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ZOHAR GOSHEN

AN EXPERT CORPORATE COURT: WALKING THE FINE LINE BETWEEN MISMANAGEMENT AND SELF-DEALING

Why is there a need for an expert court in corporate law? This Article examines the court's role in regulating the relationships between shareholders and management and between minority shareholders and a controlling shareholder, and identifies the cases in which judicial expertise is required. Judicial expertise is necessary in order to distinguish between cases of "mismanagement" and cases of "self-dealing". While judicial expertise in cases of mismanagement will manifest itself in abstention from intervention, leaving regulation to the shareholders, in cases of self-dealing, judicial expertise will manifest itself in judicial intervention and in the ability to determine fair prices for non-market transactions.

MISHPATIM 47 2018

RUTH RONNEN & SHIR ESHKOL

THE BUSINESS JUDGMENT RULE AND THE REQUIREMENT FOR AN "INFORMED DECISION"

This Article deals with the question of how courts should review directors' liability for breach of their duty of care: should courts only review the board's decision-making process or should they also review the substantive reasonableness of the decision itself. We will describe the traditional approach of the Israeli Supreme Court, which did not limit its review to the decision-making process, but also left room for substantive review of the board's discretion. In contrast, we will demonstrate the approach of the Delaware courts, who apply the "Business Judgment Rule", assuming the board's decision to be an informed decision, in good faith, and with no conflict of interest. According to this assumption, as long as the plaintiff does not prove otherwise, Delaware courts do not engage in substantive review of the reasonableness of the board's decision. We will argue that Israeli courts should adopt the Business Judgment Rule while, at the same time, developing the requirement that the board's decision be informed. We will describe how this requirement should be interpreted and applied by Israeli courts, discuss difficulties in its implementation, and propose solutions to these difficulties. We will also point out the future challenges that Israeli courts will have to face in implementing this requirement.

MISHPATIM 47 2018

IDO BAUM & COHAV GILLER

THE SOPHISTICATED OFFEREE PRESUMPTION

Dozens of companies left the Israeli stock market in recent years and "went private". In most of the so called "going private" deals the shares that were held by the public were acquired either by tender offer or through triangular reverse merger deals. Going private deals regularly trigger class actions filed on behalf of shareholders arguing that the share price does not reflect the fair value of the corporation. Typically, these class actions involve a duel of valuation-opinions. Courts are thus required to decide which opinion prevails, the valuation provided by the plaintiff arguing the deal price was below fair value or the valuation arguing the opposite, usually submitted by the controlling shareholder or sometimes by the corporation itself.

In a seminal case on the matter, the Supreme Court adopted the so called "Sophisticated Offeree Presumption" according to which, the acceptance of the deal price by a sophisticated offeree yields a rebuttable presumption that the price reflects the corporation's fair value. The presumption thus shifts the burden of proving unfairness to the plaintiff. The underlying assumption supporting the presumption is that a sophisticated offeree is an informed investor, making efficient investment decisions that maximize value for all public shareholders. This presumption has been developed and expanded primarily by judges of the Corporate Division of the Tel Aviv District Court.

This essay reviews the application of this presumption in case-law. In our critical analysis of the presumption we argue that it is unjustified in regard to private individual sophisticated investors. As it relates to institutional investors, we argue that the assumption of informed, efficient, rational and conflict-of-interest-free investment decisions by such investors is flawed. Using game theory we also explain why the presumption is unfounded even with an overall acceptance of the deal price by multiple and unrelated institutional investors. In view of the weak foundations of the presumption we propose courts should require proof of effective negotiations with institutional investors as a prerequisite of granting the presumption evidentiary weight in the determination of fair value.

MISHPATIM 47 2018

AMIR N. LICHT

AGAINST FAIRNESS: THE ABSENT PLACE OF FAIRNESS IN THE DUTY OF LOYALTY IN ISRAELI LAW

This Article examines the role of the fairness element in the duty of loyalty in Israeli law in the light of a trend that is largely attributable to the Economic Department of the Tel Aviv District Court – namely the apparent adoption of a requirement of "entire fairness" from Delaware law in implementing the duty of loyalty of directors, officers, and controlling shareholders. A theoretical analysis points to the absolute informational superiority that fiduciaries enjoy vis-à-vis the beneficiary and the court. Transactions between fiduciary and beneficiary, which might be efficient and at times necessary, thus depend on the beneficiary's valid, fully-informed consent – namely, a property rule rather than a liability rule. The fiduciary laws of England and the United States adopted this approach long ago and adhere to it to this day, save for American corporate law. In the latter, a legal accident engendered the doctrine of entire fairness, a doctrine whose undesirability is barely disputed. Against this backdrop, Israeli law rejects any attempt to examine the fairness of fiduciary action that is suspected of being tainted by breach of loyalty with a view to validating it. The only way to validate a tainted action is through the beneficiary's valid, fully-informed consent. The "legal atmosphere" that warmly accepts the substantive elements of Delaware's entire fairness doctrine, and the emerging rule on "enhanced scrutiny", that is satisfied by the mere reasonableness of the tainted action, thus represent a regressive, undesirable trend.

MISHPATIM 47 2018

ASSAF HAMDANI & SHARON HANNES

ENTIRE FAIRNESS! ANOTHER LOOK AT JUDICIAL REVIEW OF SELF-DEALING TRANSACTION

Israel's Corporations Statute requires that material self-dealing transactions between public companies and their controlling shareholders be approved by the audit committee, the board, and a majority-of-minority shareholder vote. In a 2011 case (the *Kahana* decision), the Tel Aviv District Court's Economic Division held that this mandatory approval procedure does not immunize a self-dealing transaction from judicial scrutiny. The Court also held that empowering a special committee of independent directors to negotiate the proposed transaction and evaluate its terms may lead the court to apply a more deferential approach in reviewing controllers' self-dealing transactions. Against this background, this Article seeks to answer three questions concerning. We first outline the necessary requirements for the special committee to conduct an effective process. We then consider the type of self-dealing transactions for which companies should form a special negotiating committee in order to avoid exacting judicial scrutiny. Finally, we explain when an effective special committee process should lead courts to apply the business judgment rule to a self-dealing transaction.

MISHPATIM 47 2018

ODELIA MINNES & DOV SOLOMON

THE ECONOMIC DIVISION AND BANKRUPTCY LAW – TIME TO INTEGRATE

The Economic Division of the District Courts in Tel Aviv and Haifa are authorized to handle matters concerning corporate law and securities law, but not corporate bankruptcy law. This article calls for an expansion of the Divisions' authority to corporate bankruptcy law as well. We offer several justifications for our proposal: first, corporate law and corporate bankruptcy law share a theoretical foundation which justifies a unified discussion. Second, there are reciprocal relations and interactions between these types of law that necessitate a comprehensive treatment of a company's life, from beginning to end. In practice, players in the market acknowledge the natural connection between these two fields that directly influences their behavior. When players decide whether to participate in the game and on what terms, they examine not only the laws that apply to solvent corporations, but also those that apply in case of insolvency. Third, the goals which the Economic Division was meant to achieve, namely, economic expertise and swift rulings, will be further advanced by expanding the Division's authority to bankruptcy law. In addition to a theoretical analysis, the article also proposes a number of ways, reflecting different levels of intervention, in which the authority of the Economic Division can be expanded to include the area of corporate bankruptcy.