ECGI)

marco.becht@ecgi.org

European Corporate Governance Institute (ECGI)
c/o Royal Academies of Belgium
Palace of the Academies
Rue Ducale 1 Hertogsstraat
1000 Brussels
Belgium

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Global Webinar Participants (16 April 2020)

Renee Adams, Professor of Finance Said Business School, University of Oxford
John Armour, Hogan Lovells Professor of Law and Finance University of Oxford, Faculty of Law
Todd H. Baker, Senior Fellow Columbia Business School
Anna Kinberg Batra, Former Head of the Moderate Party of Sweden
Marco Becht, Professor of Finance and the Goldschmidt Professor of Corporate Governance, Université libre de Bruxelles
Bo Becker, Cevian Professor of Finance, Stockholm School of Economics
Diana Bonfim, Senior Economist in the Economics and Research Department, Banco de Portugal
Roberto Bonsignore, Partner, Cleary Gottlieb Steen & Hamilton
Priscilla Bryans, Partner, Herbert Smith Freehills
Michael Callahan, Professor of the Practice of Law, Stanford Law School
Kyung-Hoon Chun, Professor of Commercial Law, Seoul National University, School of Law
Joon Hyug Chung, Assistant Professor of Commercial Law, Seoul National University, School of Law
John Coates, John F. Cogan, Jr. Professor of Law and Economics, Harvard Law School / Harvard Business School
John C. Coffee Jr., Adolf A. Berle Professor of Law, Columbia Law School
Claudia Custodio, Associate Professor of Finance, Imperial College Business School
Steven Davidoff Solomon, Professor of Law, University of California, Berkeley School of Law
Robin Dicker QC, Barrister, South Square
Malcolm Edey, Adjunct Professor of Economics, The University of Sydney; former Assistant Governor, Reserve Bank of Australia, Chair of the OECD Financial Markets Committee and member of the Basel Committee on Banking Supervision.
Andreas Engert, Professor of law, Freie Universität Berlin
Luca Enriques, Professor of Corporate Law, University of Oxford, Faculty of Law
Sylvia Falzon, Non-Executive Director Suncorp Group, Regis Healthcare and Premier Investments Ltd
Liv Forhaug, CEO, Martin & Servera Group
Tomotaka Fujita, Professor of Law, Graduate Schools for Law and Politics, University of Tokyo
Johan Giesecke, Professor Emeritus of Medicine at Karolinska Institute, former head epidemiologist at the Public Health Agency of Sweden, and former head of research, ECDC
Ronald Gilson, Marc and Eva Stern Professor of Law and Business at Columbia Law School and Meyers Professor of Law and Business emeritus at Stanford Law School.
Juanita Gonzalez-Uribe, Assistant Professor of Finance London School of Economics and Political Science
Jeffrey Gordon, Richard Paul Richman Professor of Law Columbia Law School
Gen Goto, Professor of Law Graduate Schools for Law and Politics, University of Tokyo
Li Guo, Professor of Economic Law Peking University Law School
Assaf Hamdani, Professor of Law Tel Aviv University
Petra Hedengran, General Counsel, Head of Corporate Governance Investor AB
Jennifer Hill Bob Baxt AO Chair in Corporate and Commercial Law Monash University
Hidefusa Iida, Associate Professor, Graduate Schools for Law and Politics, University of Tokyo
Ben Iverson, Assistant Professor, Marriott School of Business at Brigham Young University
Li Jin, Chair Professor of Finance, Guanghua School of Management, Peking University
Mary Johnstone-Louis, Senior Research Fellow and Programme Director, Said Business School, University of Oxford
Kathryn Judge, Professor of Law, Columbia Law School
Eugene Kandel, Professor of Economics and Finance, Hebrew University of Jerusalem
Sang Yop Kang, Professor of Law, Peking University, School of Transnational Law
Hiroyuki Kansaku, Professor of Commercial Law, Graduate Schools for Law and Politics, University of Tokyo
Takahito Kato, Professor of Commercial Law, Graduate Schools for Law and Politics, University of Tokyo
David Kershaw, Professor of Law, London School of Economics and Political Science
Woochan Kim, Professor of Finance, Korea University Business School
Jungyeun Kim, Professor, College of Law Incheon National University
Kon Sik Kim, Professor of Law, Seoul National University School of Law
Hans-Helmut Kotz, Visiting Professor of Economics Center for European Studies, Harvard
Jan Pieter Krahnen, Professor of Finance Center for Financial Studies (CFS), Leibniz Institute SAFE, Goethe University Frankfurt
Per Krusell, Professor of Economics, Institute for International Economic Studies, IIES, Stockholm University
John Laker Chair, ING Australia; member of the Experts Panel of the International Monetary Fund (IMF); former Chair, Australian Prudential Regulation Authority (APRA)
Luh Luh Lan, Associate Professor, National University of Singapore, Business School
Amir Licht, Professor of Law, Harry Radzyner Law School, Interdisciplinary Center Herzliya
Martin Linder, President, Unionen
Jonathan Macey, Sam Harris Professor of Corporate Law, Securities Law and Corporate Finance Yale Law School

Global Webinar Participants (16 April 2020) - continued

Ron Masulis, Scientia Professor of Finance, UNSW Business School, University of New South Wales
Tomoyo Matsui, Professor of Corporate Law, Graduate Schools for Law and Politics, University of Tokyo
Colin Mayer CBE, Peter Moores Professor of Management Studies, Said Business School, University of Oxford
Kevin McCann, Chair, Telix Pharmaceuticals Ltd; former Chair, Macquarie Bank
Lev Menand, Academic Fellow, Lecturer in Law, and Postdoctoral Research Scholar, Columbia Law School
Karen Mills, Senior Fellow Harvard Business School
Joshua Mitts, Associate Professor of Law Columbia Law School
Hideaki Miyajima, Professor, Faculty of Commerce, Waseda University
Jon Jungbien Moon, Professor, Korea University Business School
Edward Morrison, Charles Evans Gerber Professor of Law, Columbia Law School
Kristin W. Mugford, Senior Lecturer of Business Administration, Harvard Business School
Ramana Nanda, Visiting Professor of Entrepreneurial Finance, Imperial College Business School
Kerem Nevo, Head of Government Relations, Wix
Diana Nicholson, Partner, King & Wood Mallesons
Mariana Pargendler, Professor of Law, FGV Law School of São Paulo
Louise Pentland, Chief Business Affairs & Legal Officer, PayPal
Katharina Pistor, Michael I. Sovern Professor of Law, Columbia Law School
John Price, Commissioner, Australian Securities and Investments Commission (ASIC)
Dan Puchniak, Associate Professor, National University of Singapore, Faculty of Law
Ian Ramsay, Professor of Law, University of Melbourne Law School
Lucrezia Reichlin, Professor of Economics, London Business School
Georg Ringe, Professor of Law & Economics, University of Hamburg
Mark Roe, David Burg Professor of Law, Harvard Law School
Maribel Saez, Professor of Commercial Law, Universidad Autonoma de Madrid
Isabel Schnabel, Member of the ECB's Executive Board European Central Bank
Alan Schwartz, Sterling Professor, Yale Law School
David Skeel, S. Samuel Arsht Professor of Corporate Law, University of Pennsylvania - School of Law
Ok-Rial Song, Professor of Law, Seoul National University, School of Law
Judith Stroehle, Research Fellow, Said Business School, University of Oxford
Per Strömberg, SSE Centennial Professor of Finance and Private Equity, Stockholm School of Economics
Johan Sulaeman, Dean's Chair and Associate Professor, National University of Singapore, Business School
Adi Sunderam, Marvin Bower Associate Professor, Harvard Business School
Eric Talley, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School
Hans Tjio, CJ Koh Professor of Law, National University of Singapore, Faculty of Law
Tobias Tröger, Professor of Private Law, Commercial and Business Law Liebnitz Institute SAFE, Goethe University Frankfurt
Stephen Turner, Co-Head of Infection and Immunity Program; Head of Microbiology at the Monash Biomedicine Discovery Institute
Kristin van Zwieten, Clifford Chance Associate Professor of Law and Finance, University of Oxford
Liyan Wang, Professor of Accounting, Guanghua School of Management, Peking University
Yishay Yafeh, Professor of Finance, The Hebrew University of Jerusalem
Weina Zhang, Senior Lecturer of Finance, National University of Singapore, Business School
Luigi Zingales, Robert C. McCormack Professor of Entrepreneurship & Finance, University of Chicago, Booth School of Business