

DELAWARE'S COPYCAT: CAN DELAWARE CORPORATE LAW BE EMULATED?

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Delaware's famous corporate law and its highly respected specialized Court of Chancery attract entrepreneurs from all over the world, who choose the small state as their locus of incorporation and litigation forum, and global investors who choose Delaware law as the law governing their corporate investments and mergers and acquisitions (M&A). Other jurisdictions vie with Delaware in regard to these choices. This interjurisdictional competition makes Delaware a significant global norm exporter in the field of corporate law because jurisdictions emulate some of its corporate law. Israel leads the global pack. For two decades, it has been approximating its corporate law to Delaware's and emulating its principal institutions, including by establishing a specialized Chancery-like court whose judges seek guidance in Delaware's case law in deciding open corporate law questions.

This Article employs qualitative methods—interviews with M&A practitioners from the United States, the United Kingdom, and Israel. We use the interviews to assess whether the project of approximating Delaware corporate law has succeeded in shifting incorporation decision preferences away from Delaware to Israel and watering down the natural reluctance of global investors to accepting an unfamiliar corporate law when engaging in cross-border corporate M&A transactions involving an Israeli party. Our findings indicate that the approximation project has countervailing effects, opinions about its success being polarized and nuanced; that approximation increases the familiarity of domestic practitioners with the foreign law being emulated, making the emulated law easier to implement; and that approximation creates more room for other aspects of interjurisdictional competition to influence private choices.

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INTRODUCTION

It is both common wisdom and a widely accepted truism among corporate law practitioners and academics that the corporate law of the state of Delaware is one of the most sophisticated and advanced bodies of corporate law in the world.¹ Also accepted are that the superiority of Delaware's corporate law is the result of an interstate competition between corporate laws in the United States and that the specialized Delaware Court of Chancery's contribution to Delaware's advantage in the competition for the hearts, minds, and pockets of incorporation decision-makers is paramount.

Corporate law scholars argue that competition exists not only within the United States but also on the global playing field, with jurisdictions vying to attract entrepreneurs to incorporate domestically and global investors to adopt domestic corporate laws as the laws governing investment agreements. Other scholars argue that this phenomenon is not a result of competition but rather a process of global convergence of laws. The nature of this competition, or convergence, and whether it generates better or worse corporate laws is a matter of continual debate among scholars of corporate law.²

Underlying the theory that there is global regulatory competition or convergence over corporate laws is an assumption that when business decision-makers choose their locus of incorporation, corporate law matters. Another implied assumption of this theory is that when investors choose the governing law in their investment agreements or mergers and acquisitions (M&A), corporate law matters. These assumptions, however, have largely gone unexplored. To the extent that corporate law matters, an approximation of one jurisdiction's corporate law to the corporate law of a "successful" competitor should influence both incorporation decisions and the selection of governing corporate laws in cross-border M&A transactions. The same is true for leveling the corporate playing field as a result of convergence.

By all accounts, Israel's corporate law represents a unique case study for an evaluation of the assumptions underlying the theory of interjurisdictional competition or convergence between corporate laws. Israel has invested significant effort, over two decades, into approximating its corporate law to the corporate law of Delaware. Furthermore, Israel established a specialized court dedicated to corporate law disputes, shamelessly copycatting the Delaware Court of Chancery.³ The declared objectives of this tremendous legal effort were twofold: first, to draw domestic entrepreneurs away from choosing Delaware over Israel as the locus of incorporation, and second, to increase the willingness of foreign investors—especially U.S. and global investors—to choose or accept Israeli corporate law as the governing law in cross-border M&A transactions involving Israeli target corporations.⁴ The Israeli case therefore provides an opportunity to evaluate whether an approximation of

1 See discussion *infra* Part I.B.

2 See discussion *infra* Part I.A.

3 See discussion *infra* Part I.C.

4 See discussion *infra* Part I.C.

corporate laws is at all possible and whether it eventually influences the choices in the realm of private international law.

Building on interviews with seasoned corporate M&A practitioners with ample cross-border M&A experience, this Article aims to unpack perceptions about the process of approximating Israel's corporate law to Delaware's and the influence of this process on the choices of law if other factors are held constant. Our findings indicate that U.S.-based practitioners are skeptical about the possibility of other jurisdictions emulating Delaware, whereas practitioners in Israel are ambivalent regarding the success of the approximation project but nevertheless use it as a "selling argument" when market actors are reluctant to buy into an unfamiliar governing law. To the extent that approximation of laws is undertaken in order to increase local incorporation and adoption of the unfamiliar law, our findings indicate that a countervailing effect may occur because local practitioners become more familiar and comfortable with the approximated jurisdiction.

Our findings thus cast doubt on whether the mere approximation of a jurisdiction's corporate law to that of a popular jurisdiction can have more than a marginal effect on decisions of entrepreneurs regarding the location of incorporation and on the willingness of investors to accept an unfamiliar law. Our analysis of the responses elicited from the interviewed practitioners also indicates that an approximation project can have countervailing effects on practitioners in the emulating jurisdiction. On one hand, they may find it easier to convince global investors to accept their local corporate law, but on the other hand they become more familiar and comfortable with the emulated law, Delaware's law in this case, and more likely to use it.

The Article proceeds as follows. In Part I, we discuss the theory of regulatory interjurisdictional competition. We then focus on the emergence of Delaware as a globally attractive locus of incorporation and of its body of law as a popular choice for governing corporate law. In the last section of this Part, we discuss the unique effort undertaken in Israel to approximate its corporate law to Delaware's and to establish a Chancery-like specialized court to adjudicate corporate law cases.

In Part II, we report the findings of a qualitative study designed to assess whether M&A practitioners on both sides of the pond find the approximation process successful and effective in promoting its objectives. We begin by introducing the empirical qualitative methods employed in our study. In the following sections of this Part, we present our findings. In the first of these sections, we unfold a polarized view of the approximation's success. The next section presents the findings regarding the approximation's influence on governing law choices. The final section presents the findings regarding the role of the specialized Israeli corporate law court in the approximation process. In Part III, we analyze and discuss the results of the study. In the final Part, we conclude the discussion.

I. THE GLOBAL COMPETITION OVER CORPORATE LAW

A. *Interjurisdictional Competition*

The academic literature on corporate law presents a long and as-yet-unresolved dispute about the role of competition over corporate law between jurisdictions. This interjurisdictional competition—sometimes referred to as “international regulatory competition”—is often described as a mechanism that improves and innovates laws as a result of the state-level laboratories of innovative regulation.⁵ The term “regulatory competition” is often used to define a situation in which states or other smaller jurisdictions “vie with each other to retain or attract investment within their jurisdictions by adjusting their regulatory regimes, and firms engage in regulatory arbitrage” by incorporating, relocating, or moving capital.⁶

Interjurisdictional regulatory competition often generates regulatory arbitrage: subjects choose a privately beneficial but not necessarily social welfare-enhancing regulatory regime by exiting from the regulating jurisdiction and migrating to the desired jurisdiction.⁷ To choose the law that best serves their interests, entrepreneurs and executives can go “shopping” around the world for the desired corporate law. In fact, regardless of whether this is good or bad, for regulatory competition to work, subjects must be able to choose between jurisdictions and also to fairly easily exit from their jurisdiction and migrate to a competing jurisdiction.⁸

In light of this global competition, jurisdictions have an interest in shaping their corporate law in a way that will attract entrepreneurs and executives because companies pay annual registration fees to the state in which they are incorporated.⁹ Indeed, the most popular incorporation state in the world, Delaware, realizes a significant portion of its tax revenue from corporate registration fees.¹⁰ Thus, states, like the corporations registered in them, are exposed to incentives to shape their

5 This perception is an offspring of the famous metaphor of states as laboratories of democracy, which derives from the dissenting opinion of Justice Louis Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

6 Thomas Gibbons, *The Impact of Regulatory Competition on Measures to Promote Pluralism and Cultural Diversity in the Audiovisual Sector*, 9 CAMBRIDGE Y.B. EUR. LEGAL STUD. 239, 240 (2006); Ido Baum, *Innovative Regulation Through Competition: A Response to Rapidly Evolving Markets*, 49 ISR. L. REV. 197, 212 (2016). See also ROBERT BALDWIN, MARTIN CAVE & MARTIN LODGE, *UNDERSTANDING REGULATION: THEORY, STRATEGY AND PRACTICE* 356 (2nd ed. 2012) (“Regulatory competition involves the competitive adjustment of regulatory regimes in order to secure some advantage.”).

7 For a definition of regulatory arbitrage and an explanation of how this phenomenon undermines the rule of law, see generally Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010).

8 BALDWIN ET AL., *supra* note 6, at 359.

9 See William J. Moon, *Delaware’s New Competition*, 114 NW. U. L. REV. 1403, 1429–32 (2020) (suggesting that heavy governmental reliance on incorporation fees influences legislative behavior by making lawmakers highly sensitive to private-sector preferences regarding corporate governance rules).

10 See Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. REG. 209, 212 (2006) (“A substantial portion of Delaware’s tax revenue—an average of 17% over the past several decades—is derived from incorporation fees.”).

corporate law in a way that maximizes their private benefit even if it is undesirable from the perspective of third parties such as investors and creditors.¹¹

The jury is still out on the academic debate over whether regulatory competition creates a regulatory race to the top or an undesirable race to the bottom.¹² Opponents of regulatory competition base their criticism on the agency problem that exists between entrepreneurs and managers on the one hand and investors on the other.¹³ In choosing the state of incorporation, entrepreneurs and executives have incentives to maximize their private benefit at the expense of investors. Specifically, entrepreneurs and executives are likely to prefer “enabling” and lax corporate law that has few cogent provisions, giving them considerable freedom to use investors’ money without investors being given footholds in corporate governance matters. Delaware’s corporate law is considered enabling corporate law that gives company management extensive leeway to navigate company affairs as it sees fit.¹⁴

It therefore follows, that states interested in attracting corporate charters will shape their corporate laws in ways that match the preferences of entrepreneurs and executives even if they conflict with the interests of investors. The competition among states, which are striving to increase their share in the incorporation market, will incentivize them to adopt pro-management and anti-investor corporate law. If one state relaxes its corporate governance standards and allows managers to exploit investors, other states may be forced to follow suit to avoid losing their registered companies to the first state. In contrast, a state that insists on strict requirements for investor protection will find itself out of the race because its competitors will provide, in the eyes of entrepreneurs and executives, superior corporate law. The competition between jurisdictions over corporate law will result in a race to the bottom, with all states ending up with similar lax corporate governance standards, to the detriment of investors. Therefore, some scholars argue that federal or even global harmonization of laws and integrated regulation would be better than competition.¹⁵

11 See generally Moon, *supra* note 9; Ido Baum & Dov Solomon, *The Least Uncomfortable Choice: Why Delaware and England Win the Global Corporate Law Race*, 73 S.C. L. REV. (forthcoming 2022); but see Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002) (“[T]he very notion that states compete for incorporation is a myth. Other than Delaware, no state is engaged in significant efforts to attract incorporations of public companies.”).

12 BALDWIN ET AL., *supra* note 6, at 357-66.

13 See, e.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits of State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992); Lucian Arye Bebchuk & Allen Ferrell, *A New Approach to Takeover Law and Regulatory Competition*, 87 VA. L. REV. 111 (2001); Lucian Arye Bebchuk & Allen Ferrell, *Federalism and Corporate Law: The Race to Protect Managers from Takeovers*, 99 COLUM. L. REV. 1168 (1999); Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775 (2002); William W. Bratton, *Corporate Law’s Race to Nowhere in Particular*, 44 U. TORONTO L.J. 401 (1994).

14 See *infra* Part I.B.

15 See, e.g., William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974) (proposing a Federal Corporate Uniformity Act that will apply to major corporations and set general standards for corporations, thus reducing the incentive to incorporate specifically in Delaware); George W. Dent, Jr., *For Optional Federal Incorporation*, 35 J. CORP. L. 499 (2010); Luis Garciano & Rosa M. Lastra, *Towards a New Architecture for Financial Stability: Seven Principles*, 13 J. INT’L ECON. L. 597 (2010) (arguing in favor of integrated supervision of financial markets, securities, banking, and insurance because synergy and coordination are more important than creativity and innovation).

On the other hand, proponents of interjurisdictional regulatory competition tell a completely different story, arguing that the corporate law competition creates a race to the top.¹⁶ If states were to converge at the bottom by adopting lax corporate laws that produce systematic exploitation of investors, investors would find that the return they can expect in these states is consistently lower than the return they can expect in states whose corporate laws are stricter and therefore protect them more. This would lead investors to move their investments from companies registered in enabling states to companies registered in stricter states or, alternatively, demand a premium that would adequately cover their damages. The capital markets would thus discipline companies registered in enabling states. Fears of such market sanctions are causing entrepreneurs and executives to internalize the implications of their choice of corporate law for investors because what harms investors boomerangs against them. The narrative that competition between states leads to efficient development of corporate law while incentivizing socially beneficial corporate law innovations is probably the mainstream view in modern corporate law circles.¹⁷ Indeed, investors are flocking to enabling states like Delaware,¹⁸ indicating that interjurisdictional competition has real-life effects.

Note that investors are not homogenous, and their characteristics will have an impact on the final ability of entrepreneurs and managers to use or abuse the chosen corporate law. In other words, the race to the top or the bottom will also be influenced by the type of investor pool sought by the company. For example, dispersed individual investors are normally considered to be rationally apathetic.¹⁹ In that case, entrepreneurs and managers will be inclined to choose a regime that allows them to shape corporate charters in their favor. On the other hand, large institutional investors are considered knowledgeable, well-informed, and professional, and thus better situated to bargain over their rights in the company. However, some institutional investors are portfolio investors such as index funds, which focus on a passive dispersed portfolio, and thus they may not care about the particulars of the corporate charter.²⁰ This Article focuses on the choice of law in the formation

16 See, e.g., ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 14-24 (1993); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 289-92 (1977); Mathis Koenig-Archibugi, *Global Regulation*, in *THE OXFORD HANDBOOK OF REGULATION* 407, 414 (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010) (arguing that the empirical evidence to support the hypothesis that international competition creates a race to the bottom is scarce); Ofer Eldar & Lorenzo Magnolfi, *Regulatory Competition and the Market for Corporate Law*, 12 AM. ECON. J.: MICROECONOMICS, May 2020, at 60 (2020) (showing that most firms dislike protectionist laws, such as anti-takeover statutes and liability protections for officers, and therefore the race-to-the-bottom view that regulatory competition benefits managers at the expense of shareholders is doubtful).

17 See Moon, *supra* note 9, at 1413-14.

18 See *infra* Part I.B.

19 See Dov Solomon, *The Voice: The Minority Shareholder's Perspective*, 17 NEV. L.J. 739, 748-49 (2017).

20 Passively managed funds have significantly increased their ownership share of the capital markets in recent years. See Ian R. Appel et al., *Passive Investors, Not Passive Owners*, 121 J. FIN. ECON. 111, 112 (2016) (showing that the share of equity mutual fund assets held in passively managed funds tripled

stages of a company and the stages of mostly private mergers and acquisitions conducted by sophisticated investors. Some sophisticated investors may have very large and diversified portfolios and may care less about the applicable law. In that case, emulating other jurisdictions' better laws makes little sense in the context of attracting investors. Nonetheless, some institutional and other sophisticated investors do care about the applicable law. For example, some reduce transaction costs by making an initial commitment to invest only in jurisdictions that abide by certain corporate governance standards or by requiring that the applicable law be a law that abides by these standards.²¹ If these standards are high, then attracting these investors sets off a race to the top.

Along with the regulatory competition theories, there is evidence of global convergence in various fields of law. By convergence, we mean the adoption of identical or very similar norms or institutions by competing jurisdictions. When competing jurisdictions identify a "successful" norm (or institution), then a "me too" replication process will induce global convergence towards that norm. One of the strong examples of interjurisdictional convergence is securities regulation.²² Moreover, there is growing evidence for global convergence in corporate law and

over the 1998-2014 period to 33.5%, and the share of total U.S. market capitalization held by passively managed funds quadrupled to more than 8%).

- 21 Baum & Solomon, *supra* note 11 (providing evidence that some institutional investors generally prefer investing in jurisdictions with well-developed corporate laws). This phenomenon is driven by the understanding of sophisticated investors that diversification of investments should take into account differences in legal systems. See Kelli A. Alces, *Legal Diversification*, 113 COLUM. L. REV. 1977 (2013). Even passive investors such as index funds have recently taken into account corporate governance considerations by excluding dual-class share structures from the indexes. See Scott Hirst & Kobi Kastiel, *Corporate Governance by Index Exclusion*, 99 B.U. L. REV. 1229 (2019); Scott Hirst & Lucian A. Bebchuk, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029 (2019); Dov Solomon, *The Importance of Inferior Voting Rights in Dual-Class Firms*, 2019 BYU L. REV. 533, 561-65 (2020).
- 22 See, e.g., Amir N. Licht, *International Diversity in Securities Regulation: Roadblocks on the Way to Convergence*, 20 CARDOZO L. REV. 227, 227 (1998) ("[T]he dominant trend in securities regulation is harmonization and convergence of domestic national regimes . . ."). The effort to harmonize disclosure rules and reporting standards has been particularly evident in securities regulation and financial accounting. See generally Karel van Hulle, *International Convergence of Accounting Standards: A Comment on Jeffrey*, 12 DUKE J. COMP. INT'L L. 357 (2002); Roberta S. Karmel, *The E.U. Challenge to the SEC*, 31 FORDHAM INT'L L.J. 1692 (2008) (discussing the efforts to bring U.S. and international accounting standards into convergence); Ido Baum & Dov Solomon, *When Should You Abstain? A Call for a Global Rule of Insider Trading*, 88 U. CIN. L. REV. 67, 95-100 (2019) (suggesting the adoption of a global test for determining the materiality of information about future corporate events). See also Eric C. Chaffee, *The Internationalization of Securities Regulation: The United States Government's Role in Regulating the Global Capital Markets*, 5 J. BUS. & TECH. L. 187, 192 (2010) (arguing that "[T]he United States government should push for the harmonization and centralization of international securities regulation to end the race-to-the-bottom in international securities law and to avoid another financial crisis."); Marco Ventoruzzo, *Comparing Insider Trading in the United States and in the European Union: History and Recent Developments* 3 (Eur. Corp. Governance Inst., Working Paper No. 257/2014, 2014), <http://ssrn.com/abstract=2442049> (arguing that "[N]otwithstanding the different theoretical underpinnings of insider trading in the U.S. and in Europe, the practical scope of the two systems are largely similar, especially in the most egregious cases, even if important differences exist.").

corporate governance.²³ Convergence may be driven by a deliberate strategy of emulating more efficient bodies of law developed in other jurisdictions, it may be driven by legislative inspiration, or it may occur because states, instead of investing in optimizing their own laws, prefer to free-ride on the investment of others.²⁴

A finer observation is that regulatory competition yields convergence toward either a less strict common denominator or the most stringent regulation—if any convergence happens at all. Arguably, regulation affecting production costs converges to the least strict common denominator because market participants exert pressure on regulators to reduce the cost of regulation. On the other hand, regulation affecting access to the market tends to be stringent because it insulates domestic companies against foreign competitors.²⁵ Hence, evidence of the results of interjurisdictional regulatory competition is inconclusive.

The academic literature implicitly assumes that corporate law influences several types of decisions. First, it affects entrepreneurs' decisions regarding where to incorporate. Consequently, it affects investors' decisions to invest or refrain from investing in a company incorporated in a jurisdiction with superior or inferior corporate law.²⁶ Finally, it influences the choice-of-law decisions of parties to multinational shareholder agreements and cross-border corporate mergers and acquisitions.²⁷

Since corporate law influences investment decisions, according to the regulatory competition theory, if investors have a preference for a certain corporate law, entrepreneurs seeking capital will prefer to incorporate under that law.²⁸ It follows that, all other things being equal, if competing jurisdictions approximate or harmonize their corporate law with that of a preferred jurisdiction, investors should be less apprehensive about investing in entities incorporated under a specific law and, accordingly, entrepreneurs should be willing to incorporate under the corporate law of the harmonizing or approximating jurisdictions.

23 Dionysia Katelouzou & Mathias Siems, *The Global Diffusion of Stewardship Codes* (May 29, 2020), (Eur. Corp. Governance Inst., Law Working Paper No. 526/2020, 2020), <https://ssrn.com/abstract=3616798> (using content analysis of dozens of stewardship codes to prove that the diffusion of the UK Stewardship Code across many jurisdictions renders the UK a significant global norm exporter, but also noting diffusion of other codes in some geographical regions). An edited version of the paper will be published as a chapter in *GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES* (Dionysia Katelouzou & Dan W. Puchniak eds., forthcoming).

24 Michael B. Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 946 (2011).

25 Dale D. Murphy, *Interjurisdictional Competition and Regulatory Advantage*, 8 J. INT'L ECON. L. 891 (2005); Gibbons, *supra* note 6, at 241-42.

26 Even scholars that are skeptical regarding the competition over incorporations agree about the existence of jurisdictional competition over investments. See, e.g., Ehud Kamar, *Beyond Competition for Incorporations*, 94 GEO. L.J. 1725 (2006) (arguing that the European Union is characterized by competition for investments rather than incorporations).

27 See Baum & Solomon, *supra* note 11 (using qualitative methods to observe the process of determining the governing corporate law in cross-border M&As).

28 The directional effect of competition may change if entrepreneurs have a stronger position in the market. For example, when investors compete over investment opportunities and the supply or opportunities by entrepreneurs are weak then entrepreneurs can dominate the choice of law.

B. The Case of Delaware

The phenomenon of interjurisdictional regulatory competition in corporate law has emerged in the United States, especially in the superiority of Delaware as a locus of incorporation and a litigation forum, and Delaware corporate law as the governing law in M&A deals.²⁹ Corporate law in the United States is governed by the states and enacted by them as part of their traditional authority over commercial law.³⁰ Although each state can shape its corporate law according to its agendas and goals, perceptions, and views, approximation toward Delaware corporate law is the prevailing trend. The emulation of Delaware corporate law by other U.S. states is attributed not only to the efforts of state legislators but also to the judicial system. Courts in numerous other U.S. states now accord Delaware case law a previously unheard-of level of deference: many state judiciaries have declared explicitly that they will look to Delaware cases in deciding open corporate law questions.³¹ Even though Delaware is a small state by any measure—population, geography, industrial or agricultural production—its corporate law and precedents have largely dominated all the rest.³²

Delaware's law is considered the leading corporate law in the world: the most developed, favorable, and approachable law, and the law that inspires other legal systems inside and outside the United States.³³ Arguably, the quality of corporate law is an important factor in deciding where to incorporate.³⁴ Hence, most public corporations in the United States,³⁵ as well as in many foreign companies, choose to

29 Theodore Eisenberg & Geoffrey P. Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1973 (2006) (studying the connection between choosing Delaware as a situs of incorporation and decisions of parties to M&A agreements regarding choices of law and forum).

30 See ROMANO, *supra* note 16, at 1; Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, 26 REGUL. 26, 26 (2003) ("For over 200 years, corporate governance has been a matter for state law").

31 See Jens Dammann, *Deference to Delaware Corporate Law Precedents and Shareholder Wealth: An Empirical Analysis* (2018), <https://ssrn.com/abstract=3384446> (analyzing empirically the deference to Delaware corporate law precedents by many courts in other U.S. states).

32 ROMANO, *supra* note 16, at 6.

33 See LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE (2007); Demetrios G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965 (1995).

34 Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J.L. ECON. & ORG. 340 (2006).

35 See Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering Competition over Corporate Charters*, 112 YALE L.J. 553, 553-54 (2002) ("Although Delaware is home to less than one-third of a percent of the U.S. population, it is the incorporation jurisdiction of half of the publicly traded companies in the United States and of an even greater fraction of the larger publicly traded companies."); Robert M. Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 526 (2001) ("More than 50% of all public firms are incorporated in Delaware, while New York, the state with the second highest share, attracts fewer than 5% of public firms."); Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 481 (2007) ("Delaware is the corporate home to 61% of all Fortune 500 companies and more than half of all firms traded on the New York Stock Exchange and NASDAQ").

register in Delaware.³⁶ In recent years, almost ninety percent of firms going public in the United States chose Delaware as their corporate domicile.³⁷

Delaware corporate law is predominantly made up of “enabling” default rules that leave significant discretion to private choice.³⁸ Mandatory rules are limited to a few issues such as fiduciary duties of directors and shareholder inspection rights. As a result, corporate stakeholders can opt out of default rules on central matters, such as economic rights and voting rights of stock,³⁹ through private ordering, almost without limit.⁴⁰ This important characteristic of Delaware corporate law has greatly increased its attractiveness because it allows stakeholders to shape the legal arrangements that will apply to them in a way that maximizes their benefits.

The superiority of Delaware corporate law is attributed not only to the excellent work of the state legislators but also to the quality of its specialized court system.⁴¹ Empirical studies have shown that the existence of business courts has a positive effect on the performance of companies.⁴² The Delaware Court of Chancery has exclusive jurisdiction over corporate issues. Appeals from the Court of Chancery are taken to the Delaware Supreme Court. Both courts have expert, experienced judges in the field of corporate law who are well known for the quality, efficiency, certainty, and coherence of their judgments.⁴³ They have a national reputation in

36 See *About the Division of Corporations*, DEL. DIV. CORPS., <https://corp.delaware.gov/aboutagency/> (“The State of Delaware is a leading domicile for U.S. and international corporations. More than 1,000,000 business entities have made Delaware their legal home. More than 66% of the Fortune 500 have chosen Delaware as their legal home.”). On Delaware’s dominance, see also Kent Greenfield, *Democracy and the Dominance of Delaware in Corporate Law*, 67 LAW & CONTEMP. PROBS. 135 (2004) (advocating abolishing the “internal affairs” doctrine that enables a corporation to choose which corporate governance laws will apply to it, regardless of whether it has any contacts with the state it chooses).

37 See Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J.L. ECON. & ORG. 79, 87 (2011) (finding that 237 of 270 U.S. corporations that went public in the years 2006 and 2007 were incorporated in Delaware at the time of their IPO).

38 See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 2 (1991) (“An enabling statute allows managers and investors to write their own tickets, to establish systems of governance without substantive scrutiny from a regulator.”).

39 See, e.g., DEL. CODE ANN. tit. 8, § 151(c) (providing flexibility in granting special or preferential dividend rights through the certificate of incorporation); *id.* § 212(a) (providing flexibility in overriding the one-share-one-vote default rule by the certificate of incorporation). In recent years an increasing number of companies have utilized this flexibility and raised capital using a dual-class capital structure. See Dov Solomon et al., *The Quality of Information Provided by Dual-Class Firms*, 57 AM. BUS. L.J. 443, 450-52 (2020) (noting that the percentage of companies that went public by listing dual-class shares on U.S. stock exchanges has increased dramatically, from 1% in 2005 to 26% in the first half of 2019).

40 See Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1782-86 (2006).

41 See Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1064 (2000) (attributing Delaware’s success in attracting corporate charters to “the unique lawmaking function of the Delaware courts”); Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 918 (1990) (suggesting that a specialized judiciary makes Delaware incorporation more attractive).

42 See, e.g., Jens Dammann, *Business Courts and Firm Performance* (Univ. Tex. L. & Econ., Research. Paper No. 564, 2017), <https://ssrn.com/abstract=2889898>.

43 See Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. UNIV. L. REV. 542, 589-90 (1990) (arguing that Delaware’s prominence is due to the expertise of its judiciary).

the business community and are responsible for a well-developed collection of corporate law precedents.⁴⁴

The interjurisdictional competition over corporate law is not limited by U.S. borders. In recent decades, an international market for corporate law has emerged; consequently, foreign nations compete with Delaware to supply corporate law.⁴⁵ U.S. intra-jurisdictional competition over the supply of corporate law is easier to identify because most other relevant laws, such as taxation, labor laws, environmental laws, and bankruptcy laws, are federal and apply equally to all companies regardless of their state of incorporation. This changes in the case of global interjurisdictional regulatory competition. Jurisdictions may compete on diverse regulatory fields,⁴⁶ and the importance of other fields of regulation may supersede that of corporate law. The increasingly globalized market for corporate law has largely not yet been explored by legal scholars, who presuppose a U.S. interstate market.⁴⁷ This Article aims to fill this gap in the academic literature.

C. The Case of Israel

As a result of global corporate law competition, many jurisdictions try to adapt their corporate law to attract entrepreneurs and executives. Indeed, the approximation of corporate laws is a well-recognized trend. This Part discusses a prominent example: the Israeli approximation toward the corporate law of Delaware,⁴⁸ the world's leading incorporation state.⁴⁹

44 Perhaps this is the consequence of a self-fulfilling prophecy. As many companies flocked to Delaware in the past and contributed to the creation of a large and reactive body of case law, most companies choose to be domiciled in Delaware today because of the experienced judiciary. This perception about the superiority of Delaware's law and its judiciary was recently captured in Lawrence Hamermesh, Jack B. Jacobsand & Leo Strine, *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead* (U. Pa., Inst. L. & Econ. Rsch. Paper No. 21-29, Harv. L. Sch. Program on Corp. Governance Discussion Paper No. 2021-12), <https://ssrn.com/abstract=3954998>.

45 See Moon, *supra* note 9 (introducing foreign nations as emerging lawmakers that compete with American states in the increasingly globalized market for corporate law).

46 See, e.g., Michael P. Devereux et al., *Do Countries Compete Over Corporate Tax Rates?*, 92 J. PUB. ECON. 1210 (2008) (showing a race to the bottom between OECD countries over corporate taxes and that this has a direct influence on capital choices made by corporations); Ronald B. Davies et al., *Knocking on Tax Haven's Door: Multinational Firms and Transfer Pricing*, 100 REV. ECON. & STAT. 120 (2018) (showing the effects of tax havens on corporate decisions); Kjetil Bjorvatn & Carsten Eckel, *Policy Competition for Foreign Direct Investment Between Asymmetric Countries*, 50 EUR. ECON. REV. 1891 (2006) (showing that jurisdictions compete for investments by choosing different minimum wage laws).

47 Another challenge to the traditional interstate competition theory was presented by Professor Mark Roe, who identifies the federal government in Washington, D.C., as Delaware's real competition. See Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003).

48 This trend is part of a broader phenomenon of Americanization of the law faculties in Israel. See Pnina Lahav, *American Moment[s]: When, How and Why Did Israeli Law Faculties Come to Resemble Elite U.S. Law Schools?*, 10 THEORETICAL INQUIRIES L. 653 (2009). Specifically, most corporate law professors in Israel have spent significant periods in leading U.S. universities for study and research purposes. Moreover, many of the corporate law conferences held in Israel include lecturers from Delaware courts and U.S. law schools.

49 Note that we do not make a value judgment as to whether Delaware law represents the "top" or the "bottom" in terms of the quality of corporate law. The latter is an unresolved dispute that extends well beyond the limits of this Article. See discussion *supra* Part I.A. However, it is undisputed that Delaware

In recent years, Israeli corporate law has moved to a pronounced approximation of Delaware corporate law. The steps taken to approximate Delaware included both statutory reforms incorporating concepts from Delaware and incorporation of Delaware practices and case law through casuistic judicial decisions.⁵⁰ Evidently, the approximation process was driven by jurisdictional competition between Israel and the United States over incorporation and investments, particularly but not limited to the high-tech industry. Between 1995 and 2000, a period often dubbed the “Dot Com Bubble,” a growing number of Israeli-based corporations preferred to incorporate in Delaware and raise capital in stock exchanges in the United States. The Israeli government was particularly concerned by this trend and established a committee in 2000, headed by the former director-general of the Ministry of Finance, David Brodet, to address this phenomenon.⁵¹ Given that the Israeli Companies Law of 1999 had just been enacted and lacked the stability and predictability created by decades of interpretative case law, the Brodet committee proposed to amend the Israeli Securities Law to allow corporations listed in the two major U.S. stock exchanges, NYSE and Nasdaq, to cross-list their securities in Israel while being subject almost only to the disclosure and reporting obligations required by their jurisdiction of primary listing.⁵² Less than a decade later, another driving force of the approximation trend was Israel’s aspiration to become a global financial center. Several legal reforms, spearheaded by a government committee headed by the then director-general of the Ministry of Finance, Yarom Ariav, were pushed through as of 2008 in order to promote the viability of Israel as an international financial center.⁵³

corporate law has dominated the choice of incorporation race in striking a legal regime that enables an optimal balance of the interests of entrepreneurs, managers, and investors. This optimal balance is what emulating jurisdictions seem to aim for.

- 50 A factor that contributed to the approximation trend was the fact that many of the legal reforms in the Israeli business arena were based on academic foundations and advice provided by law professors from the United States, including Lucian Bebchuk, Jesse Fried, and Louis Kaplow from Harvard University. See Ido Baum & Davida Lachman Messer, *Can the Next Amazon or Facebook Be Controlled Before It Becomes Too Powerful*, 52 UNIV. MEM. L. REV. (forthcoming 2022) (observing that the major reforms in Israeli corporate and business laws in the last three decades were supported by leading corporate law experts from the United States). For examples of Bebchuk’s work that influenced the adoption of legal and regulatory reforms in Israeli corporate law and financial regulation see LUCIAN A. BEBCHUK, CONTROL OF FINANCIAL FIRMS IN THE ISRAELI ECONOMY: PROBLEMS AND POLICIES (2012) https://www.gov.il/BlobFolder/unit/competitiveness-committee/he/Vaadot_ahchud_CompetitivenessCommittee_FinalReport_ExpertOpinion1.pdf (A Report Prepared for the Committee on Increasing Competitiveness in the Economy); LUCIAN A. BEBCHUK, CORPORATE PYRAMIDS IN THE ISRAELI ECONOMY: PROBLEMS AND POLICIES (2012) (A Report Prepared for the Committee on Increasing Competitiveness in the Economy); LUCIAN A. BEBCHUK, CONCENTRATION OF INVESTMENTS AND SYSTEMIC RISKS IN ISRAEL’S LONG-TERM SAVINGS FUNDS: PROBLEMS AND POLICIES (Mar. 2012), www.gov.il/blobfolder/unit/competitiveness-committee/he/vaadot_ahchud_competitivenesscommittee_finalreport_expertopinion3.pdf (A Report Prepared for the Committee on Increasing Competitiveness in the Economy).
- 51 Stella Korin-Lieber, *Just Like America*, GLOBES (Feb. 20, 2000), <https://en.globes.co.il/en/article-382735> (explaining that the purpose of the Brodet committee was to attract approximately 100 Israeli corporations listed in the United States to list their shares in Israel as well and raise capital in Israel).
- 52 § E3, The Securities Law, 5728-1968 (Isr.).
- 53 Ido Baum, *Legal Transplants v. Transnational Law: Lessons From the Israeli Adoption of Public Factors in Forum Non Conveniens*, 40 BROOK. J. INT’L L. 357, 361 (2015) (“Israel, like England, has strived to become an international, or at least a regional, financial center by lowering the barriers to entry for

The fact that Israel and Delaware became competitors was manifested in practice. Practitioners played an active role in highlighting the pros and cons of incorporating in Delaware versus Israel.⁵⁴ In yet another manifestation of the competition over incorporations, Delaware governor Jack Markell visited Israel in 2013 accompanied by an entourage of Delaware practitioners, in an effort to promote the state as a venue for incorporation for Israeli companies.⁵⁵

The distinct effort to emulate Delaware law can be identified in three spheres: legislation, case law, and the work of regulatory authorities. In this section we describe the efforts in each of the spheres.

1. Legislation

As regards legislation, the choice of Delaware as the main source of inspiration in developing the Israeli modern Companies Law of 1999 is far from trivial. In fact, this choice is a deviation from Israel's fundamental roots in the corpus of English law. Israeli law has common-law origins, thanks to the heritage of the British Mandate regime in Palestine, which was in force until Israel declared its independence in 1948.⁵⁶ Specifically, Israeli corporate law relies on a backbone of fiduciary law that draws its main principles and many rules from English law.⁵⁷ The Israeli Companies Ordinance of 1929 was enacted during the British Mandate and followed the UK Companies Act of 1929. At the beginning of the millennium, however, the Israeli Companies Law of 1999 replaced much of the Companies Ordinance. The Companies Law provides a modern framework for business entities, both private closely held companies and public, listed, widely held or controlled corporations. The influence of Delaware can already be traced to the Companies Law of 1999, the mere formulation of which was inspired by the modernization of Delaware corporate law.⁵⁸

This approximation trend was greatly strengthened in December 2010 by the establishment of an Economic Division in the Tel Aviv District Court with special

international accounting and legal firms and promoting the expertise of its legal dispute resolution institutions.”); Moti Bassok, *Ariav's Dream: Turn Israel into a Global Financial Center*, HAARETZ (Mar. 24, 2008, 12:00 AM), <http://www.haaretz.com/print-edition/business/ariav-s-dream-turn-israelinto-a-global-financial-center-1.242427>; Israel Trying to Become Int'l Financial Center, ARUTZ SHEVA (Feb. 28, 2008, 9:42 AM), <http://www.israelnationalnews.com/News/Flash.aspx/142367#.VDBcky5dXZg>.

54 See, e.g., Barry P. Levenfeld, *Delaware vs. Israel: Where are the Biggest and Easiest Exits?*, ISR. VENTURE CAP. & PRIV. EQUITY J. 13, 26 (20 June 2007), https://www.yigalarnon.co.il/sites/default/files/files_from_old/01.%20Delaware%20vs%20Israel_1.pdf (a native U.S. lawyer and partner in one of the leading law firms in Israel explaining why incorporation in Israel is preferable to incorporation in Delaware).

55 Reuters Staff, *Delaware Governor Markell seeks to attract Israeli companies*, REUTERS (July 11, 2013), <https://www.reuters.com/article/israel-delaware/delaware-governor-markell-seeks-to-attract-israeli-companies-idUSL6NoFH1HF20130711>.

56 See Ron Harris, *History and Sources*, in THE ISRAELI LEGAL SYSTEM: AN INTRODUCTION 15, 16-18 (Christian Walter et al. eds., 2019).

57 Itai Fiegenbaum & Amir N. Licht, *Corporate Law*, in THE ISRAELI LEGAL SYSTEM: AN INTRODUCTION 155, 155-56 (Christian Walter et al. eds., 2019).

58 The legislation of the Israeli Companies Law was the result of a codification process inspired among other jurisdictions by the modernization of the Delaware Corporate Law. See Explanatory Note, Draft Bill for The Companies Law 5749-1999, HH (Gov.) 2432 3 (Isr.), https://fs.knesset.gov.il/13/law/13_ls1_291587.PDF.

jurisdiction over company and securities law cases.⁵⁹ Its establishment was the statutory outcome of the 2006 recommendations of the Goshen Committee, which was appointed to address the proper structure and content of an Israeli corporate governance code.⁶⁰ One of its key recommendations was that Israel adopt the successful model of the Delaware Court of Chancery by establishing an Israeli court specializing in corporate law in order to promote the efficiency, certainty, and consistency of the case law in this field, which would in turn contribute to the behavior of business players and the development of the economy.⁶¹ Indeed, the establishment of the Economic Division immediately led to a burst of legal innovation that has greatly contributed to the development of corporate law in Israel.⁶²

The convergence of the Israeli legal system toward Delaware law is not limited to the establishment of special courts to adjudicate corporate law cases.⁶³ It is also reflected in the absorption of Delaware's corporate law doctrines into Israeli law. One of the main recommendations of the Goshen Committee was to incorporate voluntary practices from Delaware as mandatory procedures into the Israeli Companies Law. Most notably, the Goshen Committee recommended the enactment of a mandatory requirement that related-party transactions between a corporation and its controlling shareholders be confirmed by a majority of disinterested shareholders.⁶⁴ The Israeli Companies Law was amended in 2011 to reflect this recommendation.⁶⁵ The Goshen Committee then recommended that after the establishment of the specialized economic court and a trial run that will prove its efficiency, the Companies Law be amended to relax some of the mandatory procedures and align them with the Delawarean enabling practices.⁶⁶

2. Case Law

The second sphere in which the tectonic shift towards Delaware's law happened was in the courts. In recent years, Israeli judges have tended to examine and draw inspiration from Delaware law when dealing with complex corporate law issues.⁶⁷

59 For a description of the steps that led to the establishment of the Economic Division, see Yifat Aran, *From Delaware to Israel: Evaluating Israel's Quasi Experiment of a Specialized Corporate Court* 34-46 (May 30, 2015), <https://ssrn.com/abstract=2619916>.

60 ISRAEL SECURITIES AUTHORITY, REPORT OF THE COMMITTEE FOR THE EXAMINATION OF CORPORATE GOVERNANCE CODE IN ISRAEL (2006) [in Hebrew] [hereinafter GOSHEN COMMITTEE REPORT].

61 *Id.* at 43-45. The Economic Division of the Tel Aviv District Court has jurisdiction over securities law cases, while in the United States, securities law cases are adjudicated at the federal level.

62 For an empirical study showing the significant impact of the Economic Division's case law and legal precedents by examining the number of citations of its judges' decisions, see Aran, *supra* note 66, at 6-8. Aran concludes the results of the study as follows: "Our results demonstrate that the specialized judges' influence on the development of economic case law has been at least equivalent to that of the Supreme Court Judges." *Id.* at 62.

63 The success of the Economic Division in the Tel Aviv District Court led, in 2018, to the establishment of an economic division in another district court, the Haifa District Court.

64 GOSHEN COMMITTEE REPORT, *supra* note 67, at 27.

65 § 275 of the Israeli Companies Law, 5759-1999, SH 1711, 189, 237 (Isr.).

66 GOSHEN COMMITTEE REPORT, *supra* note 67, at 31.

67 Esther Hayut, Justice and President of the Supreme Court of Israel, Speech at the 12th Annual Columbia-Ono Conference on Corporate Law and Governance, Comparative Law

Indeed, the case law of the Economic Division is saturated with references to the legal decisions of Delaware's judges.⁶⁸ In light of the lack of specific precedents in the Israeli Supreme Court regarding complex corporate issues, it is not surprising that the Economic Division relies on and even adheres to Delaware's precedents, with local alterations, whenever it encounters gaps in Israeli case law.

An important influence of Delaware corporate law on Israeli law is the adoption of the "business judgment rule" (BJR) as a standard of judicial review of companies' business decisions.⁶⁹ The Supreme Court of Israel recently stated that the principles of the rule are "an integral part of the Israeli corporate law." However, it emphasized that importation of the BJR into Israeli law should be carried out with appropriate adjustments to the Israeli Companies Law.⁷⁰

When Delaware's courts are asked to examine conflict-of-interest transactions, in particular transactions in which the controlling shareholder has a personal interest, they do not hesitate to consider the content of the transaction and its fairness. This

in General and in Corporate Law (July 17, 2018), <https://supreme.court.gov.il/Speeches/%D7%93%D7%91%D7%A8%D7%99%20%D7%A0%D7%A9%D7%99%D7%90%D7%AA%20%D7%91%D7%99%D7%AA%20%D7%94%D7%9E%D7%A9%D7%A4%D7%98%20%D7%94%D7%A2%D7%9C%D7%99%D7%95%D7%9F%20%D7%94%D7%A9%D7%95%D7%A4%D7%98%D7%AA%20%D7%90%D7%A1%D7%AA%D7%A8%20%D7%97%D7%99%D7%95%D7%AA%20%D7%91%D7%9B%D7%A0%D7%A1%20%D7%91%D7%A0%D7%95%D7%A9%D7%90%20%D7%93%D7%99%D7%A0%D7%99%20%D7%97%D7%91%D7%A8%D7%95%D7%AA%20%D7%91%D7%A7%D7%A8%D7%99%D7%94%20%D7%94%D7%90%D7%A7%D7%93%D7%9E%D7%99%D7%AA%20%D7%90%D7%95%D7%A0%D7%95%2017.7.18.pdf>.

68 See, e.g., *DerivC* (DC TA) 43335-11-12 *Verdnikov v. Alovitch*, Nevo Legal Database § 55 (Sept. 17, 2014) (Isr.). https://www.nevo.co.il/psika_html/mechozi/ME-12-11-43335-55.htm ("For the discussion and the decision in this proceedings, much can be learned from the American law, and in particular from the case law of the courts in the State of Delaware, which dealt with the issues at the center of this proceedings two or three decades ago.").

69 This rule creates a presumption that directors and officers have complied with their duty of care (the care expected to be exercised by an ordinarily prudent person) if they acted on an informed basis, in good faith, and in the honest belief that their act would further the corporation's best interests. See 1 AMERICAN L. INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (1994). In other words, as long as directors and officers make informed decisions in good faith and without the taint of conflicts of interest, their decisions will be reviewed under the highly deferential business judgment standard. The court will confine its review to management's decision-making process and avoid any review of the substantive reasonableness of the decision in question. See *Aronson v. Lewis*, 473 A.2d 805, 812-13 (Del. 1984).

70 *CivA 7735/14 Verdnikov v. Alovitch*, 62, Nevo Legal Database (Dec. 28, 2016) (Isr.), https://www.nevo.co.il/psika_html/elyon/14077350-e06.htm (approving cash dividends following a control-changing leveraged buyout). This decision fell into line with a multitude of recent corporate law decisions that contain an analysis of the BJR and its various justifications. See, e.g., *CivC* (DC CT) 7250-05-11 *Adler v. Livnat*, § 83 (Nov. 25, 2012) (Isr.) https://www.nevo.co.il/psika_html/mechozi/ME-11-05-7250-394.htm; *DerivC* (DC TA) 48081-11-11 *Rozenfeld v. Ben-Dov*, § 140 (Mar. 17, 2013) (Isr.) https://www.nevo.co.il/psika_html/mechozi/ME-11-11-48081-829.htm; *DerivC* (DC TA) 32489-02-12 *Altman v. Ormat Taasiyot Ltd.*, § 16 (Mar. 10, 2013) (Isr.) https://www.nevo.co.il/psika_html/mechozi/ME-12-02-32489-907.htm; *DerivC* (DC TA) 13663-03-14 *Noyman v. Financitech Ltd.*, § 47 (May 24, 2015) (Isr.) https://www.nevo.co.il/psika_html/mechozi/ME-14-03-13663-11.htm; *DerivC* (DC CT) 10466-09-12 *Ostrovsky v. Hevrat Hashkaot Discount Ltd.*, § 50 (Aug. 9, 2015) (Isr.) https://www.nevo.co.il/psika_html/mechozi/ME-12-09-10466-22.htm; *DerivC* (DC TA) 26814-12-14 *Menashe v. Uvision Air Ltd.*, § 24 (May 5, 2016) (Isr.) https://www.nevo.co.il/psika_html/mechozi/ME-14-12-26814-89.htm.

stricter judicial review is known as “entire fairness.”⁷¹ It seems that some aspects of substantive judicial review embodied in Delaware’s entire fairness doctrine have been recently adopted in Israel, first by the Economic Division of the Tel Aviv District Court⁷² and then by the Israeli Supreme Court.⁷³ In addition, on the basis of Delaware’s “enhanced scrutiny,”⁷⁴ Israeli courts have recently implemented an intermediate standard of judicial review to deal with situations involving potential conflicts of interest between the company and its directors.⁷⁵ Such conflicts are not sufficiently strong to trigger entire fairness, but they also do not comfortably permit business judgment deference.⁷⁶

It seems that the Israeli rulings represent a strict regime of directors’ and officers’ liability, sometimes stricter than Delaware’s precedents.⁷⁷ This puzzling fact may contradict some of the theoretical premises regarding regulatory competition and convergence.⁷⁸ However, this case law—handed down with regard to public corporations registered in the Israeli Stock Exchange—reflects the fact that unlike Delaware corporations,⁷⁹ Israeli public corporations are mostly dominated by controlling majority shareholders who appoint most of the board of directors.⁸⁰ Accordingly, in the context of Israeli public corporations, a stricter protection of dispersed minority shareholders is important to increase investors’ trust in the capital market.

71 See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

72 CA (DC TA) 26809-01-11 *Kahana v. Makhteshim-Agan Ltd.*, § 4.C, Nevo Legal Database (May 15, 2011) (Isr.), https://www.nevo.co.il/psika_html/mechozi/me-11-01-26809-97.htm.

73 CivA 2718/09 “Gadish” *Kranot Gmulim Ltd. v. Elscint Ltd.*, §§ 40-44, Nevo Legal Database (May 28, 2012) (Isr.), https://www.nevo.co.il/psika_html/elyon/09027180-n16.htm.

74 The enhanced scrutiny standard of judicial review was developed in *Unocal Corp v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

75 See, e.g., *Verdnikov* 7735/14 (Isr.); CivA (DC TA) 55916-02-18 *Payne v. Collinson*, § 26-30, Nevo Legal Database (Apr. 29, 2018) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-18-02-55916-810.htm.

76 *Id.*

77 See, e.g., *DerivC* (DC TA) 13663-03-14 *Newman v. Financitech Ltd.*, Nevo Legal Database (May 24, 2015) (Isr.) (increased judicial scrutiny of duty of care), https://www-nevo-co-il.lib.clb.ac.il/psika_html/mechozi/ME-14-03-13663-11.htm; *DerivC* (DC TA) 47490-09-13 *Toelet Latzibur v. Clal Industries Ltd.*, Nevo Legal Database, § 32 (Aug. 6, 2015) (Isr.) (more judicial scrutiny than in Delaware’s precedent of *MFW*), https://www.nevo.co.il/psika_html/mechozi/ME-13-09-47490-388.htm; *DerivC* (DC CT) 10466-09-12 *Ostrovsky v. Hevrat Hashkaot Discount Ltd.*, Nevo Legal Database (Aug. 9, 2015) (Isr.) (increased judicial scrutiny of duty of care), https://www.nevo.co.il/psika_html/mechozi/ME-12-09-10466-22.htm; CivA 7735/14 *Verdnikov v. Allovitz*, Nevo Legal Database (Dec. 28, 2016) (Isr.) (even a *pro rata* dividend can breach the duty of loyalty), https://www.nevo.co.il/psika_html/elyon/14077350-e06.htm; CivA 7657/17 *Bardichev v. Feuchtwanger*, Nevo Legal Database (June 18, 2020) (Isr.) (even a sale to a careless buyer can be considered a sale to a looter), https://www.nevo.co.il/psika_html/elyon/17076570-R21.htm.

78 See discussion *supra* Part I.A.

79 See Zohar Goshen, *Controlling Corporate Agency Costs: A United States-Israeli Comparative View*, 6 CARDOZO J. INT’L & COMP. L. 99 (1998) (pointing out the differences in the structure of the Israeli and the U.S. capital markets and the different agency problems that characterize each of the markets).

80 See Dov Solomon, *Rational Apathy of Shareholders: How to Awaken Investors from Their Sleep?*, 39 TEL AVIV UNIV. L. REV. 317, 322-26 (2016) (describing the concentrated structure of the Israeli capital market and analyzing the agency problem between the minority and majority shareholders that characterizes concentrated-ownership companies).

Also the result of the significant influence of Delaware corporate law on Israeli law is the adoption of ad hoc special independent committees.⁸¹ These committees are set up by the board of directors to simulate, as much as possible, a market process and thus allow the company to enjoy a lesser standard of judicial review even in situations such as those involving controlling shareholder transactions or decisions regarding the filing of a derivative claim, which usually justify stricter judicial review. Based on customs and precedents from Delaware courts, a handful of recent decisions of the Economic Division of the Tel Aviv District Court have held that a properly constructed and well-functioning special committee of independent directors may afford the company some benefits when it defends a claim filed by dissatisfied shareholders.⁸² For example, the Economic Division was strongly inspired by Delaware's *Zapata Corp. v. Maldonado*⁸³ when it recognized for the first time the status and function of a special litigation committee in Israeli law.⁸⁴

3. Regulatory Measures

The third sphere in which the effort to emulate Delaware law is being made has to do with the work of regulatory authorities, most notably the Israeli Securities Authority (ISA). In fact, the Goshen Committee was established within the ISA,⁸⁵ and its recommendations were mostly implemented by the ISA when the authority was chaired by Professor Zohar Goshen, during his term from 2008 to 2011. Moreover, the ISA, as a part of the Ariav committee,⁸⁶ was the driver behind the 2010 amendment of the Israeli Law of the Courts [Combined Version], 1984, that established the Economic Division of the Tel Aviv District Court, based on the model of the Delaware Court of Chancery, and dedicated to fast-tracking and resolving corporate disputes.

Throughout the last two decades, the ISA issued countless legal opinions and guidelines emulating Delaware's legal principles and has often submitted legal positions to the Economic Division supporting the emulation of Delaware law. One recent example of the ISA's regulatory position, which reflects the combined multilayered effort to emulate Delaware law, is the disclosure guidance issued by the legal department of the ISA regarding the procedures and outcomes of independent committees appointed by boards of directors to cleanse corporate transactions with controlling shareholders. The legal opinion clearly acknowledges that the disclosure

81 The incentive to establish a special independent committee to negotiate with the controlling shareholder came following the Economic Division's decision in CA (DC TA) 26809-01-11 Kahana v. Makhteshim-Agan Ltd., § 4.C, Nevo Legal Database (May 15, 2011) (Isr.), https://www.nevo.co.il/psika_html/mechozi/me-11-01-26809-97.htm.

82 *Id.*

83 *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).

84 *DerivC* (DC TA) 32690-10-11 *Gotlieb v. Ayalon Achzakot Ltd.*, Nevo Legal Database (Sep. 3, 2012) (Isr.), https://www.nevo.co.il/psika_html/mechozi/ME-11-10-32690-33.pdf.

85 See GOSHEN COMMITTEE REPORT, *supra* note 67.

86 See *supra* note 54 and accompanying text.

of a proper process conducted à la Delaware's standards is required if the corporation seeks BJR protection from the court.⁸⁷

In sum, this Part sheds light on the recent phenomenon of significant approximation of the Israeli corporate law to Delaware corporate law. In the next Part, Israeli corporate law will serve as a test case to examine the success of this approximation in achieving the purpose of increasing the willingness of investors to invest in Israeli corporations and accept Israeli law.

II. THE QUALITATIVE STUDY

A. Methodology

Our research is based on qualitative analysis of semi-structured interviews of nineteen practitioners specializing and currently engaged in cross-border corporate mergers and acquisitions.⁸⁸ All interviews were conducted between June 2020 and October 2020,⁸⁹ and all were recorded.⁹⁰ We promised all interviewees that their identities would remain confidential to elicit candid responses and enable them to use nonpublic cases and events as examples. Each interview took forty-five to sixty minutes.⁹¹

To locate and approach the interviewees, several methods were used.⁹² Some were approached on the basis of personal acquaintance with the researchers. Some were

87 101-23 Legal Position by the Israel Securities Authority, *Disclosure Regarding Special Committee for negotiations with controlling shareholders* (26 October 2020), https://www.isa.gov.il/%D7%92%D7%95%D7%A4%D7%99%D7%9D%20%D7%9E%D7%A4%D7%95%D7%A7%D7%97%D7%99%D7%9D/Corporations/Staf_Positions/SLB_Decision/Control_Oner/Documents/EMDA261020.pdf

88 Regarding the increasing use and prevalence of qualitative methods in legal research, see generally Norman K. Denzin & Yvonna S. Lincoln, *Preface*, in *STRATEGIES OF QUALITATIVE INQUIRY* (Norman K. Denzin & Yvonna S. Lincoln eds., 3rd ed. 2008); Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in *OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 926 (Peter Cane & Herbert Kritzer eds., 2010).

89 We are aware that during this period, the COVID-19 pandemic imposed significant travel limitations on a national and global level and inflicted national and global financial distress on a widespread scale and particularly in certain economic sectors, such as tourism and aviation. Our interviewees indicated that despite the pandemic, their business activities did not change in any material way. Most of them were interviewed in their offices and all of them reported that they were busy and felt no significant change in their workload during the pandemic. None of them thought that the pandemic should have an effect on the choice-of-law issue discussed in this Article.

90 All the interviews are on file with the authors.

91 Semi-structured interviews are generally used to allow respondents to describe the field of research in their own words. This technique enables the researchers to accumulate more information and develop a complex and nuanced understanding of the field. See generally Annie Irvine et al., *Am I Not Answering Your Questions Properly?: Adequacy and Responsiveness in Semi-Structured Telephone and Face-to-Face Interviews*, 13 *QUALITATIVE RSCH.* 87 (2013); Michele J. McIntosh & Janice M. Morse, *Situating and Constructing Diversity in Semi-Structured Interviews*, 2 *GLOB. QUALITATIVE NURSING RSCH.* 1 (2015); Kathleen M. Blee & Verta Taylor, *Semi-Structured Interviewing in Social Movement Research*, in *METHODS OF SOCIAL MOVEMENT RESEARCH* 92 (Bert Klandermans & Suzanne Staggenborg eds., 2002).

92 Regarding sampling techniques in qualitative research, see Webley, *supra* note 97, at 932.

reached through “snowballing.”⁹³ The snowballing technique was used specifically to contact lawyers in different countries, to diversify the pool of respondents to include lawyers from the United Kingdom, and to increase the number of women in the pool of interviewees. We also approached lawyers who are leading practitioners in the field according to international legal rankings such as Chambers and Legal500.

The final selection of interviewees included practitioners from the United States, United Kingdom, and Israel.⁹⁴ Collectively, they have experience with thousands of cross-border investment mergers and acquisitions.⁹⁵

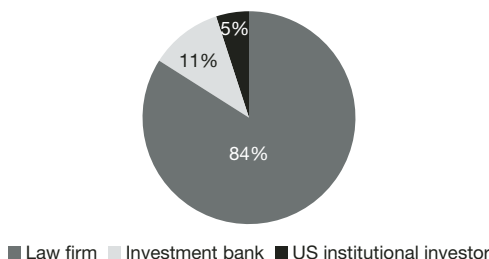
The pool of interviewees included nineteen practitioners: eighteen lawyers and one economist.⁹⁶ Sixteen of the lawyers are leading partners, founders, or name partners in law firms. Three interviewees work for major international private equity funds or other global institutional investors; of these, two are lawyers and one is managing the national activities of a global institutional investor. The professional affiliation of the subjects is presented below in Chart 1.

93 Snowball sampling uses a small pool of initial subjects who are then asked to nominate other potential subjects who meet the criteria of the study. The term “snowballing” reflects an analogy of the pool of subjects to a snowball increasing in size as it rolls. The snowball sampling technique is often used in qualitative empirical studies when the traits of the sampled subjects are rare and obtaining additional participants in a subject pool is difficult without referrals from existing subjects. In the case of our study, the non-probabilistic nature of the snowballing technique is somewhat mitigated by the fact that the interview subjects were drawn from chain referrals starting from several unrelated initial interviewees, located in different countries. *Id.*

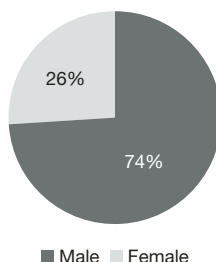
94 We experienced almost no rejections when we approached the potential interviewees. We approached a leading female partner in a law firm, who, due to the significant workload and major deals she was managing, explained that she would be unavailable and referred us to another partner in the firm, a man. One New York practitioner was too busy to be interviewed and one California lawyer did not respond to our approach.

95 One practitioner based in New York estimated that he had concluded 600 deals in his career. Another lawyer based in London estimated that his team handled an average of 50 deals per year.

96 The picture that emerges from the interviews is that lawyers explicitly influence the choice of the governing law. Even sophisticated investors are relatively less concerned about the governing law and they rely on the advice of lawyers in developing their perception about the suitability of the potential choice of legal regimes. This finding is also supported by other studies. *See, e.g.,* Juliet P. Kostritsky, *Context Matters—What Lawyers Say about Choice of Law Decisions in Merger Agreements*, 13 DEPAUL BUS. & COM. L.J. 211, 221-22 (2015) (finding that lawyers are making the determination about the choice of law in merger agreements, not the clients); Baum & Solomon, *supra* note 11, at Section III.B.2.f (uncovering the significant role played by lawyers as well as the dynamics of the interaction with their clients that yields the final choice of law in M&A transactions). Therefore, our sample consists almost entirely of lawyers, some of them insiders in large global investment corporations. Naturally, lawyers have self-interests that may diverge from their clients. *See* Kostritsky, *id.*, at 222-23 (illustrating the potential conflicts of interest in the principal-agent relationship between corporations and their lawyers in the context of choice-of-law provisions in merger agreements). However, these self-interests are not the most influential factors affecting the decision on the governing law in transnational M&A deals. *See* Baum & Solomon, *id.*

Chart 1: Professional Affiliation of Interview Subjects

Of our interviewees, fourteen are men and five are women. The gender distribution of the pool of subjects is presented in Chart 2.

Chart 2: Gender of Interview Subjects

Eleven are Israeli lawyers working for top-tier Israeli law firms.⁹⁷ Ten of the eleven Israeli lawyers have significant work experience in international law firms. Of these, nine worked in international law firms based in New York or in major U.S. law firms and were licensed by one or more of the U.S. state bars.⁹⁸ One worked in a London-based firm. Two of the Israeli lawyers were U.S.-born and -trained and had immigrated to Israel. One Israeli lawyer is the head of an Israeli firm's New York office and resides permanently in New York.

Any additional categorization of our interviewee pool, for example, based on their country of domicile or legal origins, would be misleading. How would one categorize a lawyer born in the U.S., educated in a top-tier U.S. university, who practiced in a major U.S. law firm before moving to Israel and working as a partner

97 The large representation of Israeli lawyers in the pool of interview subjects is not due to their geographic accessibility to the authors, but a natural outcome of reaching the point of "satiation" in the process of interviewing the subjects. By satiation, we refer to the point at which additional interviews do not elicit additional meaningful responses. The relative heterogeneity of responses elicited from Israeli lawyers as compared to the relative homogeneity of responses from U.S. lawyers, as discussed in detail in the next section of the Article, required conducting more interviews with Israeli lawyers before reaching the point of satiation.

98 Three Israeli interviewees (as opposed to none from the United States) hold doctoral degrees (SJD) from Harvard University.

in a London-based global firm? How would one categorize an Israeli lawyer who spent most of his career in the U.S after concluding his doctoral degree in a leading U.S. university, lives in Israel, but represents almost exclusively public corporations traded on U.S. stock exchanges? How would one categorize a subject that was born in the Far East, studied in the U.S., but now practices global M&As from London? Our subjects were chosen for their global perspective, derived in most cases from their cosmopolitan careers and experience.⁹⁹

The main purpose of the qualitative study was to collect data from the field in order to contribute to the ongoing theoretical debate on interjurisdictional competition in the market for corporate law. Specifically, it examined whether the Israeli project of approximating Delaware corporate law has succeeded in attracting incorporations and watering down the natural reluctance of global investors to accept an unfamiliar corporate law when engaging in cross-border corporate M&A transactions involving an Israeli party. We did, however, have two hypotheses. First, given the literature on corporate charter competition in the U.S. and the two decades of Israeli efforts to emulate Delaware law, we hypothesized that the interview subjects would all be aware of the global competition/convergence trend and that Israeli interviewees would be aware of the national approximation process. Second, we hypothesized that lawyers would be inclined to favor the law of their home jurisdiction and that this home bias would be particularly strong in the case of Israeli lawyers if they assert that the approximation to Delaware was meaningful and successful.¹⁰⁰

The interviewees were asked a set of open-ended questions adapted to their jurisdiction. They were asked in what stage of the negotiations of a corporate transaction the issue of governing law would be raised. They were then asked whether the venue of potential litigation would have an influence on the choice-of-law decision.

The interviewees were asked whether their choice of law is influenced by the type of the deal, such as (a) when the acquisition is of all the shares of the target corporation and thus the target corporation is or becomes privately held by the acquiring corporation or (b) when the deal reflects a majority or minority investment in the shares of a corporation. The underlying assumption was that the former usually requires primarily a stock purchase agreement (SPA) whereas the latter would also require a shareholder agreement (SA) or some other form of legal document that governs the rights and liabilities of shareholders.

The interviewees were asked which party raises the governing-law issue and to what extent this is an issue of concern to the client or the business-side decision-

99 Unless otherwise explicitly indicated, in the text below we identify the interviewees according to a combination of citizenship and country of domicile. Hence, when quoting a "U.S. lawyer," we refer to an interviewee who is a U.S. citizen residing in the U.S.

100 One potential bias of the results has to do with the fact that a lawyer may be inclined to favor the law of the jurisdiction in which she was initially trained. In the case of the interviewed Israeli lawyers, this concern is mitigated by the fact that at least two of the subjects were initially trained in the U.S. and an overwhelming majority of the Israeli interviewees had significant U.S. practical experience. In the case of U.S.-based subjects, we could not mitigate the potential bias and this may explain some of the homogeneity in the responses of this group of subjects.

makers. They were asked whether a demand by an opposing party that a foreign jurisdiction's law govern the M&A transaction would deter business decision makers from pursuing the corporate transaction.

On the assumption that investors often have opportunities to invest in corporations that are incorporated in a foreign jurisdiction, we asked the participants whether investors would be deterred by the foreign law of the place of incorporation or by other aspects of an investment in a corporation incorporated in a jurisdiction that is not the investor's home jurisdiction.

The interviewees were also asked about the relationship between the place of incorporation and the forum of potential litigation and their effect on the choice of which jurisdiction's law would govern. Interviewees were also asked about the effect on the choice of law of the difference between common-law and civil-law systems.

Focusing on the Israeli case, interviewees were asked whether they recognize an approximation of Israeli corporate law to the corporate law of Delaware. As a follow-up, they were asked to elaborate on the effect of any such approximation on the decision where to incorporate and on the choice of governing law in M&A agreements. They were also asked to comment on the role of the specialized Israeli corporate law court in the approximation process. In the following Parts we survey the responses.

B. The Israeli Approximation of Delaware Corporate Law

In this section, we discuss our findings regarding the importance of the choice of law in the corporate M&A setting and whether practitioners perceive a global approximation of corporate laws in general, and in the Israel-Delaware case in particular. A persuasive majority of interviewees in this research recognized the existence of a global process of approximation in corporate law. This recognition appeared in eighteen of nineteen interviews that addressed this issue (approximately ninety-five percent). Regardless of the jurisdiction in which the interviewees were practicing, they indicated that laws or practices have evolved in a way that allows local lawyers to alleviate clients' concerns about unfamiliar corporate laws by explaining that "our corporate law is no different than others."¹⁰¹

In a response that reflected the prevailing view, a UK-based partner in an international law firm summarized as follows:

Delaware is a code name. Actually, Delaware is similar to any other common law. The advantage of Delaware is that they built a very practical system, . . . very user-friendly to the so-called clients—the parties that go there to set up a corporation and run it . . . other countries in the world also try to be efficient in that sense. Israel, too.¹⁰²

The Israeli case is unique. The approximation of Israeli corporate law to Delaware corporate law was driven by, among other things, an effort to convince Israeli

101 Respondent #17, interviewed on August 15, 2020. The numbers attached to the respondents were assigned randomly.

102 Respondent #9, interviewed on August 17, 2020.

entrepreneurs to incorporate in Israel rather than in Delaware.¹⁰³ Equally important was a desire to convince foreign investors—in particular, U.S. or global investors—to invest in Israeli corporations governed by Israeli corporate law without attributing any legal risk to the uncertain and unfamiliar legal system that might be reflected in a negative premium on the valuation of the target corporation. Israel thus serves as a unique case study for the effects of an approximation of its corporate law to the corporate law of Delaware. The interviews were therefore designed to understand whether the approximation of Israeli corporate law to Delaware corporate law is perceived as a meaningful phenomenon and whether it has achieved the effects that it was designed to achieve.

Our interviewees agreed that the governing law issue and the forum of dispute resolution will come up in every cross-border M&A transaction at a relatively preliminary stage. The document that will reflect this choice will usually be the initial nonbinding documents exchanged between the parties: a letter of intent (LOI),¹⁰⁴ memorandum of understanding (MOU),¹⁰⁵ term sheet,¹⁰⁶ or even a non-disclosure agreement (NDA), the last of which is usually sent to potential investors as a prerequisite for conducting a due diligence investigation.

Obviously, the approximation of corporate laws is not the only determinant in the decision of entrepreneurs to incorporate in a jurisdiction, nor is it the only reason for the parties in an M&A deal to adopt a jurisdiction's corporate law as the governing law of the transaction.¹⁰⁷ The purpose of the study is therefore to assess whether the approximation of Israeli corporate law to Delaware's influenced the role of the law in these choices.

It is important to note that the choices of the law of incorporation and the law governing M&A transactions are closely linked to each other. Increasing the willingness of investors to invest in Israeli corporations, governed by the Israeli Companies Law, implies an increased willingness to accept Israeli law as the governing law of the M&A deal. This is because often the choice of the law governing M&A agreements will be one and the same as the law of incorporation. One Israeli lawyer explained that as a rule of thumb, the governing law of the M&A transaction should not create

103 See *supra* Part I.C.

104 A letter of intent is a nonbinding document declaring the preliminary commitment of one party to do business with another. It outlines the chief terms of a prospective deal.

105 A memorandum of understanding is an agreement between two or more parties outlined in a formal document. It is not legally binding but signals the willingness of the parties to move forward with a contract.

106 A term sheet is a nonbinding agreement that shows the basic terms and conditions of an investment. It serves as a template and basis for more detailed, legally binding documents.

107 We focus on those M&A transactions in which the issue of the governing law is up for negotiation. This is not always the case, regardless of approximation. The nature of the parties and the dynamics of the negotiations imply that approximation would not matter when the investor's size, power or economies of scale dictate a preference towards the investor's convenient choice of law. For example, in the Israeli start-up industry, where many fledgling companies are acquired by U.S.-based tech giants, this is sometimes the case. According to an Israeli lawyer, "Large sophisticated players like Intel, Cisco, IBM, do countless acquisitions, not only in Israel. In these cases, it's only Delaware or New York as a matter of policy. They are very strict about this. We don't even argue."

a “mismatch” with the law of incorporation.¹⁰⁸ A Delaware lawyer reflected the view of other interviewees by saying that “if you have an Israeli company, use Israeli law; if you have a Delaware company, use Delaware law.”¹⁰⁹ He added that “courts in Delaware criticize hybrid agreements of governing law; for example, corporate matters are construed by Delaware law and contracts by Israeli law. Courts criticize that by saying you buy yourself a mess because there are conflicts.”¹¹⁰

This section proceeds as follows. First, we uncover the interviewee’s polarized view of the Israeli approximation’s success. We then present the findings regarding the approximation’s influence on governing law choices. Finally, we present the findings regarding the role of the specialized Israeli corporate law court in the approximation process.

1. Approximation: Yes or No?

Israeli respondents were divided on whether the differences between Delaware and Israel are significant or minor for U.S. investors. While eight of them described Israeli corporate law as “more or less similar” to Delaware’s or other major U.S. state corporate laws, four argued that the differences are beyond bridging. One of the latter said, “I would never tell anyone that Israeli law is like Delaware law.”¹¹¹

In terms of the use of U.S.-driven standard agreements, the Israeli lawyers agreed that the contracts are on par with what a U.S. lawyer would be familiar with. A veteran Israeli lawyer said:

When I came back from New York in 1994 and we started doing VC deals, we took the documents from the VCs in the West Coast and we tailored them to Israeli law. So, the U.S. funds feel at home when they see the Israeli corporate documents of a start-up. It’s in English and it’s mostly what they know.¹¹²

This excerpt reflects the fact that the process of approximation can be traced to the venture capital scene in the early 1990s and was driven, among others, by practitioners in the industry.

Has there been a successful approximation of the material aspects of Israeli corporate law to Delaware’s? The Israeli lawyers disagreed with each other. Although a majority of the interviewed Israeli lawyers described the differences between Israeli and Delaware corporate laws as minor and easily surmountable, others said that the distinctions are wider.

Several lawyers mentioned differences between Israel and Delaware that needed explaining to U.S. clients, but these interviewees did not describe the differences as a material divergence. Among the recurring examples of differences that U.S. clients find unusual in Israeli law were the public and constitutive nature of the registration of shareholders in public companies in the Companies Registrar,

108 Respondent #1, interviewed on November 2, 2020.

109 Respondent #3, interviewed on October 20, 2020.

110 *Id.*

111 Respondent #4, interviewed on October 20, 2020.

112 Respondent #6, interviewed on October 18, 2020.

which is part of the Israeli Ministry of Justice,¹¹³ as opposed to Delaware in which shareholder identities are kept in the company and are nonpublic; the requirement for written approval by *all* the shareholders for any decision of the shareholder assembly resolved in writing without convening an actual shareholder assembly;¹¹⁴ an obligation of shareholders to act in good faith;¹¹⁵ the fact that CEO duality is not permitted by default;¹¹⁶ a statutory gender diversity provision for independent directors on the board of a public corporation;¹¹⁷ and the Articles of Association that need to be in Hebrew. Several oddities were particularly relevant in M&A transactions: the need to have all the shareholders of a private company sign off on a sale of 100% of the company's shares unless there is a "bring-along" clause in the shareholder agreement;¹¹⁸ and a provision in the Companies Law that requires that after a merger notification is sent to the Companies Registrar the parties must wait fifty days before the merger is verified.¹¹⁹

One Israeli lawyer summarized:

There are actually quite a lot of things in Israeli corporate law that are not so intuitive for American investors . . . However, I don't see all of these things deterring investors. They generally feel comfortable with Israeli corporations.¹²⁰

On the other hand, one Israeli lawyer reported saying to investors that Israeli law is conceptually similar to Delaware law and that Israeli courts are pro-foreign buyers, but nevertheless adding: "There is a huge issue called directors' liability. In Israel you can't protect against a lot of directors' liability. Your directors' insurance or indemnity agreement covers basically good faith, but any breach of your fiduciary duty, criminal liability, civil liability, you're exposed. Delaware has more protection."¹²¹

Some of the divergences between Israel and Delaware can be attributed to the perception of Israeli lawyers regarding the courts. Some lawyers perceive the Israeli case law to be unpredictable whereas others expect the case law to predictably follow Delaware. An Israeli lawyer reflecting the former approach said:

I don't think I can say Israeli M&A law is as developed as the law in the United States. We have all the standard clauses in the agreements, but I can't say that courts

113 See §§ 36-44 Companies Law 5759-1999 SH 1711 189, 204 (Isr.), https://www.nevo.co.il/law_html/law01/139_002.htm.

114 See § 76 Companies Law 5759-1999 (The Israeli corporate law requirement that resolutions in writing be unanimous gives significant power to dissenting minority shareholders).

115 See § 192 Companies Law 5759-1999.

116 See § 95 Companies Law 5759-1999 (CEO duality is permitted only if the company meets the conditions of § 121).

117 See § 239(d) Companies Law 5759-1999.

118 "Bring-along" rights are rights that allow a majority shareholder to compel minority shareholders to sell their shares to an acquirer such that the minority cannot block a sale of one hundred percent of the corporation.

119 See § 323 Companies Law 5759-1999.

120 Respondent #8, interviewed on August 23, 2020.

121 Respondent #5, interviewed on October 18, 2020.

have ruled on these issues with the same frequency that they have been litigated in the United States.¹²²

By contrast, another Israeli lawyer contended that the approximation is so compelling that lawyers expect Israeli courts to reach Delaware-style outcomes even if the particular issue has not been discussed in the Israeli case law yet.¹²³ This interviewee gave the following example:

In one case of an Israeli corporation traded on a U.S. stock exchange, more than ten years ago, we had an offer from a bidder. At the time, we felt compelled to add a clause into the agreement that the board of directors will be subject to a “fiduciary out” obligation.¹²⁴ At that time there was no Israeli case law equivalent to the *Revlon* duty in Delaware.¹²⁵ In recent years, in similar situations we [have] no longer felt compelled to add such a clause because our feeling is that the Israeli case law, as it is currently interpreted by the Israeli specialized corporate court, would judicially recognize such a duty.¹²⁶

Another Israeli lawyer exemplified the point by describing the process of introducing U.S. directors to an Israeli board: “We explain to U.S. directors that the Israeli law is more or less similar to Delaware law in terms of care and fiduciary duties. The only difference is that Israeli law is less developed, which means that the answers we can give will sometimes be less certain.”¹²⁷ This lawyer then qualified this answer: “I’m actually not sure if the similarity is so big.”¹²⁸

The enthusiasm of some of the Israeli lawyers about the process of approximating Israeli corporate law to Delaware law is not shared by their U.S. counterparts. Four of five interviewed U.S. lawyers and one UK-based lawyer were extremely skeptical about the approximation effort.

A highly experienced New York M&A lawyer said: “You can’t just have a country, even if it’s a well-developed country, just announce one day that they are going to be like Delaware. It’s a long road from the theoretical to the practical.”¹²⁹

A Delaware lawyer rejected the Israeli approximation narrative:

122 Respondent #17, interviewed on August 15, 2020.

123 Respondent #18, interviewed on August 15, 2020.

124 A “fiduciary-out” clause allows the board to terminate the M&A agreement when there is a possibility of a better deal.

125 The *Revlon* duty of a board of directors under Delaware law requires that the board exercise a heightened level of care when negotiating a cash sale of a public corporation. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

126 Respondent #18, interviewed on August 15, 2020.

127 Respondent #17, interviewed on August 15, 2020. This lawyer added an example: “Recently, due to the COVID-19 pandemic, the share price of a public corporation dropped significantly and the board received a bid from an outside bidder for a price that was obviously well below the fair value of the corporation. We needed to explain to the board that the business judgment rule exists in Israel but that it is not as strong as it is in Delaware. At least that is our understanding of the Israeli case law. In general, I would say that the law regarding directors’ and officers’ duties is very similar to the United States.”

128 *Id.*

129 Respondent #12, interviewed on August 4, 2020.

That is totally nonsense . . . that's the prevailing view in Israel, but it is based on complete misunderstanding of the reality . . . Israeli courts do look to Delaware, but that's where it ends. They take the terms and bring them home and create some Israeli version of it.¹³⁰

When asked whether he could give examples of significant differences between Delaware and Israeli corporate law, he replied:

There are tons of examples . . . Everything that makes Delaware good does not apply in Israel, and not because Israel is bad; Israel is just similar to all the other jurisdictions and that's why they come to Delaware rather than New York or California.¹³¹

For example, this Delaware lawyer rejected the contention that Israeli directors' liability is similar to that of Delaware. He explained that the business judgment rule standard of review in Delaware creates a procedural barrier to litigation against corporate officers, whereas in the "Israeli version" the rule does not stifle litigation but rather reflects the fact that the court will examine the deal with a limited standard of review. He used the example of lawsuits filed in Delaware and in Israel against the directors of a failed electric-car company called Better Place:

Better Place went into insolvency proceedings in Israel. The Israeli liquidator brought a claim against the Delaware directors in Israel, claiming that they mishandled the company and so on . . . The Delaware directors were dragged into a massive litigation in Israel [based on] conduct which in Delaware would have been [thrown] out of court on day one. That is a huge difference.¹³²

To sum up, on both sides of the globe there is awareness of a process of approximation or emulation of Delaware corporate law in Israel. The Israeli subjects have an ambivalent view of that process, whereas U.S. interviewees are of the opinion that such a process is impossible by definition.

2. Did the Approximation Process Influence the Choice of Governing Law?

Most of the Israeli lawyers (eight of eleven, or approximately seventy-three percent) hold the view that the approximation of Israeli corporate law to Delaware law has made the issue of governing law less important in transnational M&A deals involving Israeli targets and indicated that major international investors are more willing to invest in Israeli corporations and accept Israeli corporate law as the governing law. However, given the more skeptical view from the U.S. lawyers and the remainder of the Israeli lawyers, a more nuanced picture emerges from the interviews.

One Israeli lawyer explained that U.S. investors will always prefer their national law and cautiously suggested, "I would argue that the developments in the Israeli corporate law enable us to say to U.S. investors that if all other issues have been resolved and this is the only remaining issue, it is not a problem to select Israeli law

¹³⁰ Respondent #3, interviewed on October 20, 2020.

¹³¹ *Id.*

¹³² *Id.*

as the governing law.”¹³³ This view was reinforced by a U.S.-trained lawyer based in Israel. He explained how apprehension about adopting Israeli law is mitigated: “I tell them [non-Israeli investors] that the Israeli courts are normal, fast, and fair, and most importantly that they give you the principles that you know from Delaware Usually, investors are content with that.”¹³⁴ Then, in awareness of the Israeli approximation process in recent years, he added: “I think this was not the case in the 1990s.”¹³⁵ In contrast, another Israeli lawyer explained that in U.S.-Israeli M&A transactions, “the experience and the familiarity with the Israeli market along with the fact that the corporate law is quite similar makes the issue of the governing law almost irrelevant.”¹³⁶

Other Israeli lawyers said that the willingness of foreign investors to accept Israeli corporations and Israeli corporate law is mostly driven by investment opportunities and by growing experience with the Israeli market. For example, an Israeli lawyer with particular expertise in the technology start-up industry said:

The first time is always the hardest. The more an investor had a good experience in Israel the easier it will become the next time. It matters what the legal advisors say. If they already have experience with Israel, they can relieve the concerns of the investor. I think it is less of a legal issue and more of a psychological or sociological issue.¹³⁷

This insight was echoed by other Israeli lawyers. One said that “the more private equity investors had experience in investing in Israel, the more willing they were to accept an investment in an Israeli corporation and accept Israeli law as the governing corporate law.”¹³⁸ Similarly, a U.S. lawyer currently working as a partner in an Israeli law firm explained that “I think that investors who have more experience with the Israeli market realize that accepting Israeli law would not be a legal adventure such as accepting Zambian law or the law of I don’t know what country.”¹³⁹

When Israeli lawyers used the terms “experience” or “track record” in reference to the willingness of foreign investors to accept Israeli law as the law of incorporation they were referring to two different meanings. One meaning of the term “experience” seems to refer to having experience with successful investments. In other words, the passage of time has proven that despite the Israeli locus of incorporation, U.S. investors were not deterred from investing in a corporation because the bottom line

133 Respondent #8, interviewed on August 23, 2020.

134 Respondent #16, interviewed on August 20, 2020. This lawyer explained, however, that other factors such as the use of the Hebrew language by the courts are an obstacle. He said: “What still poses a problem is the Hebrew language used by the Israeli court. Take, for example, an acquisition of [a] company for one billion dollars with the payments done in installments over a period of two years. In that case, we’re concerned that if something happens in the middle and we have to go to court all the litigation will be in Hebrew. This means that everything has to be translated to English during the legal procedure. In litigation of this magnitude, the lawyers of the foreign investors will not let the local lawyers run the court procedure on their own. The lawyers of the foreign investor will always ask to be involved in every step of the litigation [and] that will make things more complicated.”

135 *Id.*

136 Respondent #5, interviewed on October 18, 2020.

137 Respondent #17, interviewed on August 15, 2020.

138 Respondent #1, interviewed on November 2, 2020.

139 Respondent #14, interviewed on July 26, 2020.

was a profit. One Israeli subject said that “this was a matter of valuation. Entrepreneurs and investors believed in the past that you would get a better valuation in an IPO as a Delaware corporation [than as] an Israeli corporation. I think this has changed”¹⁴⁰ A second meaning in which the term “experience” was used referred to feeling more certain and comfortable with the foreign law. Another Israeli lawyer explained that the Israeli high technology industry started as early as the 1990s, hence, “after more than twenty-five years, many [foreign] lawyers already have the experience of at least one investment in Israel and they know that you can exit; they are less concerned.”¹⁴¹

On the investor side, experience emerges as an important factor alongside intermediaries such as trusted lawyers. An in-house counsel of a global PE fund that is usually focused on the United States and Europe but nevertheless chose to invest also in Israel explained the decision by referring to the overall experience gained by the fund after long interest in the Israeli market. He said, “I think when we started our journey in Israel, we preferred doing English law, but now we do a lot of stuff in Israeli law I think over time we are very comfortable [with the] Israeli law and forum.”¹⁴² When asked what made him comfortable with Israeli law, he replied:

We have access to really good lawyers, and when you go through a transaction and you discuss issues you understand how it is interpreted. I understand that often Israeli courts look to U.S. jurisprudence and sometimes take thoughts from there. You find a lot of documents drafted U.S.-style. There are a lot of both Israeli and Jewish American lawyers [who] practice in Israel. That feels like a strong basis [for being comfortable with] how things are done.¹⁴³

In contrast, U.S.-based lawyers rejected the idea that experience plays a significant role in the willingness to accept foreign corporate law. Regarding the willingness to accept Israeli law, one of them observed that “it has nothing to do with experience. There are many cases in which a U.S. company was willing to accept Israeli law without having any prior experience in investments in Israel.”¹⁴⁴ Another U.S. lawyer said, “Because the applicable law is not the most important thing on the list of our clients in terms of priorities, we are sometimes willing to accept Israeli law.”¹⁴⁵ Despite this claim, a New York M&A lawyer indicated that the applicable law does carry some weight in investment decisions:

Obviously, it's better if the local lawyers tell you that you can trust the local legal system [rather] than if someone says you should bribe the officials or something

140 Respondent #5, interviewed on October 18, 2020. She explained: “In the beginning, people were saying that you can't get a good valuation if you are an Israeli company; go be a Delaware company. That's not true anymore Take the book *Start-up Nation*. When that was published, that's when people started thinking Israeli high-tech is disproportionately better than anything else that has to do with high-tech. That's when the valuation gap diminished.”

141 Respondent #18, interviewed on August 15, 2020.

142 Respondent #10, interviewed on August 13, 2020.

143 *Id.*

144 Respondent #12, interviewed on August 4, 2020.

145 Respondent #3, interviewed on October 20, 2020.

like that. In some cases in African countries, we have actually had the local lawyers telling us specifically not to trust the local law. However, everything has to do with the dynamics. If you are very desperate to buy something in Bolivia and the competitor is a Bolivian company and the buyer is willing to accept Bolivian law, you are going to be choosing between local law or losing the deal. Sometimes you have to capitulate a lot in order to get the transaction done.¹⁴⁶

To summarize, we observe that for the interview subjects in this study, the mere approximation of corporate laws is not perceived as an overwhelming consideration in the willingness to accept foreign governing law. Note that this does not mean that the approximation process was not meaningful, but rather that it is not a sufficient condition for choosing an unfamiliar law and that it rarely changes the basic preference of one's home jurisdiction's law. There is some need for investors and their lawyers—unless the former have other overriding considerations regarding the transaction—to become comfortable with the unfamiliar law. This comfort can be achieved through a positive first-time experience, observing other market players, or relying on trusted intermediaries such as global or local legal advisors.

3. *The Role of the Specialized Courts in Israel*

Approximation of laws is not enough when the risk of litigation is substantial, and it must be complemented by an efficient court system. Therefore, the willingness to accept Israeli corporate law is also dependent upon the efficiency and stability of the court system. An Israeli lawyer claimed that the willingness of foreign investors to invest in Israeli corporations can be traced to the inception of the specialized Israeli corporate law courts in 2010.¹⁴⁷ One U.S. lawyer said, "There are jurisdictions [about] which you hear horrible stories. In Israel this is not the case because you have specialized courts."¹⁴⁸ A New York-based in-house counsel in a global investment bank said, "What I've been told is that Israeli courts look to Delaware a lot in answering questions about corporate law. I don't know if that makes us one hundred percent comfortable, but it's helpful."¹⁴⁹

However, a Delaware lawyer rejected the Israeli aspiration to emulate the Delaware Court of Chancery. He told the following story: "A few years ago the Israeli judges from the specialized economic court met the chief justice of Delaware and they told him that they rule as a court [by] adopting the Delaware corporate law but make it adaptable to the Israeli environment. The chief justice said, 'You can't do that.'"¹⁵⁰

The specialized court was an issue of contention among Israeli lawyers as well. An Israeli lawyer working for a large Israeli law firm and based in New York who strongly agreed with the existence and influence of the Israeli approximation process drew the line with the specialized courts and said: "The specialized Israeli courts

146 Respondent #12, interviewed on August 4, 2020.

147 Respondent #18, interviewed on August 15, 2020. See discussion *supra* Part I.C.

148 Respondent #12, interviewed on August 4, 2020.

149 Respondent #13, interviewed on July 29, 2020.

150 Respondent #3, interviewed on October 20, 2020.

are not as sophisticated as the Delaware courts. [For example,] they hardly deal with cases regarding start-ups.”¹⁵¹

Another Israeli lawyer argued that there is a “huge difference” between the specialized Israeli court and the Delaware court:

I prefer Delaware over the specialized Israeli courts. Our agreements are done according to U.S. standards. I prefer to have a Delaware judge read them over an Israeli judge. An Israeli judge would not know how to read our 120-page agreement, which is in English. The first thing they will ask for is a translation . . . I follow Delaware case law. It's amazing how practical it is.¹⁵²

A UK-based partner in an international law firm rejected the premise that the Israeli corporate law court provides the stability and predictability of English courts or of Delaware's Chancery. He explained that he would refrain from using Israeli law or Israeli corporations, if possible, because of the uncertainty created by the use of standards in corporate law:

The issue with the courts is legal stability . . . If you go to one court you get one decision . . . and on another day [on the same facts] will get a different decision. This is because of standards like good faith. This is different than the situation in England or the United States, where you have stability. They make a point of not changing rules overnight. It takes twenty years of case law for the court to change from point A on the spectrum to point B.¹⁵³

To sum up, in the case of the specialized Israeli court, familiarity breeds skepticism. In other words, the more familiar the interview subjects were with the inner workings of the specialized court, the more skeptical they were of the claim that the Israeli courts provide Delaware-like judicial outcomes. This skepticism was directed at both the efficiency and sophistication of the specialized Israeli court as compared with those of the Delaware Chancery, and its material legal outcomes, their certainty and predictability.

III. ANALYSIS AND DISCUSSION

Our qualitative study sheds light on the phenomenon of approximation of Israeli corporate law to Delaware corporate law. It addresses three questions in the field of private international law. First, has Israel succeeded in emulating Delaware corporate law? Second, does this approximation encourage entrepreneurs to choose Israel as a locus of incorporation? Third, has the effort undertaken over the last two decades in Israel to approximate its corporate law to Delaware's achieved the purpose of making foreign investors more willing or at least less reluctant to accept

151 Respondent #2, interviewed on October 20, 2020.

152 Respondent #4, interviewed on October 20, 2020.

153 Respondent #9, interviewed on August 17, 2020.

the choice of law of a relatively unfamiliar jurisdiction in M&A deals?¹⁵⁴ In this Part, we analyze and discuss the findings that emerge from the interviews with regard to these important questions.

Respondents were divided in their comments on the approximation of Israeli corporate law to Delaware corporate law. Interviewees from the United States generally rejected the notion that Delaware law could be emulated. This strong view can be attributed to a natural home bias by lawyers trained in the U.S. Although home bias may explain the overwhelming opinion among U.S. lawyers, the views of non-U.S. lawyers that are supposed to be biased in favor of non-U.S. jurisdictions indicate that the skepticism towards the emulation theory is not unfounded. Indeed, the Israeli interviewees were divided among themselves. Some of them sided with the idea that Delaware could not possibly be emulated, but most of them opined that the approximation had succeeded and that Israeli corporate law is now conceptually similar to that of Delaware.

However, even some of the Israeli respondents who evaluated the process of approximation to Delaware as a success noted the inferiority of the specialized Israeli corporate law courts as compared to the Delaware Court of Chancery. Critics of the specialized Israeli courts explained that because of the uncertainty of their corporate case law, the Israeli courts do not provide the stability and predictability of Delaware's courts. The mixed opinions about the Israeli court's emulation of Delaware's Chancery can be explained by the fact that the approximation process was mostly driven by legislators, regulatory bodies and practitioners, whereas judges may have a different agenda. For example, judges may be interested in swifter resolution of disputes and reducing case backlog at the expense of producing predictable norms through intensive stable judicial rulemaking.

Language is an important barrier that needs attention. Our interviewees pointed out that the cost of litigation in a foreign language is prohibitive. Accordingly, when M&A deals involve long-term relationships (e.g., payments in installments or earnout clauses) or when they are large in value, international lawyers will be hesitant to agree to the applications of laws in a language they are not familiar with or to submit their clients to litigation in courts that conduct their proceedings in a foreign language.

Setting aside the issue of using a language other than English by Israeli courts,¹⁵⁵ our observation implies that Delaware's advantage will be impossible to emulate because a perfect emulation of Delaware's court is not a real possibility.

154 It should be noted that there is a direct link between the second and third questions. The choice of the law of incorporation has a strong influence on the law governing M&A deals. This is because according to our interviewees it is better to avoid a "mismatch" between the governing law of the M&A transaction and the law of incorporation. Therefore, increasing the willingness of investors to invest in Israeli corporations, governed by the Israeli Companies Law, implies an increased willingness to accept Israeli law as the governing law of the M&A transaction.

155 The possibility that the Israeli specialized courts will shift from Hebrew to English is not on the table. However, one cannot overlook tremendous efforts by Israeli lawmakers and regulators to enable the use of English in all other corporate administrative and regulatory procedures in Israel. Over the last two decades, Israeli regulators made significant efforts to reduce the regulatory burden on corporations

Our study reveals that, at least in the view of practitioners, corporate law is probably a secondary consideration when compared to tax regimes in influencing decisions regarding where to incorporate and which jurisdiction's law to choose as governing law in M&A transactions.¹⁵⁶ Seventeen of eighteen interviewees made the point about the dominance of tax considerations, and only one argued that tax issues are not crucial.¹⁵⁷ In contrast, none of our respondents said that significant changes in corporate law would have such an immediate impact on the decisions of entrepreneurs and investors with regard to the jurisdiction of incorporation and governing law. In other words, all other things being equal, emulation of a favorable corporate law may reduce the reluctance of entrepreneurs and investors to buy into an unfamiliar law. However, usually, all other things are not equal. Although our pool of respondents mostly alluded to tax considerations, these can be more broadly

listed outside Israel and wishing to cross-list on the Israeli stock exchange. Originally, § 40 of the First Schedule to the Securities Regulations (Details of the Prospectus and Draft Prospectus - Structure and Form), 5729-1969, KT 2417, 1794, https://www.nevo.co.il/law_html/lawo1/308_007.htm#med13 stipulated that corporations listed in the Israeli stock exchange must submit their reports and disclosures in Hebrew. Moreover, § 8B(e) of the Securities Regulations (Periodic and Immediate Reports), 5730-1970, KT 2591, 2037, https://www.nevo.co.il/law_html/lawo1/308_014.htm#Seif13 required that any valuation not in Hebrew be supported by a Hebrew translation. However, as of 2016, the Securities Regulations (Reports of a Corporation whose Shares are Included in T.A. Tech-Elite Index), 5776-2016, KT 7644, 982, https://www.nevo.co.il/law_html/lawo1/501_385.htm, allows corporations normally listed on Nasdaq to file the English language reports in Israel when they were cross-listed. In 2018, a proposal to allow the use of English in all disclosure documents by all the corporations listed in Israel was proposed in the Israel Securities Authority Draft Securities Regulations (Reporting in English), 5779-2018, <https://www.isa.gov.il/%D7%97%D7%A7%D7%99%D7%A7%D7%94%D7%95%D7%90%D7%9B%D7%99%D7%A4%D7%94/Legislation/Proposed%20Legislation/Suggestions/english/Pages/default.aspx>. This was later formulated in § 4 of the Securities Regulations (Details, Structure and Form of Listing Document), 5761-2000, KT 6063, 53, https://www.nevo.co.il/law_html/lawo1/308_054.htm, which states that “documents originally published or filed by the corporation in English can be included in the source language in the listing document”; and § 2(c) of the Securities Regulations (Periodic and Immediate Reports of a Foreign Corporation), 5761-2000, KT 6063, 52, https://www.nevo.co.il/law_html/lawo1/308_053.htm, which states that “documents originally published or filed by the corporation in English can be filed in the source language.”

156 The intricacies of cross-border M&A transactions and choice of applicable law probably involve other issues beyond those of taxation and corporate law. A few interviewees mentioned issues such as labor law, environmental law, and intellectual property. However, none of these fields of law was mentioned, even remotely, as a dominant factor in the choice of the law of incorporation or the applicable law in M&As. It should be noted that the reason for that may be a bias resulting from the fact that the pool of interview subjects was almost entirely comprised of practitioners whose primary underlying expertise is corporate law.

157 For example, an Israeli lawyer with specific tax expertise argued that in accordance with the general global characteristics of incorporation trends, incorporation decisions of Israeli entrepreneurs are driven by tax considerations: “In the past, Israeli start-ups were set up as Delaware corporations. Currently, most Israeli start-up corporations are set up in Israel because it’s more convenient and the legal fees are cheaper Until 2003 there was an advantage [in] setting corporations [up] abroad because the taxation regime was territorial, which means you could withdraw dividends from the corporation in the United States tax free. In 2003, Israel changed its tax regime and now there is no benefit to setting up your corporation in Delaware. Recently this has changed because the U.S. tax system introduced a tax benefit for founders and investors who hold the shares in a U.S. corporation for five years. For founders this benefit is worth up to three million dollars in saved taxes. This is significant.” The dominance of tax considerations is also supported by Baum & Solomon, *supra* note 11, at Section III.B.2.a (finding that the choice of law in cross-border M&A transactions is first and foremost driven by tax considerations).

generalized into business, financial, or profit margin considerations. As one U.S. lawyer explained, if the investor wants the deal, even the laws of Zambia (obviously given by the respondent as an example of an unknown law) would be acceptable.

The findings from this study reveal a potential interplay in global interjurisdictional competition between several fields of law. Approximation of laws in one field may result in increased competition in another field. For example, if the process of approximating corporate laws is perceived to have leveled the playing field, making entrepreneurs and investors indifferent between corporate laws, jurisdictions will turn to tax regimes in order to attract businesses.¹⁵⁸ Indeed, one of the respondents argued that given the approximation in corporate laws one can now observe that tax reforms in Israel and the United States create a pendulum swing effect on the locus of incorporation choice between these jurisdictions.¹⁵⁹

Interestingly, several external factors to corporate law may have reduced the attractiveness of foreign investment in Israel, such as geopolitical instability, the fact that Israel is not considered a tax haven, and foreign international law firms in Israel are few.¹⁶⁰ However, Israeli respondents reported a tremendous foreign influx of investments in Israeli corporate enterprises, which translated to M&A transactions. Although the Israeli interviewees reported that non-domestic investors were more willing than a decade or two ago to invest in Israeli corporations, they attributed this willingness to anything but the approximation to Delaware corporate law. Israeli respondents opined that the willingness to accept Israeli corporate law is driven by growing experience with investments in Israel, Israeli prominence as a “start-up nation,”¹⁶¹ successful IPOs of Israeli corporations on Wall Street, etc. These findings suggest that the approximation of corporate laws is not the major determinant in the decision of entrepreneurs to incorporate in a jurisdiction, nor is it the main reason for the parties in an M&A deal to adopt a jurisdiction’s corporate law as the governing law of the transaction.

That said, the interviews revealed a more nuanced picture that indicates the existence of corporate law jurisdictional competition between Israel and Delaware over investments rather than over incorporations.¹⁶² The majority of the Israeli interviewees described the differences between Israeli and Delaware corporate laws as minor and easily surmountable, while others said that the differences are beyond bridging. Israeli lawyers admitted they have been asked by U.S. investors about Israeli

158 To compare, within the United States the situation is exactly the opposite. Corporations are taxed federally, making taxation a less relevant factor for the choice of incorporation location, and thus making corporate law much more central in the jurisdictional competition.

159 For example, the U.S. global intangible low-taxed income reform has a significant influence on the location of incorporation.

160 The existence of international law firms in a specific jurisdiction increases the willingness of foreign investors to accept its corporate law. Repeat players such as major private equity funds, investment banks, and some institutional investors can easily afford the services of leading international law firms with national branches that employ domestic lawyers with international M&A experience. The latter facilitate the use of an unfamiliar domestic corporate law.

161 See generally DAN SENOR & SAUL SINGER, *START-UP NATION: THE STORY OF ISRAEL’S ECONOMIC MIRACLE* (2009).

162 In accordance with the theory proposed by Kamar, *supra* note 27.

corporate law, and at least half of the Israeli respondents admitted explaining that Israeli corporate law and Delaware corporate law are conceptually similar. These respondents also noted that for similar reasons, U.S. investors feel comfortable nominating their representatives to boards of directors of Israeli corporations.¹⁶³

Analyzing the responses of our subjects leads to the conclusion that the approximation process in and of itself is insufficient to induce practitioners or investors to accept an unfamiliar law. The quality of corporate law may be an experience good if one needs to use the law, for example by litigating in court. Otherwise, the quality of the law is a credence good. Therefore, to be effective, an approximation process requires a significant period of time before market participants acquire uncertainty-reducing experience with the unfamiliar law. Alternatively, the process may be effective if it is supported by trusted intermediaries, such as global law firms and internationally experienced lawyers that advise global investors and serve as “insurers” against unpredictable aspects of unfamiliar legal systems.

Our analysis of the interviews suggests that approximation creates dual and countervailing effects. On one hand, many Israeli lawyers feel that they can alleviate the concern of U.S. investors concerned about the unfamiliar jurisdiction. On the other, Israeli lawyers feel comfortable with the laws of Delaware, New York, and California.¹⁶⁴ Many Israeli M&A lawyers are licensed to practice in these jurisdictions and some are U.S.-born and -trained lawyers. Even one of the few Israeli respondents who had no practice experience in the United States said that she regularly reads the case law of the Delaware Court of Chancery.

This phenomenon explains two observations. First, the relatively deep understanding that Israeli lawyers have of corporate law in the United States makes them more critical of the approximation efforts. Second, Israeli lawyers feel comfortable selecting the law of the major popular U.S. jurisdictions as the governing law in M&A transactions.¹⁶⁵ In combination, these two observations explain why some Israeli lawyers prefer Delaware to Israel, particularly when the choice of Delaware law applies to a *de facto* investment in Israel.

163 It is challenging to separate two intertwined processes: clients get used to Israeli law, and simultaneously Israeli law approximates to Delaware law. This begs the question: how can one disentangle the effects of these two related processes? We note that U.S. lawyers pointed out that clients choose Israeli law not only when they are used to dealing with Israeli corporations and Israeli law. See *infra* Part II.B.2 (a U.S. lawyer asserting that “[T]here are many cases in which a U.S. company was willing to accept Israeli law without having any prior experience in investments in Israel”).

164 An Israeli lawyer described why he prefers choosing Delaware corporate law over the laws of less familiar jurisdictions such as Israel or Florida: “The cost-effective solution is to match the governing law and the jurisdiction. However, I’m representing an Israeli company acquiring a company incorporated in Florida. In that case you need to find something neutral that will not give the seller an advantage. I think it would be inappropriate to propose Israeli law when you acquire a corporation in the United States. Delaware would be a good middle ground. The law there is well developed, and you have certainty and stability, which is very important for the parties.”

165 Some may argue that the choice of Delaware corporate law is also driven by the desire of Israeli lawyers who were trained and licensed in the United States to gain a competitive advantage over other Israeli lawyers.

CONCLUSION

It is a common perception that Israel looks up to the U.S. and wishes to emulate many of the American legal developments, in many aspects. Specifically, in the context of corporate law, Israel aims to be like Delaware. This Article examines the two-decades-long process of approximating Israeli corporate law to Delaware corporate law designed to encourage incorporations and global investments in Israel. Using qualitative methods, it uncovers a complicated picture of the approximation process and its outcomes. While the U.S. interviewees overwhelmingly rejected the premise that Delaware corporate law could be emulated, the Israeli respondents were divided in their views. However, even those who view the approximation project as a success candidly admitted that there are more significant factors driving incorporations and investments in Israel, such as the Israeli prominence as a “start-up nation” and successful IPOs of Israeli corporations on Wall Street.

The findings of the qualitative study provide important insights for judges, policymakers, academics, and practitioners regarding the approximation project. Moreover, they shed unique light on the global phenomenon of convergence in corporate law driven by a deliberate strategy of emulating laws developed by more popular jurisdictions. Specifically, they suggest that not only may approximation make it easier to convince global investors to accept an unfamiliar local law, they also increase the familiarity of domestic practitioners with the emulated jurisdiction, and consequently the foreign law becomes more likely to be used. Our findings also suggest that a jurisdiction’s effort to level the playing field in one aspect of jurisdictional competition over transnational business flows will not reduce the competition. It will rather more likely shift the jurisdictional competition to another playing field.