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ARTICLE

Business Courts as Loci of Privilege: The Business Judgment Rule Abroad

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Abstract

Business courts can function as loci of privilege, both institutional and substantive, expressing a clear privileging of business as a sphere of social action. Using an original case study, we show how the establishment of a new business court privileged businesspersons in two ways: by providing them with expert judicial services and by receiving into law a rule that gives them unique protection from liability—the Delaware Business Judgment Rule. We did not find that this reception reflected court capture by businesspersons. It did reflect a conviction that Delaware law is best, inculcated by US-educated academics, and inter-jurisdictional competitive aspirations. Our case study demonstrates how business courts express the structured power of business and businesspersons.

Introduction

Market economies give businesses and businesspersons great power, and a privileged position in their legal, political, and economic systems (Lindblom 1982, 326–27). Business power is structural, stemming from business's position in the capitalist economy (Hacker and Pierson 2002, 281–82; Bell and Hindmoor 2014, 475). Courts are one arena of structural power. They affect the economy in several ways: by allocating resources between litigants, such as by ordering one to pay another; by embracing or abandoning rules that favor certain social groups; and by a court's own resources

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being allocated between different case and hearing types, such as where a specialized court has been created. Specialized courts are judicial tribunals that specialize in specific legal fields. They are often staffed by specialist judges who only hear certain types of cases. The specialized courts phenomenon is growing, mainly in developed countries (Ad Hoc Committee on Business Courts 1997, 948; Gramckow and Walsh 2013, 2). There are specialized courts for environmental cases, for cases concerning specific types of intellectual property rights, for family matters, for business matters, and more (Gramckow and Walsh 2013, 2).

Business courts are judicial tribunals or court divisions "with dockets comprised primarily or exclusively of business cases" (Ad Hoc Committee on Business Courts 1997, 947; Coyle 2012, 1918). They deal with diverse case types, "from complex corporate governance issues to commercial transactions" (Ad Hoc Committee on Business Courts 1997, 951). The parties involved in those cases are typically corporations, their officers, their shareholders, their creditors, and their directors. Business courts have been established in various US states (Ad Hoc Committee on Business Courts 1997; Coyle 2012) as well as in countries across Europe, Asia, Africa, and America, including Canada, Denmark, England, Ireland, the Netherlands, Tanzania, Thailand, Uganda, and Israel (Peeples and Nyheim 2008, 38) and in offshore jurisdictions such as Bermuda, the Cayman Islands, and the British Virgin Islands (Moon 2020, 1438). Channeling scarce public resources to such courts, such as by assigning judges to hear business cases exclusively, can channel them away from case types more directly concerned with assisting the vulnerable, such as tort or immigration cases.

Where a jurisdiction's substantive business law expresses an attempt to attract businesspersons to incorporate under the jurisdiction's law or use its courts, that law is likely to follow a business-friendly, and, specifically, a manager-friendly, direction. The best-known example of such a state of affairs is Delaware corporate law (Cary 1974; Roe 2005). Where specialized business courts apply substantive business law that favors stronger-than-average social groups (with "strong" meaning enjoying a substantial amount of some kind of capital—economic, political, or social), such as corporate directors and officers, those groups enjoy a double privilege, both institutional and substantive: rules of law advancing their interests, applied by judicial fora the existence of which prefers those same interests. This article illustrates business courts' preferential treatment of businesspersons. We ask how specialized business courts impact the distribution of resources between court users, as well as across society, and whether they express and enhance the existing structured power of business. We examine these questions by way of a case study, describing aspects of the creation and operation of the Israeli Business Court, formally known as the economic department of the Tel-Aviv District Court.

The Israeli Business Court was established as a local equivalent of the Delaware Court of Chancery (Shapira 2021, 689; Baum and Solomon 2022), providing an international example of institutional isomorphism (for which concept, see DiMaggio and Powell 1983; Beckert 2010; as applied to courts, see Corby and Latreille 2012; Frishman 2016). The Israeli Business Court was created by a 2010 statutory amendment, implementing a recommendation of a committee appointed by the Israeli Securities Authority to consider the adoption of a corporate governance code (Israel Securities Authority 2006, 44). Following its establishment, it quickly emerged

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as a focal point for an elite community of Israeli lawyers, judges, and legal academics characterized by a strong appreciation for Delaware corporate law. We describe how that appreciation drove the court to receive into Israeli law a Delaware law doctrine that the Israeli legislature had previously rejected: the Business Judgment Rule (BJR).

The BJR provides that absent bad faith, a conflict of interests, or uninformed decision making, courts shall not review or interfere with the substance of businesspersons' business decisions (Bainbridge 2004; 2015, 140; 2023, 66–70). It reflects business's structural power, in that courts, which review decisions by professionals such as physicians or engineers, as well as by politicians and public servants, leave the substance of businesspersons' decisions unexamined, confining themselves to examining the process whereby those decisions are made. While courts are not business experts, and their second-guessing of business decisions may create suboptimal incentives, the same is true of a court's review of decisions by all professionals except lawyers, as well as of decisions by politicians and public servants. In eschewing a substantive review of businesspersons' decisions, courts therefore prioritize businesspersons over other professionals. That courts leave much business decisionmaking unexamined demonstrates the distribution of social and economic power: courts' power trumps that of non-business professionals and, occasionally, that of politicians and public servants, but business's power trumps that of courts. This reflects the existing structured power of business.

We executed our case study using two research methods: a qualitative description of the creation of the Israeli Business Court and of the formative stages in the reception of the BJR into Israeli law and a quantitative analysis of an original database, including all 124 decisions given in the Israeli courts until July 17, 2021 where a court mentioned the BJR. We mined our database to obtain data concerning thirty-eight variables and extracted a broad array of descriptive statistics from this data.[1] We found that, while until the creation of a specialized business court, Israel had avoided adopting the BJR, turning down a key opportunity to do so by legislation, the rule was first applied just as the Business Court was being established and was then applied with growing frequency by the Business Court. Its constant application by that court led to the rule's adoption as binding precedent by the Supreme Court of Israel slightly more than six years after the Israeli Business Court's establishment.

The establishment of the Israeli Business Court was part of a significant transformation of Israeli corporate law, reshaping it so as to more closely resemble that of the state of Delaware. This transformation included a significant reduction in the risk of liability to which corporate directors and officers are exposed under Israeli law: where, before the transformation, directors and officers were subject to substantive evaluation of their conduct, approximation of Delaware law shielded them from such evaluation. Business court judges were especially quick to protect directors and officers from substantive evaluation of their conduct in cases of public and non-controlled corporations, where directors and officers are supposed to be more exposed to market discipline than in private and controlled corporations, respectively. Once the BJR was received into Israeli law, its ambit of application was quickly expanded from claims that defendant directors and officers had breached

[1] Our data, our codebook, and the statistics we produced are available in our Online Supplement at https://osf.io/p5463/

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their duty of care—the focal doctrinal site of the rule's application (Bainbridge 2023, 67)—to a large variety of other claims.

While our case study cannot be regarded as proof that business courts generally, across time and space, express and enhance the power of business and businesspersons, we do show that business courts can be a privileged adjudicatory channel accessible to businesspersons and their counterparties, which channel is used to change the law so as to express the interests of corporate directors and officers. Our study, executed in the vein of progressive or critical corporate law scholarship (see, for example, L. Mitchell 2001; Tsuk 2003, 2009; Talbot 2015; Kovvali and Strine 2022), demonstrates how a specialized court, funded by the state, entrenches existing differences in socio-economic power. Given the significant possibility that business courts serve to prefer businesspersons and corporate executives at the expense of others, we believe that the continued operation of these courts should be reconsidered.

The first section provides a review of the literature on business courts and their distributive impacts. The second section introduces our case study, providing our qualitative description of the creation of the Israeli business court and of formative stages in the Israeli reception of the BJR. The third section describes the database that we assembled and the analysis we undertook. The fourth section provides the results of that analysis, and the fifth section a discussion, situating those results in the literature on business courts described earlier and using them to discuss the question at the heart of our analysis: whether business courts serve to express and enhance the existing structured power of business. The sixth section concludes, pointing out avenues for future research.

Literative Review: Business Courts and Their Distributive Consequences

Business courts have been defined as "specialized trial court[s] that hear[] business disputes primarily or exclusively" (Coyle 2012, 1922). The operation of business courts is a key site for examining whether corporations' structural power is reflected and expressed in the legal domain. Like other courts, business courts are expected to be unbiased in applying and developing the law. An unbiased application and development of the law may or may not cohere with corporate interests: where the law itself expresses and promotes those interests, its apparently unbiased application may still promote them.

Scholars have identified potential strengths and weaknesses of specialized courts. Strengths include efficient case disposition, high quality, uniform adjudication resulting from specialized judges' expertise (Stauber 2007; Baum 2011, 32; Oldfather 2012, 854–57, 894), and the development of a "consistent and coherent body of" law in the specialized area (Nees 2007, 490). Weaknesses include "the need to litigate jurisdictional boundaries between generalist and specialized courts and the inconvenience to litigants of bringing cases to a geographically centralized court" (Gramckow and Walsh 2013, 33; see also Oldfather 2012, 863; Engstrom 2015, 1706–11; Steel 2015, 344); the risk that judges assigned to hear only some types of cases will find their time underutilized given the relatively small number of relevant cases (Gramckow and Walsh 2013, 33; Steel 2015, 344–45); the risk that familiarity between specialized judges and the repeat players appearing before them will lead to

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"potentially preferential engagement, thus increasing the danger of corruption . . . bias and prejudice in the judges' decisions" (Gramckow and Walsh 2013, 8; see also Steel 2015, 343–44); and the risk that specialized court judges will "see the decisions they make from the perspective of the field in which they work and give little weight to other perspectives," making the field of law with which they are concerned increasingly disconnected from the rest of the law (Gramckow and Walsh 2013, 35–36; see also Nees 2007, 496–97; Oldfather 2012, 858–60, 877–78, 896–99; Steel 2015, 342–43).

Business courts, in particular, seem to invite engagement on the part of their judges with the "milieu of high-prestige litigants and lawyers" with which they frequently interact (Baum 2011, 217). Business court judges may seek to provide adjudicative services that attract business persons. Such a pro-business approach can express bias (Nees 2007, 494–96). It can express cultural capture (Kwak 2014): judges can be influenced by the legal know-how and prestige displayed by counsel appearing for powerful business clients. This influence may make judges receptive to such counsel's positions. Business court judges may also be former transactional lawyers, who, as Luca Enriques (2002, 775) has noted, "can be expected to be quite lenient in judging their former clients' behavior, practices, and transactions." A pro-business approach on the part of business court judges can also express a commercial desire on the part of those judges, the courts service or other parts of government to sustain or increase business persons' use of the jurisdiction's incorporation or adjudication services.[2] The very creation of business courts is often "motivated by the belief that these courts will appeal to businesses and thus attract them to a state" (Baum 2011, 192; see also Nees 2007, 491–93; Coyle 2012, 1935). Not every business court is captured by business interests, especially given Daniel Carpenter and David Moss's (2014, 13) demanding definition of capture as "the result or process by which [law] is consistently or repeatedly directed away from the public interest and toward the interests of . . . industry, by the intent and action of the industry itself."[3] Lawrence Baum (2011, 189–90) believed that the corporate law output of the Delaware Court of Chancery and Supreme Court, taken as a whole, does not justify the thesis that they have been captured by corporate management. Still, a business court's adoption of pro-management doctrines may reflect capture, bias, or the jurisdiction's, court's, or resident lawyers' commercial interests.

Further, the existence of a specialized court for business-related cases may in many cases express a privileging of business over other spheres of human activity that create demand for adjudicative services. The allocation to business courts of high-quality judges as well as of other resources necessary to operate the court (Nees 2007, 484–87) may mean that they are taken away from other courts (Baum 2011, 194). While some believe that savings resulting from the allocation of complex business cases to specialist business judges "make[] the entire court system more efficient" (Post 1994, 3), this view does not take into account that business court judges may be subtracted from the judicial workforce hearing non-business cases, making the

[2] Shaping the law to attract litigants to a forum is a common law tradition (Klerman 2007; Klerman and Reilly 2016).

[3] Daniel Carpenter and David Moss (2014) were concerned with the capture of regulators. We believe their definition to also be applicable to the capture of adjudication systems.

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hearing of such cases less efficient. To be sure, other specialized courts, such as traffic courts and domestic violence courts, also manifest a privileging of the spheres of human activity with which they are concerned over other spheres. Privileging, in the sense used here, does not connote approval of the activity concerned; it connotes the dedication of public resources to combat a social problem. We focus on the privileging of business, without claiming it to be the only instance of such privileging.

Some business courts, such as the Singapore International Commercial Court, adjudicate disputes under law other than that of the court's home jurisdiction, not requiring the applicable law to be proven as fact, which courts normally require when litigants ask them to apply foreign law (Steel 2015, 336–37). This allocates judicial effort and the other necessary resources away from the development of local law.[4] It also allows business court litigants to bypass aspects of the court's domestic law that they may prefer to eschew. The availability of such a bypass again prefers business court litigants to persons litigating before other domestic courts, who may also wish to avoid parts of domestic law. The choice of foreign law is popular among businesspersons (Eisenberg and Miller 2009), but it is often unavailable to others, such as tort victims, and may not be respected by adjudicators.

Finally, Enriques (2002, 768) has identified "requisites [judges] must have in order for corporate law on the books (bad or good) to be good 'off the books.'" One such requisite is that judges "show no deferential attitude towards insiders when conflict-of-interest situations are involved." While application of the BJR does not necessarily contradict this requisite, its application to breaches of corporate directors or officers' duty of loyalty, which requires them to avoid conflicts of interest, does entail such contradiction. Our Israeli case study shows that this jurisdiction's zealous embrace of the BJR, which was much furthered by the Israeli Business Court, was extended to breaches of the duty of loyalty, contradicting Enriques's recipe for good corporate law in action.

Case Study: Rise of The Israeli Business Court and the BJR

Establishment of the Israeli Business Court

In this section we start to present our case study, describing the creation of the Israeli Business Court and its reception of the Delaware BJR in the teeth of a legislative decision not to receive it. The Israeli Business Court, officially referred to as the economic department of the Tel-Aviv District Court, was created by a 2010 statutory amendment, commencing operations in October 2010.[5] A second business court started operations in 2018 as part of the Haifa District Court.[6] The court has so far received limited scholarly attention. Yifat Aran and Moran Ofir (2020) have offered a quantitative comparison of case volume, case duration, and case results between the business court and other Israeli district courts, covering the first four years of the Israeli Business Court's operation (2010–14). They found that, while corporate and securities litigation rates increased following the Israeli Business Court's creation, the increase seems a result of the maturation of collective litigation in Israel generally

[4] For another process having the same effect, see Blair, Williams, and Lin 2008.
[5] For an earlier empirical study of the court's work, see Aran and Ofir 2020.
[6] See Judicial Authority 2024.

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rather than of the appearance of a business court. Once this court appeared, however, most corporate and securities litigation was filed there.

The Israeli Business Court does appear to have increased the efficiency of the Israeli legal system in resolving corporate and securities cases: it resolved such cases about as quickly (or slowly) as other Israeli district courts, despite hearing more complex cases than those other courts. Once the Business Court started operating, more collective cases (class and derivative actions) were settled prior to certification, while dismissals on summary judgment also increased (Aran and Ofir 2020, 186). Ido Baum and Dov Solomon (2022) provide a qualitative study of Israel's approximation of its corporate law to Delaware's, including its establishment of a business court. They evaluated the success of the approximation project generally, based on interviews with mergers and acquisitions practitioners. We innovate by focusing on a single crucial corporate law rule—the BJR—highlighting the Israeli Business Court's key role in the gradual reception of this rule in Israeli law by way of an intense quantitative mining of a database containing every Israeli judicial decision where the rule was as much as mentioned. The present study is also the first study of either the rise of the Israeli business court or of the Israeli adoption of the BJR from a critical, progressive perspective.

The court's creation implemented a recommendation of a committee appointed by the Israeli Securities Authority to consider the adoption of a corporate governance code. The committee discussed and recommended the creation of a business court despite the fact that its mandate had not included this topic (see the committee's letter of appointment, cited in Israel Securities Authority 2006, 47–48). In recommending the establishment of a business court, the committee, headed by Zohar Goshen, an Israeli professor teaching at Columbia Law School, listed the following advantages of a specialized business court: increased judicial expertise; the stability and consistency resulting from business law being developed by a small group of judges; quick, efficient adjudication; and the fact that such a court would be able to restrain the oppression of minority by majority shareholders. The same advantages were noted in the explanatory notes to the bill creating the Business Court.[7] The committee stated that

> the existence of a specialized court able to prevent oppression of minority shareholders is a key factor in improving the management of public corporations, developing the financial markets and improving the economy. . . . In the absence of a court able to prevent minority oppression, stock ownership shall not become diffuse [as controlling blockholders will prefer the continued unchecked exploitation of their position to selling stock]. (Israel Securities Authority 2006, 44)

Providing a clear example of the availability heuristic, the committee described the Delaware Court of Chancery as the only specialized court in the world (Israel Securities Authority 2006, 44). It explicitly suggested that Israel emulate Delaware by establishing a similar court (Shapira 2021, 689). It reported that all of the persons and entities who have communicated with the committee regarding its mandate have

[7] Courts Bill (Amendment no. 59) (Authority in Economic Matters), 5770-2010, 2010, 358.

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expressed support for the establishment of a specialized business court (689), though a perusal of those communications, as summarized in appendices to the committee's report, shows that most of them have not addressed the issue, and one actually opposed the establishment of a business court (Israel Securities Authority 2006, 59–70). Baum and Solomon (2022, 2, 11–18) note that Israel's emulation of Delaware had higher-level objectives: "[d]raw[ing] domestic entrepreneurs away from choosing Delaware over Israel as the locus of incorporation, and ... increas[ing] the willingness of foreign investors—especially US and global investors—to choose or accept Israeli corporate law as the governing law in cross-border M&A [mergers and acquisitions] transactions involving Israeli target corporations."

The Business Judgment Rule

Like jurists in other jurisdictions outside the United States (Branson and Keong 2004; Puchniak and Nakahigashi 2012; Gerner-Beuerle 2021), Israeli jurists have long been aware of the BJR. The BJR gives corporate directors and officers significant protection from liability being imposed following their decisions, actions, and omissions. It "provides that [the] court will abstain from reviewing board decisions unless those decisions are tainted by fraud, illegality, or self-dealing" (Bainbridge 2015, 140; see also Bainbridge 2004; 2023, 66–70; Rosenberg 2007). The BJR is a presumption that provides directors and officers with a degree of immunity as even cases of "clear mistakes of judgment rarely result in personal liability on the[ir] part" (Bainbridge 2015, 140). In so protecting directors and officers, it prioritizes them over other decision makers and, indeed, over all other potential tortfeasors.

While the decisions of other tortfeasors are evaluated according to a reasonableness standard, expressing, where defendants are professionals, how they are expected to behave as reasonable professionals, a legal system that adopts the BJR protects directors and officers from such evaluation and the consequent imposition of liability (Arkes and Schipani 1994; Tsuk 2009). Dalia Mitchell (2023, 4), a critical corporate law scholar, describes the BJR as a manifestation of "managerialism," an approach that trusts corporate managers' expertise. Her description is borne out by mainstream corporate law scholars arguing that directors should enjoy decision-making primacy and authority (Bainbridge 2023, 68) and that "a ... strict and continuous ... [accountability] can easily amount to a denial of [such desirable] authority" (Arrow 1974, 78).

Following its development in Delaware, the BJR has been adopted internationally, including in Italy,[8] Germany,[9] Spain,[10] and Australia.[11] The BJR's proponents argue that it promotes efficiency in the sense of maximizing shareholder value (Sharfman 2017). They believe that litigation that retrospectively examines directors' and officers' business decisions is inefficient (Winter 1977; Veasey 1998, 685). Because increases in shareholder value often result from the corporation undertaking risk, the BJR's proponents believe that shareholders prefer the law not to "create incentives

[8] Corte di Cassazione, Case no. 3652, April 28, 1997.

[9] Aktiengesetz (Stock Corporation Act), BGBl I, September 6, 1965, 1089, s. 93(1)2.

[10] Ley de Sociedades de Capital (Stock Corporation Act), Real Decreto Legislativo 1/2010, July 2, 2010, s. 226.

[11] Corporations Act 2001 (Cth), 5759-1999, 1999, s. 180(2).

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for overly cautious corporate decisions."[12] They believe that "[r]equiring perfect fail-safe systems in every corporation can be far more costly than any potential loss to the stockholders [from wrong judgment calls on directors' or officers' part]" (Winter 1977, 261).

The concept of market efficiency is based on corporations attracting investors by maximizing profits; the BJR allows corporate decision makers to undertake risk in order to achieve profit maximization, free from the fear of liability being imposed (Winter 1977, 276–79; Veasey 1998, 685). From a critical perspective, a legal system that applies the BJR is seen as protecting and prioritizing the interests of some of the most powerful economic actors in society: corporate directors and officers. While derivative suit plaintiffs—often shareholders who file suit using the corporation's own causes of action against its directors and officers—are sometimes themselves powerful economic actors, the BJR's application may lead to their loss or the loss of the corporation, which is consistent with the rule protecting economically powerful defendants. Further, the loss of the corporation, to which the duties directors and officers breach are owed, may impact not only the shareholders but also customers and employees, who are typically weaker actors.

Rejection of the BJR in the Israeli Corporations Act and Its History prior to the Creation of the Israeli Business Court

The Corporations Act 1999, the key current Israeli statute concerned with directors' and officers' duties, assimilates their duty of care to the general duty of care under the law of negligence.[13] During the Corporations Act's protracted enactment process (for which, see Ben-Zion 2006), three jurists involved in that process—Michal Agmon-Gonen, Davida Lachman-Messer, and Uriel Procaccia—tried to convince Minister Dan Meridor, then head of the Ministerial Legislation Committee, to "smuggle the business judgement rule into the definition of directors' and officers' duty of care" (Procaccia 2021, 50). The minister refused, believing that the BJR only applies where the relevant director or officer acted in good faith, and the act or omission attributed to them was not plainly unreasonable. Under such circumstances, the minister reasoned, the relevant act or omission would not be held negligent, rendering incorporation of the BJR in the Act unnecessary (50). For better or worse, then, a key member of the Israeli legislature and administration considered adopting the BJR in Israeli law during the drafting process of the Corporations Act, only to reject it. As a result, the Corporations Act did not, and still does not, mention the rule. Since Meridor's rejection of a proposal to incorporate the rule in the Act was not well known, Israeli jurists could consider the rule's incorporation in Israeli law an open question, yet to be decided, rather than a proposal that has been considered by the legislature, only to be rejected.

Prior to the creation of the Israeli Business Court, Israeli corporate law adjudication was relatively sparse and undeveloped. A few landmark decisions aside, the Supreme Court of Israel decided few technical corporate law questions, which was mainly a result of its heavy caseload (Procaccia 2002, 306–9). As a result, legal advisors

[12] *Joy v. North*, 692 F.2d 880, 886 (2d Cir. 1982).

[13] Corporations Act, 5759-1999, s. 252(a).

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tended to advise their clients to avoid litigating such questions before the Israeli courts (Procaccia 2002, 310). It was against this background that Israeli courts started citing the BJR. Like the 1990s attempt to incorporate the rule in the Corporations Act, judicial citation and, later, application of the rule expressed a conscious attempt to receive Delaware corporate law into the law of Israel. Proponents of this approach, including Zohar Goshen, Michal Agmon-Gonen, Davida Lachman-Messer and Uriel Procaccia, believed Delaware corporate law to be modern, popular, and desirable and wanted to receive substantive, institutional, and procedural elements thereof into Israeli law (Procaccia 2021; Shapira 2021, 689–91; Baum and Solomon 2022, 11–18).

The popularity of Delaware corporate law with many Israeli jurists seems to have been a result of their familiarity with that law, born of their graduate studies in the United States. Many Israeli legal academics, including those specializing in corporate law, have become an extension of the US community of legal academics, highly conversant in US law and academic legal discourse (Lahav 2009; Baum and Solomon 2022, 11n48). Such a background, habitus, or cultural capture can make reforming Israeli law to conform with US law appear natural. The normative contents of Delaware corporate law were thus received into Israeli law as a result of some Israeli academics' allegiance to, and cultural or intellectual capture by, US legal thought. Leading US academic experts in corporate law were consulted during the reception process (Baum and Solomon 2022, 12n50).

The BJR was first cited by Israeli courts as part of the law of Delaware, only to be later adopted as part of Israeli law. Early Israeli decisions citing the rule were often less than clear regarding its contents. The first case to mention the BJR, decided in 1992, merely noted that "a business judgment mistake is not, per se, a breach of the duty of care."[14] A 2006 case noted that "proof of a wrong prediction or business judgment does not suffice to impose personal liability on directors ... it is highly doubtful whether plaintiff could meet its burden without showing that directors did not exercise any business judgment at all, completely ignoring the red flags raised regarding the transaction."[15] These early cases merely say that a mistake does not necessarily constitute negligence; they do not state either the rule's structure as a rebuttable presumption or the conditions for rebutting that presumption.

Until the Israeli Business Court received the BJR into Israeli law in 2012, Israeli judges looking to state the rule's contents frequently relied on the views of Israeli legal academics. These academics were themselves, however, of different views regarding those contents. While both Irit Haviv Segal and Joseph Gross, each the author of a leading corporate law textbook, sought in their books to summarize the rule as formulated under the law of Delaware, they reached quite different formulations. Haviv Segal wrote that, under Delaware law, the BJR protects directors' and officers' acts and omissions from substantive evaluation where (1) they did not act out of self-interest; (2) the decision making was based on pertinent information collected; and (3) they actively made a decision (Haviv-Segal 2007, 515). Gross (2011, 185) wrote that "under US case law the Rule applies where (a) the business act is free of the director or officer's self-interest and was made in good faith; (b) it was an act, not an omission; (c) the decision was consciously made, based on full information;

[14] Civil Appeal 1694/92, *All Services Company v. Moshitz*, 49(2) PD 397, 412 (1995).

[15] Bankruptcy Case (Tel-Aviv District Court) 1765/02, *Ness v. Viliger* (October 29, 2006), paras. 7–8.

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(d) the decision had a foundation of business reason; (e) the director was not grossly negligent."

Rise of the BJR in Israel following the Creation of the Business Court

It was, however, the view of Sharon Hannes (2009), a next generation academic, regarding the BJR's contents, that was received into Israeli law in 2012 and has since become a canonical formula, repeated in numerous cases. Hannes wrote in a frequently cited article that "a director's act or decision taken without a conflict of interests, in good faith and [on an] informed [basis] ... enjoys a presumption of propriety, and is not exposed to judicial intervention" (313; see also 321). This formulation of the rule was first applied in 2010 by Yehuda Fargo, a judge of the Tel Aviv District Court. It was thus first applied simultaneously with the creation of the Business Court, though not by a judge of that court.[16] The case, an application for permission to litigate a derivative claim, dealt with claims made by shareholders of Psagot, a venture capital fund, against Psagot's past directors and officers, concerning the conduct of the latter in a series of transactions that Psagot undertook to acquire control of another corporation. Several circumstances led to Psagot not acquiring control of that corporation and, later, to Psagot's failure.

The plaintiffs claimed that the transactions concerned violated the duty of care that the defendants owed to Psagot and led to Psagot's failure. Following that failure, Psagot was reorganized, and its causes of action, including those against its own directors and officers, were assigned to a creditor. Given this assignment, the court declined the application since any cause of action that the plaintiffs could have exercised had long been assigned away. While this made addressing the plaintiffs' substantive contentions regarding the defendants' conduct unnecessary, the court still addressed them, applying the BJR to the defendants' conduct without naming the rule or mentioning its American source. The court held that the defendants acted at all times in the best interests of Psagot and its shareholders and that all of their actions "were done in good faith, with pure, objective business judgment, in accordance with the nature of the corporation as a venture capital fund and according to the economic and legal advice they received, and their knowledge of the capital market."[17] The court further held that the collapse of Psagot resulted from events that the defendants had no ability to foresee or control and that they did everything they could to save Psagot and minimize the loss in real time.

While application of the BJR did not decide *Psagot*, the next time that the rule was applied—in 2012—it decided the case. This occurred in the Israeli Business Court. Ultra Shape, a public corporation, was targeted for an attempted takeover. The acquirer having collected a substantial minority position, the board executed a defensive maneuver: it agreed to issue stock to a competing, friendly acquirer, giving them a position significant enough to block the hostile acquirer. Since the latter already enjoyed significant power at general meetings, the defensive maneuver was designed so as to require a board resolution but not one by the shareholders. The

[16] Civil Case (Tel-Aviv District Court) 1920/07, *Greenfeld v. Psagot Finance and Factoring Ltd* (November 2, 2010), para. 9.7.

[17] *Psagot Finance and Factoring*, para. 9.7.

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hostile acquirer applied for an injunction stopping issuance of the shares to the friendly acquirer, absent shareholder consent, and a holding that directors breached, in approving the defensive maneuver, the duties of care and loyalty that they owed to the corporation. Quoting Hannes's formulation of the BJR, Judge Khaled Kabub of the Israeli Business Court held that, "without making any determination respecting [the BJR's] status under Israeli law, I hold that the board ... acted "without a conflict of interests, in good faith and [on an] informed [basis]" so that the presumption of correctness resulting from the BJR would have applied."[18] The court discussed the BJR extensively, holding that the rule reflects the reasonable standard of behavior a director is expected to exercise for the benefit of the corporation as well as a judicial choice to avoid both substantive evaluation of the directors' business judgment and holding them responsible for the results of applying that judgment, even if their judgment call was clearly wrong.[19]

Having applied the BJR in *Ultra Shape* without committing to its reception in Israeli law, Judge Kabub committed to that reception in *Gottlieb v. Ayalon*, decided later in 2012.[20] *Gottlieb* was concerned with a decision by a special litigation committee appointed by the board of a public corporation to settle a derivative action filed against two leading directors, being the controlling shareholder and his son. Judge Kabub held that "special litigation committees were created to deal with exceptional cases where due to a conflict of interests [on the directors' part] a derivative plaintiff cannot demand that the board file suit [because a conflicted board cannot deal objectively with such a demand]. Their creation is inspired by the assumption that their members have the professional ability to tell proper claims from improper claims. This assumption is inspired by (not to say fully based on) the business judgment rule."[21] Having laid out Gross's version of the BJR, Judge Kabub further held that, "though this rule is yet to be enacted by the [Israeli] legislature, we can see this material rule budding in our cases, and it is, I believe, appropriate to give it its proper due and place, step by step."[22] *Gottlieb* appears to have been the decisive case where the Israeli Business Court decided to receive the rule in Israeli law, inspired by the pro-Delaware approach that was popular among many Israeli legal academics, lawyers, and judges. Though Judge Kabub used Gross's formulation of the BJR in *Gottlieb*, it was Hannes's more parsimonious version that became canonical.[23]

Methods and Data

The research effort at the core of this study included the collection, reading, analysis, and coding of every decision handed down in the Israeli courts until July 17, 2021, where the court mentioned the BJR. We found the relevant decisions by searching Nevo, the principal database of Israeli court decisions. Some decisions merely

[18] Civil Case (Business, Tel-Aviv) 48851-02-12, *Matrat Mizug Ltd v. Ultra Shape Medical Ltd* (July 16, 2012), para. 219.

[19] *Ultra Shape Medical*, paras. 213–14.

[20] Derivative Action (Business, Tel-Aviv) 32690-10-11, *Gottlieb v. Ayalon Holdings Ltd* (September 3, 2012).

[21] *Gottlieb*, para. 92.

[22] *Gottlieb*, para. 93.

[23] See another description of the BJR's reception by the Israeli courts in Danziger and Rahum-Tawig 2015, 37–43.

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mention the rule by name, while others include wide-ranging discussion of its substance, justifications thereof, and application of the rule to the case at hand. Collecting, analyzing, and coding the decisions were done in several stages. First, we collected all decisions handed down in all Israeli courts up until July 17, 2021, that included the phrase "business judgment rule," either in its original English form or in Hebrew translation. We originally collected all the relevant decisions handed down until June 30, 2021, extending this to July 17 when a pertinent Supreme Court decision was handed down that day.

Next, we screened the decisions collected according to their relevance to the present study. For example, decisions that included the phrase "business judgment rule" without making reference to the corporate law rule of that name were removed from the database at this stage. So were decisions where the BJR was mentioned in summaries of the parties' arguments, rather than in the court's discussion of those arguments, of the facts or the law. This screening process ultimately yielded a database of 124 decisions. We next coded each of the 124 decisions, extracting data regarding thirty-eight variables. Each decision was coded twice, once by each co-author. Disagreements and unclear cases were resolved by consultation among the two authors. Data collected included both background variables and variables concerning courts' use of the BJR. background variables that we populated included the following: the date each decision was handed down; the court and judge(s) hearing the case; the case number(s); the date that proceedings were filed; the date each case was closed; the time elapsed from filing to closure; the proceeding type (civil cases, motions, applications for permission to litigate derivative actions, and so on); the interim motion type (where a decision was made on an application for interim relief); the court's classification of each case as civil, commercial, insolvency related, or criminal; the plaintiffs' counsel; the defendants' counsel; the third parties' counsel (where such parties were present); the corporation at issue; the claimant's or applicant's relationship to that corporation (shareholder, creditor, reorganization trustee, liquidator or receiver, customer, and so on); whether the corporation was controlled by some shareholder(s) at the time the events at issue occurred and (separately) at the time the proceedings were filed; whether the corporation was family owned; whether the corporation was private, public, or a bond (but not share) issuer; the corporation's sphere of economic activity (finance, biomedicine, other high tech, real estate and construction, and so on); the remedies applied for; the remedies ordered; the causes of action pleaded; whether the defendants' behavior, scrutinized in each case, was an act or an omission; the case result (granted, granted in part, denied); whether the decision was in an application to confirm a settlement, and, if so, whether it was confirmed; whether the corporation involved a special litigation committee or another committee in dealing with the claims; and any costs ordered.

The rest of our variables were directly concerned with courts' use of the BJR. One such variable indicated whether the BJR was applied. To prevent Type I errors that identify BJR application where no such application took place, we only counted as cases of BJR application decisions where the court expressly examined whether each of the rule's three elements, according to its mature Israeli version (good faith, no conflict of interests, and a reasonable, informed decision-making process) was present in the particular case. While this approach risks some Type II errors—missing less

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obvious cases of BJR application—we preferred this risk to that of exaggerating the extent of the BJR's ascendancy in Israeli law. Even given our demanding, restrictive approach to what counts as BJR application, the results portray a dramatic ascendancy.

Our second variable that was directly concerned with the BJR indicates the claim or issue to which the rule was applied (for example, breach of the duty of care, breach of the duty of loyalty, unauthorized distribution). Further variables concerned directly with the BJR were whether each of the rule's three elements was held to obtain in the particular case; how the court justified applying the BJR; whether, as a result of the rule having been applied, the decision, act, or omission challenged was in fact protected from substantive review; whether the application of the rule determined the case result; the procedural stage at which the BJR was mentioned or applied; whether an enhanced standard of judicial review, stricter than the BJR, was applied; whether each decision was the first occasion where the BJR was mentioned or (separately) applied concerning a type of claim or issue; and whether the decision enlarged the rule's sphere of application as a matter of binding law.

We then extracted descriptive statistics from our database, assisted by a statistician. Some of our results are described below; the remaining results are documented, in tabular and graphic form, in our online supplement.[24]

Results

The Israeli courts only mentioned the BJR once before the turn of the millennium. The rule was still rarely mentioned during the first decade of the present century. Mentions became more numerous since the Tel Aviv Business Court commenced hearing cases in 2010. Nearly half the decisions in our database (fifty-nine of 124 or 47.6 percent), which includes all Israeli court decisions where the rule was either mentioned or applied, were handed down in that court. The distribution of the decisions in our database according to the year each was handed down appears in Figure 1, noting whether in each decision the rule was merely mentioned or was applied as well as the percentage of decisions, each year, where the rule was merely mentioned and the percentage where it was applied.

The BJR was applied—in the demanding sense described above, considering as cases of BJR application only cases where the court expressly examined whether each of the rule's three elements was present in the particular case—in forty-eight, or 38.7 percent, of the 124 Israeli decisions where it was mentioned.[25] As described above, the rule was first applied in 2010, the year the Israeli Business Court was established. Its application started to become more common in 2012, when Judge Kabub decided *Ultra Shape* and *Gottlieb*, two highly salient decisions applying the rule. Application has ramped up since then, hitting a peak in 2016 (ten decisions applying the rule, making 62.5 percent of the sixteen decisions handed down that year where it was mentioned) and another in 2018 (nine decisions applying the rule, making 60 percent of the fifteen

[24] "Business Courts as Loci of Privilege: The Business Judgment Rule Abroad," *OSF Home*, https://osf.io/p5463/

[25] See Online Supplement, Tables and Calculations, Task 20.

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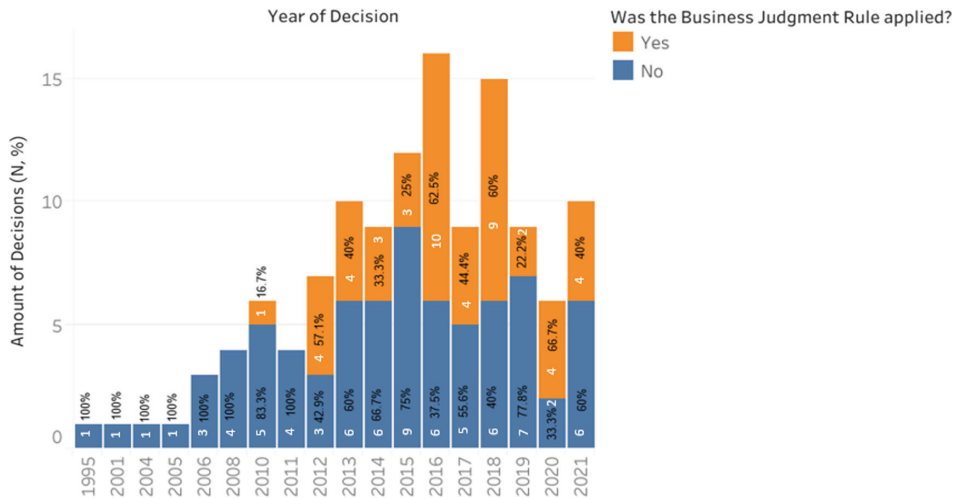

Figure 1. Distribution of Israeli court decisions where the BJR was mentioned (in blue) or applied (in orange) according to the year each decision was handed down.

decisions handed down that year where it was mentioned). This trend is illustrated in Figure 1.

This increase in BJR application did not reflect a similar increase in the number of cases filed: the number of cases filed annually in Israeli district courts increased gradually from about fifty thousand in 2010, reaching seventy thousand in 2017, then declining gradually to about fifty thousand in 2020 (Israel Judicial Authority 2023, 69). Cases filed annually in all Israeli courts save the Supreme Court increased from about seven hundred thousand in 2010 to about 850,000 in 2017, staying at that level through 2022 (67). Cases filed in the Supreme Court declined between 2010, when slightly more than ten thousand cases were filed, to 2021, when about nine thousand were filed (68). Lastly, cases filed in the Israeli Business Court did increase significantly since it started operating in October 2010: while 2012 saw 164 cases filed in that court (Israel Judicial Authority 2013, 17), the number of cases filed annually later increased, reaching 285 in 2019 (Israel Judicial Authority 2020, 25) before falling to 258 in 2020 (Israel Judicial Authority 2021, 25), then increasing to 278 in 2021 (Israel Judicial Authority 2022, 25).

Even this increase is far more modest, proportionately, than the explosion in BJR mentions and application documented in Figure 1. It is therefore clear that this explosion is not a mere effect of a similar increase in the number of cases filed: in Israel, creation of a business court drove a sudden, decisive reception of a foreign rule of law that often immunizes corporate directors and executives from substantive judicial evaluation of their conduct. That is not to say that the rule was mentioned in a large part of the Business Court's decisions. Decisions where it was mentioned comprised between 2 and 7 percent of cases filed in the Business Court per year, with the peak years of 2016 and 2018 again standing out.

For most of the Israeli Business Court's first decade, it was composed of three judges. Two of them—Judges Ruth Ronen and Khaled Kabub—were responsible for large chunks of our database: thirty-three and twenty-seven decisions respectively.[26] The Business Court's third judge until February 2017, Judge Danya Karat-Meir, gave nine of the decisions in our database. No other judge authored more than five of these decisions.[27] As illustrated in Figure 2, Judge Kabub applied the BJR in fifteen decisions, Judge Ronen in ten, and Judge Karat-Meir in five. Judges outside the Business Court applied the rule in three or fewer decisions. These findings demonstrate how court specialization can make swift, radical judicial law reform likelier: once business cases were mostly concentrated at the Business Court, and therefore heard before only three judges, it was only necessary for these judges to be convinced of the rule's merits for it to be effectively received into Israeli law.

Once appointed to the business court, Judges Ronen and Kabub were able, on their own, to receive a pro-business rule of foreign law, which had previously been rejected by the Israeli legislature, into Israeli law. The effects of their many decisions applying the BJR were felt outside the Israeli Business Court. While under Israeli law only Supreme Court decisions make for binding precedent,[28] the BJR was often applied in

[26] See Online Supplement, Tables and Calculations, Task 6. Both judges were promoted in 2022 to the Supreme Court.

[27] See Online Supplement, Tables and Calculations, Task 6.

[28] Basic Law: Judging, 5744-1984, s. 20.

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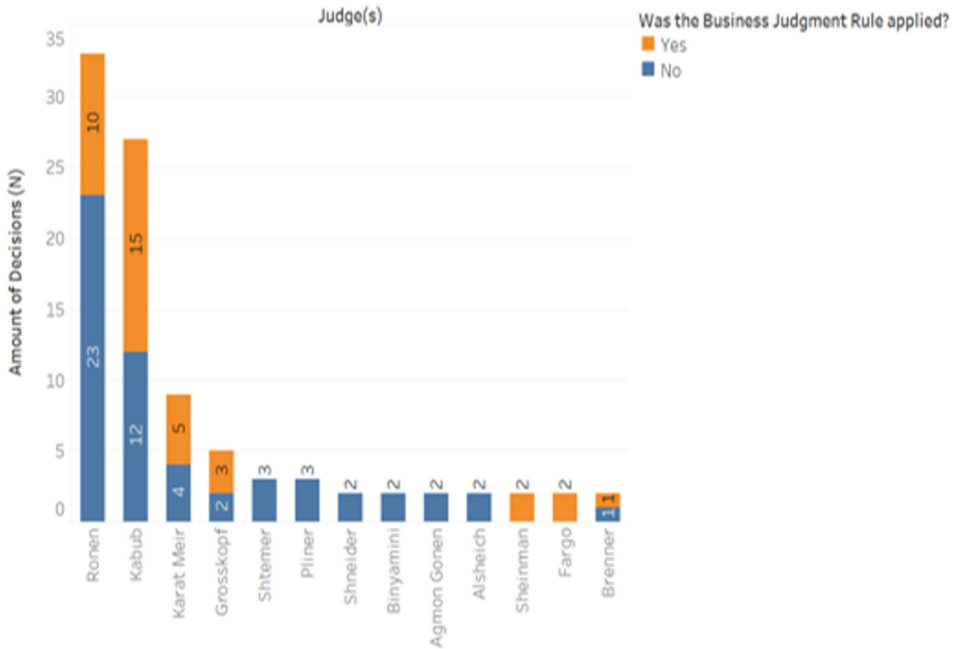

Figure 2. Distribution of Israeli court decisions where the BJR was mentioned (in blue) or applied (in orange) between authoring judges.

Israel even before its application was made binding in the Supreme Court decision in *Varednikov v. Alovich*, handed down December 28, 2016. The BJR's popularization between 2012 and 2016 can be explained by district court judges, including some outside the Business Court, giving persuasive weight to decisions by other district court judges despite their non-binding nature. Once Judge Kabub applied the BJR in *Ultra Shape* and *Gottlieb*, other judges started justifying its application by noting that it had been applied in Israel, if not by the Supreme Court.[29]

One effect of establishing a business court with exclusive jurisdiction to hear corporate and securities cases, then, is granting a few people great power to approximate local law to foreign law. Such centralization makes dramatic turns in the law likelier—for example, the Israeli Business Court's few judges, true repeat players (Galanter 1974), got repeated chances to decisively enact their agendas and views into the jurisdiction's law. Other results make clear who were the key beneficiaries of Israel's adoption of the BJR following the creation of its Business Court. While public corporations have always been a tiny sliver of all Israeli corporations—at the end of 2023, they made up only 0.13 percent of Israeli corporations[30]—51 percent of the corporations at issue in decisions where Israeli courts mentioned or applied the BJR were public.[31] The rule was more often applied where the corporation at issue was public than where it was private (46 and 28 percent of public corporation and private corporation cases, respectively, in our database).[32] Given stock exchanges' minimum capital requirements, public companies are much higher in value than the median company. This is as true in Israel as elsewhere: while the median Israeli business produced revenue of less than one hundred thousand dollars in 2019, the last year for which data is available (Central Bureau of Statistics 2021),[33] companies cannot offer their shares on the Israeli stock exchange unless public holdings of their shares are worth at least $4.26 million (Israeli Stock Exchange 2023).[34] Directors and officers of

[29] See Online Supplement, Tables and Calculations, Task 47.

[30] We calculated the proportion of public corporations out of the general population of Israeli corporations by dividing the Tel-Aviv Stock Exchange's count of public corporations as of December 31, 2023 (537 corporations) by the Israeli Corporations Registrar's count of active corporations, both private and public, as of June 17, 2023 (397,781 corporations). The former figure is taken from Government Databases, "List of Companies," https://info.tase.co.il/Heb/Statistics/StatRes/2023/Stat_251_l06_2023.pdf; the latter from the Corporations Registry, "Corporations Database," https://data.gov.il/dataset/ica_companies/resource/f004176c-b85f-4542-8901-7b3176f9a054?filters=%D7%A1%D7%98%D7%98%D7%95%D7%A1%20%D7%97%D7%91%D7%A8%D7%94%3A%D7%A4%D7%A2%D7%99%D7%9C%D7%94. While these data postdate our database, public corporations have made a minuscule fraction of Israeli corporations throughout the period covered by our database.

[31] See Online Supplement, Tables and Calculations, Task 17.

[32] See Online Supplement, Tables and Calculations, Task 31.

[33] The Israeli Central Bureau of Statistics publishes economic data separately for value-added tax (VAT)-liable and VAT-exempt businesses. All businesses with annual revenue of at least about one hundred thousand Israeli new shekels (NIS), equal to about US $30,000 at current exchange rates, are liable for the VAT. There were 499,501 VAT-liable businesses in 2019, with a median annual revenue of 343,000 NIS, equal to about $100,000 at current exchange rates: Central Bureau of Statistics (Israel) 2021, 42. There were 171,500 VAT-exempt businesses that year, the average annual revenue of which was about 40,000 NIS, equal to about $11,500 at current exchange rates (57). These data all exclude the financial sector, which is VAT-exempt.

[34] The Israeli Stock Exchange offers several initial public offering tracks, each subject to a different minimum capital requirement. The lowest requirement, a minimum capital of sixteen million NIS, equal

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large and high-value firms were thus much likelier to enjoy the rule's protection than those of smaller and low-value firms. The BJR's adoption in Israel, contemporaneous with, and accelerated by, the Business Court's emergence and operation, thus disproportionately benefited directors and officers of some of the largest, highest-value firms.

Further, while 70 percent of the corporations at issue in the decisions in our database were controlled by some shareholder(s), the BJR was more often applied where the corporation did not have a controlling shareholder at the time the events at issue in the case occurred than where it had one.[35] The courts therefore seem to take a more deferential approach to director and officer decisions where corporations are not controlled. These findings show that the Israeli Business Court judges' reception of mainstream US corporate law discourse included reception of the view that directors and officers of public corporations, especially those without a controlling shareholder,[36] are disciplined by the markets in corporate control and executive labor: they fear potential dismissal in case the corporation's results disappoint and, therefore, have less need of disciplining by way of court-imposed liability. On the other hand, directors and officers of privately held corporations, and even those of public corporations controlled by one or a cluster of shareholders, may enjoy job security even in case of disappointing results: they sometimes control the corporation themselves, while, in other cases, their job security chiefly depends on their staying in the good graces of one or a few individuals—namely, the controllers (Easterbrook and Fishcel 1985, 276). On this view, BJR application is especially appropriate for cases concerned with the liability of public corporations' directors and officers, as well as of directors and officers of corporations without a controlling shareholder: exactly the pattern apparent in Israel. Since the great majority of Israeli decisions where the BJR was applied were given in the Business Court, it appears that, in the Israeli case, the establishment of a business court drove the relaxation of duty and liability standards that were applied to directors and officers of some of the country's largest, highest-value companies.

Once the BJR was adopted in Israel, it quickly gained popularity, coming to be applied in many corporate law contexts. The BJR was most often mentioned, and most often applied, apropos claims that directors or officers breached the duty of care they owed their corporation; the forty-two cases where the rule was mentioned or applied in this context make up 33.87 percent of our case database. The courts, led by the Tel-Aviv Business Court, have since 2012 gradually expanded the rule's ambit of application—from allegations that directors or officers breached the duties of care they owed the corporation to (in chronological order) applications for interim relief (three cases, making 2.42 percent of our case database), applications for permission to litigate derivative actions (two cases, making 1.61 percent), allegations that distributions were unlawful (five cases, making 4.03 percent), applications respecting

to US $4.26 million at current exchange rates, applies to "research and development companies" (Israeli Stock Exchange 2024).

[35] See Online Supplement, Tables and Calculations, Task 28.

[36] Israeli law defines a controlling shareholder as "a person who can direct the activity of a corporation, other than as a result of holding an office with that corporation." Securities Act, 5728-1968, s. 1.

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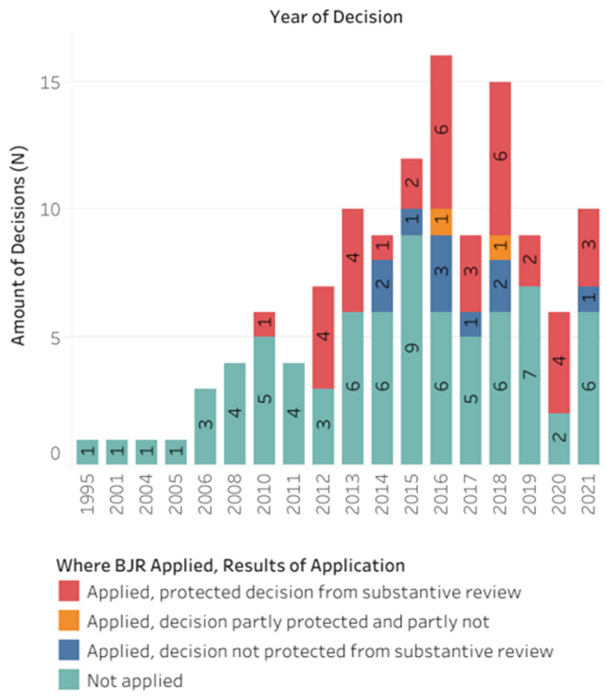

Figure 3. Distribution of Israeli court decisions where the BJR was mentioned or applied according to the date each was handed down and the results of the application.

board rejections, not involving a special litigation committee, of demands that the corporation litigate (five cases, 4.03 percent); judicial review of interested transactions (one case, making 0.81 percent), review of board discretion in deciding to approve settlements (two cases, making 1.61 percent), claims that directors breached the duty of loyalty they owed their corporation (two cases, making another 1.61 percent), and claims following special litigation committees refusing demands that the corporation litigate (three cases, making 2.42 percent of the database).[37]

Once adopted, then, the BJR, and the director and officer immunity consequent on its adoption, spread across Israeli corporate law. While the cases in our database include only five where the behavior at issue consisted of omissions rather than acts, the rule was as likely to be applied in these cases as in others: it was applied in two of the five, nearly matching its 38.7 percent rate of application in the database as a whole (forty-eight of 124 cases). BJR application does not ensure that defendant directors and officers would emerge from court unscathed. Application, including on the demanding definition we adopted, includes cases where, having examined whether each of the rule's three elements applies, the court concluded that one or more do not apply and then proceeded to evaluate the defendants' conduct substantively.

We found, however, that, in cases where the BJR was applied, all three of its elements (good faith, an informed decision-making process, and lack of conflicts)

[37] See Online Supplement, Tables and Figures, Task 36.

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were usually held present.[38] In 75 percent of cases where the rule was applied, courts held that the defendants were not liable; in 69 percent of the same cases, the court dismissed the claims against the defendants.[39] A conflict of interest was held to be present in seven of the forty-eight cases where the rule was applied, while an informed decision-making process was held to be absent in five. In five of the cases where the rule was applied, two or more of the three elements were held to be absent.[40] It therefore appears that, despite the existence of variation in the outcome of BJR application, such application usually led to the defendant directors and officers getting off scot-free.

The full history of the BJR's Israeli application up until July 2021 appears in Figure 3. This points to an increasing sophistication in BJR application: the rule was at first mentioned rather than applied. When it came to be applied, beginning in 2010, it at first always protected the corporate decisions at issue from substantive evaluation. Cases where BJR application did not prevent substantive judicial evaluation, due to the presumption of proper conduct having been rebutted, began appearing in 2014. Applying the rule with even greater finesse, two decisions, handed down in 2016 and 2018 respectively, held that the BJR only partly protected the defendants from liability. In the 2016 case, the court examined separately whether each of the rule's three elements was present regarding each alleged breach by each defendant, reaching non-uniform results. The court held that the BJR protected defendants regarding only some of their alleged breaches, while third parties were held not to be protected at all.[41] The 2018 case held that the BJR protected a board's decision to refuse a demand that the corporation sue the former directors accused of having breached their duty of care, but not the same board's decision to similarly refuse a demand that the corporation sue a former chief executive officer accused of having breached his duty of loyalty.[42]

While it cannot be conclusively proven that, absent BJR application, some or all of the defendants who escaped liability following its application would have been held liable, it is clear that not having one's conduct substantively evaluated in court is itself a unique advantage that the rule grants businesspersons. In preventing substantive evaluation, the rule protects defendants' reputations and leaves some of the substance of their business conduct secret. Such curial discreetness allows businesspersons to avoid the career disruption and resulting economic harm that being sued often brings.

Discussion

As our case study demonstrates, until a business court was established, the BJR did not exist as part of Israeli law. Israeli businesspersons could access it by incorporating abroad, which imposes more costs and inconvenience than local incorporation. The rule was adopted by the Israeli courts contemporaneously with the establishment of

[38] See Online Supplement, Tables and Figures, Task 41.

[39] See Online Supplement, Tables and Calculations, Task 76.

[40] See Online Supplement, Tables and Figures, Task 41.

[41] Civil Case (Nazareth District Court) 4663-11-11, *Kibbutz Tel Yosef v. Ben Aharon* (December 29, 2016).

[42] Derivative Action (Business, Tel-Aviv) 53151-03-15, *Shkedi v. Intercolony Investments Ltd* (July 12, 2018).

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the Israeli Business Court, with Judge Kabub, a business court judge, playing a key role in the adoption process. The adoption of the BJR and the creation of the Business Court were two parts of one process: the approximation—both substantive and institutional—of Israeli corporate law to the Delaware model. The rule's frequent application by Business Court judges led to its later adoption by the Supreme Court. It therefore appears that, in at least some cases, specialized business courts can be instrumental in the adoption and entrenchment of business-friendly norms received from foreign legal systems. The reception of such norms expresses the structured power of business.

Our case study shows that jurisdictions sometimes adopt the BJR and use it to protect directors and officers from liability, despite key justifications for the rule being inapplicable, or quite weak, in the adopters' domestic context. The market-oriented approach to corporate law justifies courts' non-intervention in the substance of business judgments, among other justifications, by the markets in corporate control and executive labor having effects rendering legal liability unnecessary as an incentive to efficient (that is, shareholder-friendly) behavior (Gilson 1981, 824). The Israeli Business Court adopted the BJR, using it to protect directors and officers from liability, despite the concentrated nature of much of the Israeli economy, which is controlled by a small group of business magnates (see Hamdani 2009; Solomon 2016, 318–19). Given such concentration, corporate decision makers who breach their duties may not face adverse market consequences for doing so: personal friendships and family relations between such decision makers and the few stockholders controlling much of the market are likely to survive such breaches, supporting the breaching director or officer continuing in their role or finding other attractive roles to fill.

Given the absence of both market discipline and liability under law, corporate decision makers may see no downside to careless, or worse, behavior. We did find some evidence of Israeli courts being aware that background conditions likely to stymie market discipline make BJR application less appropriate: Israeli courts have taken a more deferential approach to director and officer decisions where corporations were not controlled and where they were public compared to cases of controlled and private corporations. The courts, then, defer to director and officer decisions more often under circumstances where markets, in theory, are supposed to yield their disciplinary force more effectively. That theory may not however correctly describe the realities of the Israeli stock market, the concentrated nature of which may stymie the force of market discipline even regarding public corporations with widely dispersed shareholding. It therefore appears that business courts may rush to adopt Delaware law despite local markets differing from US markets in ways that could impact the economic and distributive results of the adopted law's application. The Israeli Business Court itself was created as part of a made-in-Delaware package, neglecting the different circumstances of Israel.

Our study further shows how, once courts refrain from substantive evaluation of business judgments in one context—that of directors' and officers' duty of care, where BJR application is relatively uncontroversial—this judicial choice can become something of a default, with courts expanding its application to contexts where it is far more controversial, such as directors' and officers' duty of loyalty. BJR application to claims that directors or officers have breached their duty of loyalty eliminates the

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law's incentive to refrain from conflicted behavior, such as self-interested behavior. Such an expansion of the BJR's ambit of application can be explained by courts' preference for less labor-intensive adjudicatory choices, by the force and popularity of the non-interventionist, market-driven approach to corporate law adjudication, and by a tendency to emulate adjudication before the Delaware Court of Chancery.

Integrating our case study into the specialized courts and business courts literatures summarized in our literature review, we found that the Israeli Business Court was characterized by most of the characteristic strengths of business courts and some of their characteristic weaknesses. The Israeli Business Court has undeniably provided at least some litigants with quick adjudication, and it has radically deepened and broadened Israeli corporate law. Its judges have developed a level of expertise in corporate law adjudication that was not seen in Israel until the creation of the Business Court. The rapid expansion in BJR application, with early adopting decisions widely and quickly cited and applied, demonstrates a degree of consistency in adjudication on the topic. Scholars' fear that court specialization will lead to "litigat[ion of] jurisdictional boundaries between generalist and specialized courts" (Gramckow and Walsh 2013, 33) has not materialized in our case, a result of those boundaries having been clearly defined by statute.[43] The "inconvenience to litigants of bringing cases to a geographically centralized court" is not great in Israel given the country's small size, and it was further curtailed in 2018 with the establishment of a second Business Court in Haifa, Israel's northern metropolis.

Business Court judges, to the best of our knowledge, have also not found their time underutilized. The Business Court's burgeoning application of the BJR to an increasing range of issues, however, does seem to reflect a preferential approach to corporate directors and officers compared with the court's approach to attributing civil liability to others. In particular, the court's application of the BJR to alleged breaches of directors' and officers' duty of loyalty breaches one of Enriques's (2002, 768) requisites for good corporate law in action: that judges "show no deferential attitude towards insiders when conflict-of-interest situations are involved." The motive for this preferential attitude on the part of Israeli Business Court judges, however, does not appear to have been one of those identified in the literature on business courts. We have no evidence suggesting that the judges of the Israeli Business Court were corrupt during the period examined in this study, nor that they were biased for corporate directors and officers or against those suing them. Nor do we have evidence showing that they were awed by the legal know-how and social prestige of counsel for such directors and officers or of their clients. They were swayed, rather, by an approach inculcated by US-educated legal academics and received by many Israeli counsel, according to which both the substantive and institutional aspects of Delaware corporate law represent the *ne plus ultra* of this legal field and should be adopted without question.

At least based on Daniel Carpenter and David Moss's (2014, 13) definition of capture, then, the Israeli Business Court was not captured: it did not adopt the BJR as a result of "the intent and action of ... industry" but, rather, as a result of a belief, much promoted by US-educated local academics, that Delaware law is best and that adopting it would result in the increased use of Israeli corporate law by both local and

[43] Courts Act (Consolidated Version), 5744-1984, ss. 42A-42E.

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foreign users. Enthused by this belief, the court adopted a preferential approach to corporate directors and officers, contradicting at least some views of good corporate law in action. While Israeli businesspersons could and did access the BJR prior to its adoption in Israeli law by way of incorporating their companies under foreign law that included the rule, the rule having been made available at home probably reduced those businesspersons' legal expenses given that they no longer needed to retain foreign counsel as often as previously. The availability of the BJR in Israeli law made it accessible at home and in Israelis' native language.

Returning to the theoretical questions at the heart of our analysis: how specialized business courts impact the distribution of resources between court users, as well as across society, and whether they express and enhance the existing structured power of business, we found that our case study provided significant evidence that at least some business courts improve the lot of businesspersons, particularly corporate directors and officers. Business courts can provide these groups with expert, efficient judges applying highly friendly law. While we have not shown that the provision of efficient judging applying friendly law redistributes resources across society, our results show that the Business Court that we examined transformed its domestic law so as to reflect business's and businesspersons' power. The court, a public forum supposed to provide unbiased services to all, chose a course of action that privileged business, thereby extending its power from the economic and political domains into the legal domain.

Conclusion

We have shown how a new Business Court chose to adopt, and vigorously apply, the Delaware BJR. As a result, the court's creation privileged businesspersons compared to other social actors: it provided them, in their capacities as directors and officers, with a unique shield from substantive judicial evaluation of their conduct as well as with expert, relatively quick adjudication. We believe that the continued operation of such courts should be carefully (re-)considered given the significant possibility that they show deference to businesspersons and business executives at the expense of others.

Our case study has further shown how enthusiasm for emulating substantive and institutional aspects of a foreign law, while not motivated by a pro-business bias, can nevertheless introduce such bias into the law of the adopting jurisdiction. Such enthusiasm can bring about the emulation of foreign law despite the absence from the adopting jurisdiction of critical conditions for such emulation being appropriate, such as, in the case of the BJR, the availability of strong market discipline applicable to directors and officers.

The study has raised many questions that are ripe for further inquiry. One wonders whether each aspect of the BJR's Israeli reception process is typical or atypical of its reception in other jurisdictions. How often does judicial legislation or activism serve, as it did in our case study, as a channel for adopting permissive norms, derogating from legislatively imposed duties or liabilities? Does judicial activism, in general, tend to benefit economic groups that are stronger on average, such as corporate directors and officers? Do non-Delaware business courts, inside and outside the United States, tend to adopt Delaware pro-management doctrines more than courts that are not specialized in business law that occasionally adjudicate business cases? Do other

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Israeli specialized courts privilege those litigating before them and, if so, in what sense? These questions all await further study.

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