# Potential Areas of Litigation Following the COVID-19 Pandemic – a global perspective

## Introduction

'Covid', 'Delta', 'Omicron' and now 'the Kraken', names given to the different variants of the COVID-19 virus which have been terrorising the world since early 2020. Coming into 2023, and despite the introduction of the 'super-variant', the Kraken, we are finally getting a taste of the normality we took for granted in 2000 BC (Before Covid). If there ever was such a thing as "normal".

While we would all like to believe that the COVID-19 pandemic is over, there is no denying the footprint it left behind will have severe implications for the years, possibly decades, to come.

## Corporate law

*Insolvency*

The COVID-19 pandemic has taken, and is likely to continue to take, a financial toll on companies across the globe. In the event of insolvency, directors may be forced to walk the blurred line balancing their fiduciary duties to shareholders with their various duties to the creditors when their companies enter into a 'zone of insolvency'.

It is commonly accepted that when a corporation is solvent, the directors' duties towards shareholders shall always prevail over their duties (if any) towards creditors, with jurisdictions, such as the State of Delaware, going as far as suggesting that no duties are owed to the creditors when a company is solvent.

In light of the significant increase of insolvency cases, and to protect (those deserving) directors from personal liability, different jurisdictions have made various amendments to its laws. For example, various provisions were adopted (and now repealed) by New Zealand in its Companies Act in an attempt to alleviate the risks of directors being found personally liable in the event of pandemic induced insolvency[1]. Some of the main provisions being the:

- Safe harbour provision;

- Business debt hibernation; and

- Permitting the use of electronic signatures (e-signatures) in situations where it would not have been allowed in the past.

The 'safe harbour' and 'business debt hibernation' provisions were repealed following the lifting of COVID-19 lockdown restrictions. E-signatures are still in use and being recognised (in situations

[1] Companies Act 1993.

where they were not previously recognised), but are now subject to a higher level of scrutiny (the same as electronic filing at the Court, where it is still allowed, but 'strongly discouraged').

When a company goes into insolvency, the directors will begin to owe the creditors of the company, in the creditors' capacities as interested parties, a duty of care. Derivative claims can be brought by the creditors, as the corporation, against its directors. However, this is not a fiduciary duty.[2]

Directors may also become liable if they fail to file for bankruptcy when the company comes into 'financial difficulties within the period of time as provided for in their respective jurisdictions.

In France, cases where the mismanagement of assets by the directors has caused the company to have insufficient assets, directors themselves may be hold jointly and severally liable and can, at times, be subject to criminal liabilities.[3]

In certain cases in France, shareholders themselves may even be identified as "de facto managers" and in which case, all of the directors' liabilities will be shared by the shareholders.[4]

*Insurance law*

COVID-19 has caused 'business interruption' to most businesses and undoubtedly increased the number of business insurance claims and policy renewal requests made (both accepted and denied) and consequently, increased the amount of insurance litigation.

As seen in the leading case from the United Kingdom (**UK**), the *Financial Conduct Authority v Arch*, the Court tends to favour the side of the insured.[5] Undoubtedly, this decision and its reasoning will be adopted as precedent, in whole or in part, by other similar jurisdictions such as New Zealand and Australia. Furthermore, this case also discussed the interpretation of some commonly used words in an insurance policy, namely the word 'causation', where the Court recognised that while the disease did not cause the business interruptions suffered under the insurance claim, the necessary measures taken by the government to combat the disease did cause the business interruptions.

In addition, the Court rejected the 'but-for' test as asserted by the insurers because it was deemed to be 'insufficient'. This was because under the strict interpretation of the insurer's 'but for' test, there was not a single event which could have caused the outcome, rather it was caused by a cascade of events, and none had the ability to cause the outcome independently. This more 'inclusive' definition of the word "causation" as adopted by the Court, may have insured the better service of justice in cases such as this one, but its 'fact centred' approach may have blurred the definition of 'causation' which will

[2] Brad Eric Schuler, Gary L. Kaplan Jennifer L. Rodburg (15 April 2020) Harvard Law School Forum https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency/.
[3] Brad Eric Scheler, Gary L. Kaplan, and Jennifer L. Rodburg, Fried, Frank, Harris, Shriver & Jacobson LLP "Director Fiduciary Duty in Insolvency" (15 April 2020) Harvard Law School Forum on Corporate Governance https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency/.
[4] Brad Eric Scheler, Gary L. Kaplan, and Jennifer L. Rodburg, Fried, Frank, Harris, Shriver & Jacobson LLP "Director Fiduciary Duty in Insolvency" (15 April 2020) Harvard Law School Forum on Corporate Governance https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency/.
[5] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1.

undoubtedly lead to further litigation in the UK and other jurisdictions that choose to follow in its footsteps.

The decision of this case is beneficial for the insured in countries like New Zealand and Australia which gives great thought to UK cases and use them as persuasive precedents.

*Antitrust and competition law*

This is an area of the law that transcends the scope of standard business law and can result in criminal liabilities (at least in the United States) and, consequences for breach of this can range from a fine to jail time.

In an article From Quinn Emanuel, the authors deal with this area of the law in light of the COVID-19 pandemic in great detail and optimistically suggest that "at a time of crises and economic upheaval… people [communities and business will come] together to face a common enemy: Covid-19".[6] While I have a healthy amount of scepticism towards this generalisation, and not just because it reminds me of the plots of the two Independence Day films, this article is not one about human nature (that is a topic better reserved for a High School English essay following a study of the Lord of the Flies). This article, similar to the article of Quinn Emanuel[7] is meant to inform and hopefully educate its readers on the potential areas of litigation the world may encounter following the COVID-19 pandemic, and in this section, antitrust laws.

Similar to most areas of the law, the test is 'reasonableness' and what a reasonable party would do in the situation and in the shoes of the party in question. The same analysis applies to antitrust laws.

Despite the Court's countless attempts at defining what it means to be 'reasonable', it is not a math or science thus does not have a 'right or wrong' answer. Instead, it is open to interpretation. However, there is a blurred, but definite, line between what a 'reasonable business' would do in the event of a pandemic in an attempt to mitigate its loss in hope of weathering an economic storm, and taking advantage of the pandemic and using it as an excuse to prevent new entrants into a particular practice. A good starting point for businesses is to err on the side of caution and to not expect any leeway or sympathy from the Court simply because there is an economic crisis.[8]

*Merger and Acquisition (M&A)*

Unsurprisingly, COVID-19 has led to the fallout of many high profile M&A transactions, resulting in litigation. Even less surprisingly, the State of Delaware, with its robust approach to corporate law, is on the forefront of this discussion, with many States expected to follow suit.

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[6] Adam Wolfson, Thomas Pease, Stephen Swedlow, Karl Stern, Ethan Glass, Ari Herbert, Will Sears "Staying Aware of U.S. Competition Legal Issues at a Time of Economic Upheaval" (6 April 2020) Quinn Emanuel https://www.quinnemanuel.com/the-firm/publications/staying-aware-of-u-s-competition-legal-issues-at-a-time-of-economic-upheaval/.

[7] Adam Wolfson, Thomas Pease, Stephen Swedlow, Karl Stern, Ethan Glass, Ari Herbert, Will Sears "Staying Aware of U.S. Competition Legal Issues at a Time of Economic Upheaval" (6 April 2020) Quinn Emanuel https://www.quinnemanuel.com/the-firm/publications/staying-aware-of-u-s-competition-legal-issues-at-a-time-of-economic-upheaval/.

[8] *In re Credit Default Swaps Antitrust Litigation* 261 F Supp 3d 430 (SD NY 2017).

The Delaware Court of Chancery is of the position that in the sale and purchase of a company where a purchaser backs out of a sale and purchase agreement due to a "material adverse change" or a "material adverse event" (**MAE**), the starting point for the Court is to look at whether the seller has breached the "ordinary course covenant".[9] This position was affirmed by the Delaware Supreme Court in an *en banc* decision.[10]

The purpose of an "ordinary course covenant" clause is to ensure that the business the purchaser is purchasing is the same as the one it has contracted to purchase and, like the name suggests, it is to ensure the seller does not operate the business in a way, during the period between the formation of the agreement for the sale and purchase of the business to the closing date, that is different to the company's ordinary course of conduct.[11]

Since COVID-19, ambiguity has arisen as to the meaning of the 'ordinary course of business', and it has been litigated whether the 'ordinary course covenant' refers to the ordinary course of business on an average day before the COVID-19 pandemic, or on an average day during the COVID-19 pandemic. The common ground between the parties being that the seller's actions may be reasonable during the ordinary course of business before the pandemic, but may be unreasonable and not in the ordinary course of business during a pandemic.

In addition to changing what it means to act "reasonably", thus creating a higher burden for litigants, it may also broaden the interpretation of other words (also at the expense of litigants).

For example, in Germany, the interpretation of "public order and safety" has been widened to capture companies in the textile industry involved in the "production of personal protective equipment".[12]

Depending on the definition adopted by the Court, liabilities may shift from the seller to the purchaser, or vice versa. This ambiguity of the definition for an 'ordinary course of business' is not restricted to the COIVD-19 pandemic. Rather, it can also be applicable to where there are severe floods, earthquakes or any other incidents which may be considered as a "force majeure event" or an "act of god".[13]

In *AB Stable v MAPS Hotels*, a dispute arose for $5.8 billion USD for the sale and purchase of 15 luxury hotels where extensive changes were incorporated in the running of these hotels as a result of the COVID-19 pandemic.[14] The Court ultimately held that the business was not conducted in the 'ordinary course of business' and all reliefs, including for specific performance, was denied.

[9] *AB Stable VIII v. MAPS Hotels and Resorts One LLC* 71 A (Del. Ch 2020).
[10] *AB Stable VIII v. MAPS Hotels and Resorts One LLC* 71 A (Del 2021).
[11] Diane Cafferata, Christopher D Kercher, and Kimberly E. Carson "Report from the Front Lines: COVID-19 M&A Litigation in Delaware" (2021) 34 AIRA Journal 16 at 16.
[12] Dominic Long, Matthew Townsend, Charles Pommies, Christine Waszkiewicz, Louise Tolley, Emily Bourne (11 December 2020) Allen Overy https://www.allenovery.com/en-gb/global/news-and-insights/publications/covid-19-coronavirus-update-global-application-of-foreign-investment-control-rules.
[13] Diane Cafferata, Christopher D Kercher, and Kimberly E. Carson "Report from the Front Lines: COVID-19 M&A Litigation in Delaware" (2021) 34 AIRA Journal 16 at 18.
[14] *AB Stable VIII v. MAPS Hotels and Resorts One LLC* 71 A (Del. Ch 2020).

*Risks associated with reopening*

While most businesses will benefit from coming out of the pandemic (save for maybe some online businesses specialising in e-commerce – without naming any names), businesses need to be careful in their reopening and to tread carefully following such an unprecedented event. Reopening, if not done correctly, can subject a company to litigation.

The COVID-19 pandemic has substantially increased the liabilities of businesses in their care to their customers. It was found in *Billo v. Allegheny Steel Co* that 'negligently infecting one with a disease is of the same level of seriousness as negligently striking a person with a motor vehicle'.[15] *John B. v. Superior Court* found that the negligent transmission of a disease is an offence under tort.[16] However, what is interesting is that the New Zealand's Accident Compensation Corporation (**ACC**) is in place to protect parties from personal injury law suits (i.e. striking a person with a motor vehicle) but it does not cover diseases.[17] The question now becomes, to what extent a business (i.e. a restaurant) will be liable if one of its employees or a patron infects another patron with the COVID-19 virus.

In Austria, Tyrol is facing investigation following a potential class action law suit by over 2,500 tourists where Tyrol kept the resort open despite that they allegedly knew there was a threat of mass infection.[18]

However this, at least in New Zealand, has not yet opened the 'flood gate' for personal injury claims against businesses in the three years that COVID-19 has been around because in order to succeed in such a claim, the plaintiff has to prove that they contracted COVID-19 from a visit to the establishment that they are trying to bring a claim against. This is a high threshold and it is there to discourage frivolous claims.

In addition to the improper opening of businesses, the same risks and liabilities may arise in the event of businesses conducting their business during the COVID-19 pandemic, and a large majority of these cases have been class actions against the cruise ship industry. Ironically, most of these cases were not for the contraction of the disease itself, rather, it was for general damages for 'emotional distress' from fear of catching the virus. To avoid 'opening the flood gate', the Court in *Weiss Berger* adopted the 'zone of danger test' and it was held that in order for a plaintiff to have standing to bring a claim, they must first be within the "zone of danger".[19] This is similar to the second threshold of the test adopted by the Courts in New Zealand where in order for a bystander to seek damages for the infliction of emotional distress, there must firstly be a relationship between the bystander and the victim and secondly, the bystander must be within a certain 'proximity' to the scene of the incident.

[15] *Billo v. Allegheny Steel Company* 195 A 110 (1937).
[16] *John B v Superior Court* 137 P 3d 153 (2006).
[17] Accident Compensation Act 2001.
[18] Nadine Schmidt "Austrian officials face lawsuit from 2,500 tourists over ski resort outbreak (1 April 2020) CNN https://www.cnn.com/travel/article/austria-ski-resort-ischgl-coronavirus-intl/index.html.
[19] *Ronald Weissberger et al v Princess Cruise Line Ltd* C.D. Cal 2:20-cv-02267-RGK-SK. 14 July 2020.

Furthermore, for any businesses operating in multiple jurisdictions, each office/branch will need to comply with the law in their respective jurisdiction.[20] As a result complications may arise when a business that specialises in the sale of goods trades in jurisdictions other than the one its production line is in. For example:

> *Company X offers sale of (non-essential) goods in countries A, B and C, but its production line is in country Z which has stricter pandemic rules than countries A, B and C and as a result, its stores in countries A, B and C may be unable to resume trading as normal even after the lifting of lockdown restrictions in those countries because they are waiting on country Z.*

The above example also poses insurance law questions and employment law questions, being:

- Whether company X's insurance plan in countries A, B and C will accept a claim for business interruption if businesses in those countries are permitted to trade as normal, and whether the lockdown restrictions in another jurisdiction (country Z) constitute as a business interruption under the insurance policy.

- To what extent is company X responsible to its employees in countries A, B and C and whether the company has a right dismiss those employees under the force majeure clause of its employment agreement when the force majeure event does not originate from its own jurisdiction.

Both issues above are fact dependent (maybe even more so than other areas of the law), and depends on the language and wording of the governing agreement (employment agreement or insurance policy).

This perfectly segues into our next point of discussion, employment law.

**Employment related litigation**

*Vaccines*

One of the most contested issues in relation to employment law and COVID-19 is whether an employer can require or 'strongly' encourage an employee to get the vaccine. For example, if proof of vaccination is needed by a venue where the company is holding one of its events, to what the extent must the employer accommodate the non-vaccinated employees and ensure that work functions are accessible to all regardless of vaccination status.

In addition, what if clients or customers of a company refuse to interact with non-vaccinated individuals? This may be easier for big companies to deal with but may present more of a challenge for smaller, independently owned businesses. For example:

[20] Elinor Sutton, Bobby Schwartz, Christopher Kercher, Haley Plourde-Cole, Kevin Janus " Questions Clients Are Asking About COVID-19 – What's Next: Questions for Re-Opening (23 April 2020) Quinn Emanuel https://www.quinnemanuel.com/the-firm/publications/what-s-next-questions-for-re-opening/.

> *If shifts are divided equally among three employees and two of them are refusing the vaccine and most of the customers refuse to interact with the non-vaccinated individuals, can the employer reduce the working hours of the non-vaccinated individuals or to dismiss them, or is the employer required to offer the same hours to the employees as per their agreement even if it means operating at a loss?*

This, like all areas of the law, comes down to the balance of rights among parties.

This issue has become more prominent in the past three years, and perhaps is more popular in more litigious jurisdictions (i.e. not New Zealand). However, despite being maybe three years too late into this discussion, it is still a relevant and necessary conversation, and maybe more so going forward with the surge of COVID-19 cases from this 'super' variant.

People in New Zealand (and in many other countries) have a right to refuse to undergo medical treatment (including vaccinations) under the Bill of Rights Act,[21] and employers are not allowed to discriminate based on an individual's religious and ethical beliefs under the Humans Rights Act.[22] While this may appear 'grim' for employers on the outset, it does not necessarily mean there are no redress available to the employer or that the employer must continue to employ the employee even if it means operating at a loss. Again, like most areas of the law, this comes down to the balance of rights among parties, and ultimately, it comes down to the wording of the governing (employment) agreements.

*Frustration of contract*

Frustration is when through no fault of either party, the contract has become incapable of performance due to unforeseen circumstances, or the contract is prohibited from being performed under the law due to unforeseen circumstances – frustration due to illegality.

The doctrine of frustration applies to all contracts, but is probably most prevalent in employment contracts. This has always been a highly litigated area of the law, even prior to the COVID-19 pandemic.

In *Planet Kids v Auckland Council*, the New Zealand Supreme Court found that a contract can only be said to be 'frustrated' if the 'main object' of the contract can no longer be accomplished'.[23] This is similar to the 'main purpose' test adopted in the UK case where a gas company was to install, maintain and light the streetlamps every night for five years.[24] However due the outbreak of WWI, it became illegal to light streetlamps at night. Nevertheless, the UK Courts found that the contract was not frustrated.

[21] New Zealand Bill of Rights Act 1990, s11.
[22] Human Rights Act 1993, s21(1).
[23] *Planet Kids v Auckland Council* [2013] NZSC 147.
[24] *Leiston Gas Co v Leiston-cum-Sizewell Urban District Council* (1916) 32 Times L.R. 287 (KB).

Under the UK approach, and I suspect in New Zealand, it can be found that the 'main purpose' or the 'main object' of a contract is capable of fulfilment even if >50% of the contract cannot be performed. In other words, in cases where a party can only perform 10% of the contract the Courts may still find that the 10% constitutes the 'main object' or 'main purpose' of the contract. Similarly, the Courts may decide a contract is frustrated even if a party is able to perform 90% of the contract because the other 10% forms the 'main purpose' or the 'main object' of the contract.

To play devil's advocate, and recognising the attractiveness of reopening for businesses, these businesses may still want to refrain from rushing into reopening as reopening may affect certain contractual defences including frustration, force majeure and impossibility. As expected, different jurisdictions take a different stance on this. In the State of New York, the test is 'impossibility' and it was held in the Second Circuit that a government order prohibiting performance can render contractual performance excused under a force majeure clause.[25] This is different to the State of California where performance can be excused if it becomes 'unreasonably expensive' to perform and 'impossibility' is not necessarily needed.[26]

In the issue of COVID-19 and the unprecedented effect it has had on New Zealand, we may have to look at other more experienced jurisdictions for guidance and see the way in which it handled its legal questions and issues. A good example of this is during the SARS outbreak in the People's Republic of China (**China**) where the country had to endure a similar level of disruption to what it, and other countries experienced during the COVID-19 pandemic. In the case *Li Chang Wing v Xuan Yu Xeon*, during the SARS outbreak in China, a tenant was unable to access her apartment for 10 days and sought frustration.[27] The Court found she still had access for the remaining term of the lease which was significantly more than 10 days, thus there was no frustration.

**Climate Change**

While the two matters may seem unrelated, scholars and practitioners in the legal field anticipate the COVID-19 pandemic may spark the conversation for climate change in the legal field.

Prior to the pandemic, any substantial restructuring by a corporation in support and for the betterment of the planet would most likely have been at the sole cost and inconvenience of that corporation. With little incentive to make such changes, businesses rarely go beyond the mere tokenistic gestures such as setting up a 'plastic recycling bin' for various office supplies when the country the office is situated in does not even have the ability to recycle plastic. Some companies have even been caught with two openings to the same bin with one labelled "recycle" and one labelled "rubbish" but, of course, all items discarded ends up in the same trash bag.

[25] Elinor Sutton, Bobby Schwartz, Christopher Kercher, Haley Plourde-Cole, Kevin Janus " Questions Clients Are Asking About COVID-19 – What's Next: Questions for Re-Opening (23 April 2020) Quinn Emanuel https://www.quinnemanuel.com/the-firm/publications/what-s-next-questions-for-re-opening/.
[26] *Oosten v. Hay Haulers Dairy Emp. & Helpers Union* 45 2d 784 (Cal 1955).
[27] *Li Ching Wing v Xuan Yu Xion* [2004] HK 353.

In light of the COVID-19 pandemic, and following the disruption of businesses worldwide, with many having to rebuild from the ground up, there has been increased social pressure on businesses to adopt a 'green agenda' in their rebuild / restructure.[28]

However, climate change (and COVID-19) litigation is still a new area of the law, therefore it is not, at least not sufficiently, addressed by existing statutes and case law precedents. Therefore we may see more litigation arising from these disputes. To ensure you and your business are protected, it is better to plan ahead and ensure there are contingencies in place prior to any action being brought against you and your business.

Finally, as mentioned above, the change in the economic landscape following the pandemic is likely to change many things including what is 'reasonable' under the objective (reasonable person) test. While this is vague, companies can and should look to their competitors (if they have done so already). This may sound basic and cliché, but there is 'safety in numbers'. What was "reasonable" and acceptable in the past may not be so in today's society. If a company conducts its business and exercise a similar level of care to that of its competitors, it reduces the risk of being singled out.

**Going forward**

Given the vast area that is "potential areas for litigation following the COVID-19 pandemic", this article does not serve as an exhaustive list of all areas of litigation which may arise following the pandemic, nor does it serve as an in-depth dive into one single area of litigation that may arise due to the pandemic, rather, what it (hopefully) does is summarises some of the key and potentially unexpected areas which ligation will arise going forward in light of the pandemic.

Having spent time focusing on the various things that 'could go wrong' following the pandemic, I thought I would end this article on a brighter note by looking at what good the pandemic may have generated (this is not a joke).

One thing tragedies and devastations call for is innovation, and usually at a surprising pace. For example, during the pandemic various platforms for virtual communications such as Zoom, Microsoft Teams, WebEx, and Skype 'exploded' and, it goes without saying, made lives easier for most people, especially corporations with offices worldwide. While these companies have been in business long before the pandemic (with the youngest being Zoom which was founded back in 2011), the pandemic has undoubtedly increased the traffic on these various networks which hopefully created an incentive for these companies to 'fine tune' their respective sites and, inspired competition in this area. This will encourage (even force) companies to offer the best product they can produce and for the lowest price to its consumers.

[28] Richard Cranfield, Matthew Townsend "Will Climate Change go up the Boardroom Agenda Following Covid-19" (5 August 2020) Allen Overy https://www.allenovery.com/en-gb/global/news-and-insights/publications/will-climate-change-go-up-the-boardroom-agenda-following-covid-19 .