Abstracts

Uriel Procaccia, *Rethinking Basic Assumptions Underlying the Israeli Corporate Code*

The codification of Israel's corporate code lingered for 17 long years. During this extended time span the work was informed by a number of principles. In the opinion of this author, some of these principles turned out to be well-considered. For example, most of the mandatory provisions of the statute were confined to publicly traded corporations and those regulatory measures were principally aimed at correcting well-identified market failures. In the residual domain, where no market failure could be identified, private parties were left to shape their governance structures without regulatory constraints. In the opinion of this author, some other underlying principles did not live up to expectations. For example, the effort to "harmonize" the principles of corporate governance with those of the surrounding private law was ill-taken, because these two sets of principles were largely directed at different goals.

Michal Agmon-Gonnen, *No More Old Boys' Club: Institutional Investors' Duty to Promote Women's Equality on Corporate Boards*

From quotas in law to commercial initiatives, actions designed to increase women's equality in the boardroom have proliferated due to the understanding that equality for women on corporate boards generates better governance. Yet, this article takes a novel approach to achieving women's equality on boards, in light of the increasingly central role played by institutional investors in the corporate world. Institutional investors hold great power over firms, due to their dominant role as major shareholders, and with that power comes responsibility. This article discusses the duty of institutional investors to maintain and encourage equality for women in the boardroom. By exercising their powerful voting rights, these investors can foster gender equality accompanied by the appropriate disclosure regulations. Given the immense power of institutional investors, imposing a duty on them to advance women's equality as a normative goal may prove far more effective than other efforts, be they of a voluntary or a state-driven nature.

Ido Baum & Adi Aran, *What Did Our Money Do Today? (Lack of) Transparency in the Voting Policies of Institutional Investors in Corporate General Assemblies*

Every month, Israeli employees are obliged to deposit a fixed percentage of their wage as long-term savings, towards their retirement. The funds are invested and managed by institutional investors. By investing the funds in publicly traded corporations, institutional investors become shareholders. Israeli law mandates that institutional investors vote in the general assemblies of the public corporations in which they invest. The underlying expectation is that institutional investors will thereby enhance optimal corporate governance. However, there is an agency problem between the long-term savers (principals) and the institutional investors (agents), where the latter are disincentivized to invest in optimal voting. In order to minimize the problem, savers need to receive data about the voting decisions of institutional investors. We examine the mandatory disclosure regime imposed on institutional investors with regard to their voting policy and their *de facto* voting decisions. Our empirical findings show an unsatisfactory level of compliance. Furthermore, we find that data disclosure is not standardized across the industry. Hence, the regulatory objective of fostering competition among institutional investors to improve corporate governance in their portfolio corporations is stifled.

Eli Bukspan, *Twenty Years of the Israeli Companies Law: Time to Amend Article 11 to Reflect "Corporate Purpose"*

This article, written twenty years after the enactment of the Israel Companies Law and one hundred years after *Dodge v. Ford*, explores the essence of the corporate entity and the objectives behind its establishment. It also covers the extent of the responsibilities and accountability of corporate executives and directors.

The article investigates meaningful trends in legal doctrines – in and outside – corporate law – as well in the business discourse, signifying a fundamental change in the socio-economic positioning and functioning of corporations. From an entity formed with the objective of maximizing shareholders' value, the modern corporation has become a business enterprise committed to all stakeholders associated with its activities. Under this approach, a corporation is essentially designed to sustain the economy and promote prosperity based on concepts of freedom, liberty and human dignity.

Consequently, this article calls to amend Section 11(A) of the Israeli Companies Law; a provision at the legal core of the attempt to codify the deepening nexus between corporations and society. The article proposes amending the Law by replacing the word "may" with "should" as follows: "The purpose of a company shall be to operate in accordance with business considerations in maximizing its profits, and within the scope of such considerations, the interests of its creditors, its employees and the public *should* inter alia be taken into account". While this might appear to be a small change, it maintains the corporations' business frame, concurrently codifies the significant relationship existing between corporations and society and is consistent with the current legal and business discourse and trend.

Eyal Ben Zaken, *The Purpose of the Company During Insolvency*

This article examines the company's purpose on the insolvency timeline. The examination is performed through a review and comparison of the Companies Law and the Insolvency Law. The article deals with the different perspectives and the tension between the laws, and presents a brand-new model from which the purpose of the company is derived on the insolvency timeline – The company Sustainability Model.
The company Sustainability Model distinguishes between formal insolvency and absolute insolvency. Formal insolvency occurs upon a judicial pronouncement that a company is insolvent and that the provisions of the Insolvency Law apply to it. Absolute insolvency embodies the crossing of the singular point of insolvency, determined by legal and economic parameters, which once transferred, preclude the company from being salvaged and returned to solvency.
Based on the separation between these two states, the model offers, for the first time, a conception of the company's interests as the sole interest on the insolvency timeline, without preference being accorded to any other type of interested parties, and this until the singular point of insolvency is reached.
Following the presentation of the main elements of the model, its conditions, meaning and potential criticisms in respect thereof, the article analyzes the link between the model and the purposes and provisions of the Insolvency Law.

Ronit Donyets-Kedar & Ofer Sitbon, *Obligations and Responsibilities*

In the two decades since its enactment, Section 11 of the Companies Law, 5759-1999, which deals with the purpose of the company, has failed to produce any impact. Despite

its relatively progressive language which could have reinvigorated legal thinking regarding the purpose of the modern corporation, the courts, as well as potential plaintiffs, have virtually ignored it. This article argues that in the time that has elapsed since the enactment of the section, a new corporate, political, social and legal reality has emerged, one which requires a rethinking of the section and the active use which may be made of it, both by the courts and those injured by irresponsible corporate behaviour. The article discusses the changing equilibrium between corporations and states and evolving social expectations of corporations. Thus, what is required is a re-conceptulization of the place of corporations in society, one that shifts the center of gravity from the classic discourse, which examines the question of the purpose of the company in the context of its perception as a private entity operating in the economic sphere, towards an opposite approach, which sees the question of the purpose of the corporation as secondary to its responsibilities and obligations. Adopting such a concept would bring about the necessary change in the legal climate, and this, in turn, may allow the Companies Law to be seen as a source of rights for stakeholders harmed by irresponsible corporate behavior.

Assaf Hamdani & Kobi Kastiel, *Diffused Ownership, Control and the Appointment of Directors by Institutional Investors*

Institutional investors in Israel are increasingly active in the election of directors. Institutional investors with a significant ownership stake nominate their own candidates to the boards of public companies. They even join forces to appoint a majority of the board members. In this paper, we explore the tradeoff underlying this unique form of activism and call on policymakers in Israel to clarify the conditions under which institutional investors are permitted to appoint directors.

Activism by institutional investors is commonly perceived as essential for investor protection and capital market development. At the same time, in Israel and around the world, institutional investors (such as mutual funds and pension funds) are prohibited from controlling public companies. When institutional investors become actively involved in nominating directors – and particularly when they collaborate to appoint a majority of board members – policymakers are required to draw the line between activism and the exercise of control. This article explains why coordination among institutional investors may be necessary and explores the conditions under which such coordination should not be treated as the prohibited exercise of control.

Dov Solomon & Ofir Weitzman, *Duties of Loyalty, Duties of Care, and the Business Judgement of Institutional Investors*

What is the optimal legal regime under which institutional investors would become liable for the mismanagement of investments? This article calls for the application of the "Business Judgement Rule", which reduces the exposure of pension plan managers to liability for breach of duty of care, and discusses two reasons for adopting this approach. First, managing pension plans involves taking business risks in order to achieve the returns necessary to ensure an adequate retirement annuity. In order to incentivize managers to take efficient risks, their business judgment should be protected. Second, the comprehensive regulation of pension plans in Israel is designed, inter alia, to ensure that pension savings are managed prudently. This regulation greatly curtails the leeway open to investment managers, and consequently should reduce their exposure to legal liability. As long as investment managers operate within the framework of this regulatory scheme, and make informed decisions, in good faith, free of conflicts of interest, their investment decisions are deemed to be legitimate. In these circumstances, the court should confine its review to the management's decision-making process and avoid reviewing the substantive reasonableness of the decision itself.

Eran Rozman, *The Terms "Holding" and "Acquiring" under the Israeli Companies Law*

The terms "holding" and "acquiring" appear in many provisions in the Israeli Companies Law. Their unified definition references a long and complex definition in the Israeli Securities Law. This article discusses three generic purposes for using these terms, corresponding with three typical rights arising from shares – cash flow rights, investment power and voting power – and the implication of such classification for the interpretation of these terms. When the Companies Law prevents a person from participating in a corporate decision making process relating to a transaction with another company, due to that person having a certain level of holdings in such other company, only cash flow holdings are relevant to the interpretation of the term "holding" in this context. The article proceeds to identify a more complex situation regarding the regulation of special tender offers, for which two of the generic contexts are concurrently relevant, and further analyzes the difficulties in interpreting these terms, when innovative techniques of decoupling are applied.