DISCERNING INDIAN PERSPECTIVE ON CORPORATE OPPORTUNITY DOCTRINE: COMPARATIVE DOCTRINAL STUDY

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This paper delves into the analysis of the corporate opportunity doctrine ('COD') in the Indian context, aiming to strike a delicate balance between directorial entrepreneurialism and unwavering dedication to the organization. The central challenge lies in reconciling the director's pursuit of personal interests with the company's welfare amidst a dynamic commercial landscape. While regulations governing corporate opportunities hold significance in India, the lack of judicial clarity has left the application of appropriate rules ambiguous. The research question driving this study is whether a pragmatic approach to the evolution of the corporate opportunity doctrine in India is warranted, drawing insights from principles established in both US and UK jurisdictions. Unlike the UK's rigid interpretation exemplified by the O'Donell's case, which represents a departure, this paper advocates for a nuanced and adaptable approach informed by case law analysis. The paper thoroughly examines the law on corporate opportunity, proposing a methodology for understanding the no-conflict rule enshrined in the Companies Act 2013. It analyses the structure of corporate opportunity disputes, fiduciary obligations, and potential remedies for fiduciary misappropriation. Furthermore, various exceptions and defences to the corporate opportunity doctrine, recognized across different jurisdictions worldwide, are scrutinized to suggest a pragmatic framework tailored for India. By exploring historical instances and the reasoning methodologies employed, including the conventional rigorous English method, the lenient US approach, and pragmatic dilution, this paper aims to offer a comprehensive analysis. Through a doctrinal and non-empirical approach, leveraging analytical and case-based studies, it seeks to provide insights for a pragmatic evolution of the corporate opportunity doctrine in India.

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I. INTRODUCTION

The connection between the Corporate Opportunity Doctrine (COD) and the shareholder-stakeholder theory lies in their implications for directorial duties and company decision-making. The COD concerns the obligation of directors to refrain from exploiting opportunities that rightfully belong to the company. This doctrine intersects with the shareholder-stakeholder theory, which offers differing perspectives on the purpose of corporate existence and the responsibilities of directors.

The reason why businesses are formed and run is an existential (but difficult) subject in company law. These complex issues have given rise to competing theories. On the one hand, the shareholder theory imagines the shareholders as the owners of the businesses, necessitating those businesses be conducted in a way that maximizes their worth.[1] The stakeholder theory, on the other hand, takes a broader approach and mandates that businesses be run on a sustainable and inclusive basis, to consider the interests of non-shareholder groups like employees, creditors, consumers, the environment, and society at large.[2] Under the shareholder theory, directors are viewed as agents of the shareholders and are obligated to prioritize shareholder interests above all else. In this view, the corporate opportunity doctrine ensures that directors do not divert valuable opportunities away from shareholders for personal gain. On the other hand, the stakeholder theory advocates for a more inclusive approach, where directors must consider the interests of all stakeholders, including employees, creditors, consumers, and society at large, alongside those of shareholders. In this context, the corporate opportunity doctrine becomes more complex as directors must navigate between opportunities that may benefit various stakeholders, not just shareholders.

This argument is more clearly expressed when it comes to the obligations that corporate directors have. Legislators have tried to come up with a workable remedy to what they see as a gap in common law, since they are aware that it does not impose any universal obligation upon directors towards non-shareholder constituents. By adopting the 'enlightened shareholder value' ('ESV') model through Section 172 of the UK Companies Act 2006 ('2006 Act'),[3] the British Parliament made one such legislative intervention. In a nutshell, it calls for boards to consider non-shareholder interests to increase long-term shareholder value.[4] Although the ESV is a hybrid model that incorporates elements of both the shareholder and stakeholder theories, it has a stated bias for shareholder interests in the event of a conflict, creating a unique hierarchy.

The Indian Parliament adopted a different strategy in Section 166(2) of the Companies Act 2013[5] which, at first look, seems to obligate directors to view non-shareholder interests as a goal in and of itself. In other words, Section

[1] Katharine V Jackson, 'Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis' (2011) 7(2) Hastings Business Law Journal 309, 79.
[2] Neeti Shikha, 'Corporate Governance in India – the Paradigm Shift' (2017) 8(2) International Journal of Corporate Governance 81, 99-101.
[3] Companies Act 2006, s 172 (UK).
[4] Mihir Naniwadekar and Umakanth Varottil, 'The Stakeholder Approach towards Directors' Duties under Indian Company Law: A Comparative Analysis' in Mahendra Pal Singh (ed), *The Indian Yearbook of Comparative Law 2016* (OUP 2018).
[5] Companies Act 2013, s 166.

166(2)[6] adopts a pluralist approach by treating all interests (whether of shareholders or other stakeholders) equally and as valid in their own right (without necessarily serving as a way of boosting shareholder value), without establishing any hierarchy. This strategy adheres to the stakeholder model in corporate law.[7]

Despite these conceptual differences, both the ESV model and the pluralist approach recognize the importance of balancing competing interests within corporate decision-making. However, the effectiveness of these models in protecting stakeholder interests, including in cases related to the corporate opportunity doctrine, may vary depending on their implementation and enforcement mechanisms within each jurisdiction. The rights of stakeholders in Indian firms are significantly restricted by a thorough examination based on an interpretation of the section and potential implementation challenges.[8] Stakeholders in both jurisdictions lack substantive remedies when directors fail to uphold their obligations to protect their interests as stakeholders.[9] Derivative actions and class actions are woefully insufficient mechanisms. Thus, the functioning of the Companies Act and common law principles relating to directors' duties also make the Indian situation not wholly different from the ESV model used in the UK, despite the fact that the Indian Parliament has indicated a preference for the pluralist approach that accords the interests of shareholder and non-shareholder constituencies equal weight.[10]

II. CORPORATE OPPORTUNITY DOCTRINE

The responsibilities of the director are outlined in Section 166 of the Companies Act of 2013 ('Act').[11] The JJ Irani Committee's suggestions served as the inspiration for this Section. The Committee advised that, as the directors are in

[6] Companies Act 2013, s 166(2).
[7] KW Wedderburn, 'Shareholders' Rights and the rule in Foss v. Harbottle (continued)' (1958) 16(1) Cambridge Law Journal 93, 95-97.
[8] Harwell Wells, *Research Handbook on the History of Corporate and Company Law* (1st edn, Edward Elgar Publishing 2018) 658.
[9] Shashank Shah and A Sudhir Bhaskar, 'Corporate Stakeholder Management: Western & Indian Perspectives: An Overview' (2008) 14(1) Journal of Human Values 73, 79-82.
[10] Jaison John, 'Section 166(2) of the Companies Act 2013; Protection of Stakeholders or Primacy of Company' (2016) 4 Company Law Journal 137, 139 <http://dx.doi.org/10.2139/ssrn.2885847> accessed 14 November 2024.
[11] Companies Act 2013, s 166.

a fiduciary position with regard to the firm and should be aware of their legal obligations, it is necessary to specify their commitments.[12]

A corporate fiduciary is not permitted to seek fresh business opportunities on an individual basis without first presenting them to the corporation, according to the COD. Since the parties' interests are not only mismatched but are actually in stark opposition to one another, disputes over the allocation of corporate opportunities present particularly challenging issues for corporate law.[13] Furthermore, there is a chance of COD conflicts when two or more firms have the same officers and/or directors, especially in the parent-subsidiary environment. Although there are other doctrines that similarly limit the appropriation of corporate property by fiduciaries, the doctrine is formally a subset of the director's duty of loyalty and has been a mainstay in the corporate precedents of almost every state for well over a century. But, because the doctrine's exact boundaries continue to be a little hazy, many people believe that its application will be unpredictable.[14]

III. PRINCIPAL TARGET OF COD & ELIGIBILITY TO BRING COD ACTION

The COD includes obligations that primarily affect corporate officials and directors, but typically no other agents, workers, or stakeholders in the company. From the standpoint of agency costs, these corporate fiduciaries appear to work together in the macro-organizational position of 'gatekeepers'. Directors and officers, as opposed to low-level workers or mid-level management, are primarily responsible for assessing the relative merits of potential new business ideas, and making recommendations as to which ones the company should pursue; and which ones it should avoid. Therefore, it is reasonable – if not realistic – to assume that primary aim of the COD is to tackle incentive issues particular to this gatekeeping duty.

Formally speaking, a fiduciary's duty of loyalty helps the corporation. In order to defend itself against a current or former officer or director who has seized an opportunity, the corporation must usually do so on its own. However, shareholders may also try to utilise the mechanism of derivative action suit to

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[12] A Fraser Dobbie, 'Codification of Directors' Duties: An Act to Follow?' (2008) 11 Trinity College Law Review 13, 14-17.

[13] *Kelegian v Mgrdichian* 33 Cal App 4th 982.

[14] Bede Harris, 'The corporate opportunity doctrine and directors' duties: A critique of the law in Australia' (2021) 17(2) Canberra Law Review 1, 16.

force a reluctant board of directors to make a claim based on a corporate opportunity.[15]

IV. STRUCTURE OF A COD DISPUTE

The structure of a COD can be divided into three stages. Stage one is where the first pertinent legal analysis takes place, when a judge must decide if the transaction in question qualifies as a 'corporate opportunity'. If not, the inquiry is finished. The fiduciary may explore the prospect at will unless the company's Articles of Association ('AoA') or employment contract expressly state something otherwise.[16]

In contrast, if it is determined that there is a corporate opportunity, the investigation shifts to stage two, where the court looks into whether the fiduciary has fully reported the opportunity and any related interest, to the company – that is 'complete disclosure'.[17] If not, then any authorisation, approval, or ratification received from the company is null and void, and the agent's appropriation of the project would be a breach of fiduciary duty.[18] On the other hand, if the fiduciary provides complete disclosure, the inquiry progresses to the third stage, wherein the company has the option to 'decline' the opportunity presented, thereby returning it to the fiduciary. Should rejection occur, the fiduciary is then at liberty to pursue the project under the conditions set forth in the rejection. The fiduciary cannot usurp the project without risking liability, however, if the company fails to reject – or rejects 'improperly'.[19]

This structure appears to be straightforward, but its practical application has proven to be considerably complex and contestable. Some of the crucial aspects involved that require examination are discussed further in this paper.

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[15] I Sridhar, 'Duties of directors in corporate governance: an Indian perspective' (2018) 17(4) International Journal of Indian Culture and Business Management 442, 445.

[16] Stuart M Turnbull, 'The Doctrine of Corporate Opportunity: An Economic Analysis' (1988) 13 Canada-United States Law Journal 185, 192.

[17] *Queensland Mines Ltd v Hudson* [1978] 18 ALRI.

[18] Paul Carrington and Dan McElroy, 'The Doctrine of Corporate Opportunity as applied to Officers, Directors and Stockholders of Corporations' (1959) 14(4) The Business Lawyer 957, 958.

[19] Hwa-Jin Kim, Seung H Lee, and Stephen M Woodcock, 'Favoritism and Corporate Law: The Confused Corporate Opportunity Doctrine in the Hyundai Motor Case' (2013) 3(1) Michigan Journal of Private Equity & Venture Capital Law 41, 55-57.

V. CONSTITUTION OF CORPORATE OPPORTUNITIES

In a corporate opportunities dispute, the court's first step is often to determine whether the contested proposal actually constitutes a 'corporate opportunity'. In practise, this one decision has turned out to be really ambiguous, leading jurisdictions to switch between the several characterisation standards elaborated on further. The tests mentioned below tend to be in conflict, and at the same time overlap in a variety of circumstances. Thus, the confusion regarding their application continue to persist.

A. Interest and Expectancy Test

Whether a company has an 'active commercial interest or expectation' in such opportunities is the longest-standing characterisation test for deciding whether new business chances are corporate opportunities.[20] The projects over which the corporation already has a contractual right are typically referred to as the 'interest' component of this strategy.[21] Projects that are not yet expressly secured by a contract but are anticipated, given current rights, to develop into contractual rights at a later time are included in the 'expectancy' component. Particularly pertinent in this context are so-called 'relational' contracts between the company and frequent business partners, where periodic extensions are implied but not officially mentioned.[22]

It is noteworthy that the interest-or-expectancy test finally determines a business opportunity primarily in light of the corporation's existing (rather than future) activity. As a result, the test offers a boundary that is largely predictable. In fact, the test's limited scope effectively restricts it to the projects that the firm already has real or probable knowledge about thanks to its current contractual rights.[23]

The test has been criticised as being under-inclusive because it only covers projects for which the company's proprietary claim is somewhat developed,

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[20] OECD, *White Paper on Corporate Governance in Asia* (Asian Roundtable on Corporate Governance 2003) <https://state-owned-enterprises.worldbank.org/sites/soe/files/reports/White%20Paper%20on%20Corporate%20Governance%20in%20Asia.pdf> accessed 14 November 2024.

[21] *LaGarde v Anniston Lime & Stone Co* 126 Ala 496 (1900).

[22] Victor Brudney and Robert Charles Clark, 'A New Look at Corporate Opportunities' (1981) 94(5) Harvard Law Review 997, 998.

[23] Henry W Blizzard Jr, 'Corporations-Corporate Opportunity Doctrine: A Corporate Opportunity does not exist unless the Corporation had an Interest or Tangible Expectancy in the Property' (1968) 20 Alabama Law Review 363.

notwithstanding its administrative convenience.[24] The argument makes the point, that a characterization rule that protects only 'mature rights' runs the risk of lowering the *ex-ante* incentives of the shareholders to invest in long-term projects. This is because many business projects do not pay off, in say, the form of significant market share, until a long time after an initial investment. As a result, although almost all jurisdictions continue to use the interest and expectancy tests, they have also been open to different expansions of the concept.[25]

B. THE LINE OF BUSINESS TEST

The most popular of the tests used to determine existence of corporate opportunity states that a new business opportunity qualifies as a corporate opportunity if it is determined to be in the company's 'line of business'. According to the majority of legal accounts, this test which was established in the landmark case of *Guth v Loft*,[26] encompasses any project that the corporation may reasonably be anticipated to adapt itself to undertake now or in the reasonable future given its assets, knowledge, skills, and talents.[27]

Many jurisdictions have adopted the line-of-business test (or a close variant) in recent years, and perhaps for good reason. The line-of-business test, in contrast to its doctrinal forebear (the interest-or-expectation test), extends beyond the firm's current contractual interests and includes potential areas of expansion as well, giving the theory a substantially more dynamic (and realistic) approach.[28]

C. FAIRNESS TEST

A few jurisdictions have made attempts to further improve the theory by creating a 'fairness' test to determine whether a corporate opportunity exists. If a fiduciary's appropriation of an opportunity does not meet 'ethical standards of

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[24] Robert Charles Clark, *Corporate Law* (Little Brown 1986), chs 3-4.
[25] Kenneth B Davis Jr, 'Corporate Opportunity and Comparative Advantage' (1999) 84 Iowa Law Review 211 <https://repository.law.wisc.edu/s/uwlaw/media/38243> accessed 14 November 2024.
[26] *Guth v Loft Inc* 5 A2d 503 (Del) (1939).
[27] Struan Scott, 'The Corporate Opportunity Doctrine and Impossibility Arguments' (2003) 66(6) The Modern Law Review 852, 857 <https://www.jstor.org/stable/3699099> accessed 14 November 2024.
[28] *Thompson v Price* 251 Cal App 2d 182 (1967).

what is fair and equitable [to the corporation] in particular sets of facts', then the opportunity is deemed to be a corporate one under this method.[29]

Similar to the line-of-business test, the fairness test may forbid the appropriation of the firm's present or future operations. Therefore, when assessing which projects qualify as business prospects, courts using this method commonly run into line-drawing issues. However, the difficulty of defining what 'fairness to the corporation' entails a more frustrating issue for courts. Due to these flaws, some commentators and judges have claimed that the fairness test as applied to the COD only muddies the waters, adds further layers of confusion to the already hazy doctrine, and doesn't offer any clear rules. Perhaps as a result, courts have only occasionally used the fairness test.[30]

In an effort to improve the characterization rules, numerous courts over the years have altered, merged, hybridised, and augmented the traditional tests in addition to the pure methods mentioned above.[31] In this sense, the combination of the interest-or-expectancy and line-of-business tests appears particularly potent, but other combinations are possible. The determination of whether or not a given chance fits the required relationship is mostly based on the objective facts and environmental factors present at the time the opportunity emerges. There is no one factor that determines whether an executive has misused a corporate opportunity.[32]

VI. ANALYSIS OF REJECTION, RATIFICATION AND CONSENT-BASED EXCEPTIONS

The common law doctrines of 'no conflict' and 'no profit' are foundational principles in company law that govern the fiduciary duties of directors towards the companies they serve. These doctrines are closely related to the COD

[29] Eric L Talley, 'Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine' (1999) 108 Yale Law Journal 277, 289-295 <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/9216/18_108YaleLJ277_November1998_.pdf> accessed 14 November 2024.

[30] M Corradi and J Nowag, 'Directors' Duty of Loyalty: Corporate Opportunity Rules as Restrictions of Competition' in M Corradi and J Nowag (eds), *Intersections Between Corporate and Antitrust Law* (CUP 2023) 151–64.

[31] John Lowry, 'Codifying the Corporate Opportunity Doctrine: The (UK) Companies Act 2006' (2012) 5 International Review of Law, 11-15 <https://doi.org/10.5339/irl.2012.5> accessed 14 November 2024.

[32] Pat K Chew, 'Competing Interests in the Corporate Opportunity Doctrine' (1989) 67(2) North Carolina Law Review 435, 440-446, 501-502 <https://scholarship.law.unc.edu/nclr/vol67/iss2/5/> accessed 14 November 2024.

embodied in Section 166 of the Act, which regulates directors' actions concerning opportunities that arise within the scope of their positions.

The no conflict doctrine stipulates that directors owe a duty to avoid situations where their personal interest is in conflict with the interests of the company.[33] Directors must act in the best interests of the company at all times and refrain from engaging in activities or transactions that could compromise their ability to make impartial decisions for the company's benefit. This includes situations where directors may have competing financial interests, business relationships, or other personal interests that could influence their decision-making. Similarly, the no profit doctrine dictates that directors must not personally profit from their position or from opportunities that arise through their role within the company, unless expressly authorized to do so by the company's governing documents or by law.[34] Directors are prohibited from taking advantage of their position for personal gain or engaging in self-dealing transactions without proper disclosure and approval.[35]

In its current iteration, Section 166 of the Act partially incorporates the common law principles of no-conflict and no-profit, lacking explicit provisions for consent-based exceptions.[36] This omission is particularly perplexing considering that the common law traditionally recognises consent as a valid defence against breaches of fiduciary duties by the directors. Consequently, a director could potentially face repercussions under Section 166 despite receiving authorization from the company for certain actions. In contrast, the UK Companies Act 2006 explicitly allows for consent-based exceptions under Section 175. Hence, this Section of the paper seeks to explore alternative common law defences within the context of the no-conflict and no-profit doctrines to address this inadequacy.

A. DUOMATIC PRINCIPLE

[33] ibid.

[34] RC Beuthin, 'Corporate Opportunities and the No-Profit Rule' (1978) 95 South African Law Journal 458.

[35] SV Joga Rao and Y Shiva Santosh Kumar, 'Understanding the Law on Corporate Opportunity: Inputs for India' (2013) 55(4) Journal of the Indian Law Institute 531, 543 <https://www.jstor.org/stable/43953655> accessed 14 November 2024.

[36] Rohit Pradhan and Srishti Sneh.a, 'Doctrine of Corporate Opportunity: Indian Perspective' (2020) 121 Taxmann 201.

The *Duomatic* principle, originating from the English case of *In Re Duomatic Ltd*,[37] has been reaffirmed by the Indian Supreme Court in the recent judgment of *Mahima Datla v Dr Renuka Datla* (2022).[38] This principle essentially states that anything, which the members of a company can do by formal resolution in a general meeting, they can also do informally if all of them assent to it. In the *Mahima Datla* case, the court applied the *Duomatic* principle to settle the issue of whether the resignation of a director had lapsed due to no objection from another director. The court held that since there was no evidence of protest from the concerned director, the resignation was deemed not accepted. However, the application of the *Duomatic* principle in India raises several concerns due to the lack of clarity on its requirements and potential for misuse. The principle overrides the terms of articles of association regarding the procedure for consent, allowing informal decisions if all members assent. Yet, there is ambiguity regarding other legal prerequisites for invoking this principle beyond consent.

The *Duomatic* principle could be one line of defence. Actions committed in violation of the conditions outlined in company law are protected under it. In *In Re Duomatic Ltd* case, the corporate liquidators had sought to have payments made by the business to the directors revoked on the grounds that a shareholder resolution was not present, as required by the then-Section 191 of the Companies Act 1948. The court denied this argument on the grounds that when shareholders approved the company's financial statements, they all implicitly approved of such payments.

According to Buckley J (as he then was), 'to put it another way, I proceed under the assumption that, in cases where it can be established that all shareholders have the right to attend and cast a vote at a general meeting of the company, their assent to a matter that the meeting could decide upon is just as binding as a resolution adopted at the general meeting.'

Based on the aforementioned observation, actions taken by the company that are unanimously approved by the shareholders would be valid even in cases where the AoA or the applicable companies' legislation requires approval through a general or special resolution of the shareholders. The *Duomatic* principle has also been recognised by courts as a valid defence in situations

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[37] [1969] 2 Ch 365.

[38] *Mahima Datla v Renuka Datla* (2022) 10 SCC 258.

involving the breach of fiduciary obligations. The UK Court of Appeal determined in *Sharma*[39] that a director had chosen a viewpoint that was in conflict with her fiduciary obligations to the firm, but held that she had not violated the no-conflict doctrine, as the shareholders had implicitly consented to the director's action in question.

If the prerequisite of shareholder consent is satisfied, the *Duomatic* principle could be used to defend directors against proceedings under Section 166 as it has been recognised and used in India.[40] However, there are compelling arguments against applying *Duomatic* to decisions involving the derogation of Sections 166(4) and (5) of the Act.[41] One reason is that the principle can only be used to alter the type of consent that the Act contemplates. However, the principle cannot be applied where consent-based defences are not even something that the legislation is intended to cover.[42]

B. Consent as a Pre-condition for Suit

The UK Act's Section 175(5) allows for board-authorized, consent-based exemptions.[43] When a director abstains from their financial obligations, the *Duomatic* principle essentially transfers the mode of consent from board approval to shareholder authorisation. In contrast, Section 166 does not offer any form of consent-based defences, making the applicability of the *Duomatic* principle questionable. This is because consent-based defences are not something the Act was intended to cover.[44]

A stronger argument might be made to read common law exceptions into the definition of 'conflict' itself. In other words, initiating lawsuits under Sections 166(4) and (5) would be subject to shareholder consent. Therefore, the duty would be on the affected party to demonstrate that consent was not given. This contrasts with the *Duomatic* principle, which placed the onus on the director to

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[39] *Sharma v Sharma* [2013] EWCA Civ 1287.

[40] *Darjeeling Commercial Co Ltd v Pandam Tea Co Ltd* 1983 54 Comp Cas 814.

[41] Companies Act 2005, ss 166(4)-166(5).

[42] *Madoff Securities International Ltd v Raven & Ors* [2013] EWHC 3147 (Comm), 416.

[43] Companies Act 2013, s 166.

[44] Leslie Kosmin QC and Catherine Roberts, 'Informal Decisions and the Duomatic Principle' in Leslie Kosmin QC and Catherine Roberts (eds), *Company Meetings and Resolutions* (3rd edn, OUP 2020).

establish its presence.[45] The fact that Section 166 only partially codifies the no-conflict and no-profit doctrines lends weight to this interpretation. Therefore, it might be claimed that Section 166 should be understood to include common law criteria separately. This view would be in line with common law precedents[46] that have treated the need for permission as a prerequisite before the no-profit and no-conflict doctrines could be put into practise.[47]

However, this line of thinking also has several flaws.[48] Giving shareholders the broad authority to resolve disputes could have unfair effects, particularly in the Indian setting where promoters hold concentrated ownership.[49] Because Indian law, unlike English law, does not impose fiduciary obligations on shareholders, exacerbating this difficulty. Courts have also allowed directors vote in their capacity as shareholders, to 'pardon' their own transgression.[50]

C. Theory of Non-Ratifiable Breaches

Both approaches appear unsatisfactory, indicating the need for a more balanced solution. One such proposal is the theory of 'non-ratifiable breaches', as introduced in the *Cook v Deeks* case.[51] This theory suggests that directors or involved parties cannot obtain shareholder approval through personal voting to benefit themselves. However, the validity of this theory has been questioned due to its unclear rationale. Since shareholders are not bound by fiduciary duties like directors, restricting their property rights under this theory lacks justification. Moreover, the *Cook* case[52] conflicts with precedents like *Northern*,[53] which allowed directors to vote as shareholders to excuse their own breaches.

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[45] Harvey Gelb, 'The Corporate Opportunity Doctrine-Recent Cases and the Elusive Goal of Clarity' (1997) 31 University of Richmond Law Review 371, 376-393 <https://scholarship.richmond.edu/lawreview/vol31/iss2/3 > accessed 14 November 2024.

[46] *Mothew (t/A Stapley & Co) v Bristol and West Building Society Respondent* [1996] EWCA Civ 533.

[47] *Parker v McKenna* (1874) LR 10 Ch App 96.

[48] David Milman, 'Regulating Close Companies in Corporate Law: Towards a more Formal Recognition?' (2017) 46(3) Common Law World Review 198, 203-204 <https://doi.org/10.1177/1473779517732722> accessed 14 November 2024.

[49] Sahil Aggarwal and Akshat Baghmar, 'Neither Mere Substantial Compliance nor a Normative Right' (*IndiaCorpLaw*, 7 June 2022) <https://indiacorplaw.in/2022/06/duomatic-principle-neither-mere-substantial-compliance-nor-a-normative-right.html> accessed 14 November 2024.

[50] *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 1 WLR 1133.

[51] *Cook v Deeks* [1916] AC 554.

[52] ibid.

[53] *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 1 WLR 1133.

Consequently, the applicability of *Cook's* principle[54] in India is uncertain, as evidenced by the Bombay High Court's hesitancy to address the issue definitively in *Vadilal Raghavji v Maneklal Mansukhbhai*.[55] Given these complexities, it is advisable that while corporations may seek shareholder consent to breaches of director duties under Section 166, such ratifications should exclude 'interested directors'. Their involvement could potentially reinforce the doctrine of non-ratifiable breaches, prompting courts to uphold stricter standards.[56]

VII. EXCEPTIONS AND DEFENCES TO COD

Several significant affirmative defences to a COD action have been developed by courts over time. The so-called source rule, the defense of incapacity, and the 'implied rejection' theory are three common tests applied. The effects of the first two of these defences neutralise the finding that a challenged transaction was a corporate. The last line of defence effectively replaces the corporation's express denial of the opportunity.

A. The Source Rule

A fiduciary may be eligible for a limited defence in some countries if they can show that the source of a presented business opportunity was drawn to her own competence, reputation, and knowledge rather than those of the corporation. Although this outlook can be understood to influence a variety of choices, many commentators have sharply criticised it, pointing out that it is virtually impossible to separate the comparative contributions of the fiduciary's personal attributes from her corporate affiliation in luring the transaction. As a result, it has proven to be of only sporadic use to the defendants.[57]

B. The Incapacity Defense

Although the 'incapacity' defence can be used in a variety of ways, three are the most common. The first strand can be understood as the *ultravires* exception. Fiduciaries assert that the company was legally prohibited from pursuing the

[54] Under Companies Act 2006, s 175 (UK) interested directors are barred from voting on ratification of breaches.

[55] *Vadilal Raghavji v Maneklal Mansukhbhai* (1925) 27 BOMLR 48.

[56] John E Jackson III, 'Corporate Opportunity Doctrine: A Historical View with a Proposed Solution' (1988) 53(2) Missouri Law Review 393, 398-402 <https://scholarship.law.missouri.edu/mlr/vol53/iss2/9/> accessed 14 November 2024.

[57] Matthew R Salzwedel, 'A Contractual Theory of Corporate Opportunity and a Proposed Statute' (2002) 23(1) Pace Law Review 83, 125-132.

opportunity in some situations (e.g., because of *ultravires* issues, injunctions, and violations). In the second case, the defence of the fiduciaries focuses on the company's financial inability to take advantage of the corporate opportunity (for instance, liquidity issues, insolvency, etc).[58] The third set of cases deals with '*bonafide* refusals', where the defendants argue that the corporation's inability was caused by more general business limitations, such as a dearth of qualified personnel, unreliability, or refusal by third parties to do business with the company, which made the transaction effectively unavailable to the company.[59]

C. Implied Rejection

Situations in which the fiduciary has disclosed the possibility but the company does not take action, present an intriguing particular scenario for the COD.[60] For such circumstances, a few jurisdictions have adopted what is essentially an implied refusal law, enabling the director to act on the opportunity if the company does not act on it within a reasonable length of time after the disclosure.[61] Only when defendants have claimed that they acted and took steps with *bonafide* intentions by fully disclosing and not using other corporate property including information, to pursue the opportunity have they typically been successful in such trials.[62]

VIII. COMPARATIVE ANALYSIS OF THE STRICT RULE VS THE PRAGMATIC APPROACH: DISCERNING INDIAN PERSPECTIVE

Various jurisdictions have handled the equitable rule of corporate opportunity differently, which aims to strike a balance between a director's fiduciary duty to the firm and their personal entrepreneurial interests. Most significantly, courts in the United States (US) are thought to take a more flexible approach, whereas courts in the UK are traditionally seen to embody severe enforcement of this

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[58] James C Slaughter, 'The Corporate Opportunity Doctrine' (1964) 18(1) SMU Law Review 96 < https://scholar.smu.edu/smulr/vol18/iss1/6> accessed 14 November 2024.

[59] Martin Gelter and Genevieve Helleringer, 'Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law' (2018) 15(1) Berkeley Business Law Journal 92.

[60] *Carlton v Halestrap* (1988) 4 BCC 538.

[61] John Lowry and Rod Edmunds, 'The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies' (1998) 61(4) Modern Law Review 515 <https://www.jstor.org/stable/1097307> accessed 14 November 2024.

[62] Michael Begert, 'The Corporate Opportunity Doctrine and Outside Business Interests' (1989) 56(2) University of Chicago Law Review 827 <https://www.jstor.org/stable/1599853> accessed 14 November 2024.

norm. While *Vaishnav Shorilal Puri*,[63] is the only Indian case that properly explores the concept of corporate opportunity, showing a confusing application of the two distinct methods, the approach of Indian courts remains unclear to this day.[64]

A. Flexible Approach of United States

The COD in the US has its roots in common law fiduciary duty principles and has evolved significantly over the 20th century. Unlike the UK approach, which is based on strict conflict of interest rules, the US approach to COD is characterized by flexibility and adaptability to changing circumstances. The doctrine aims to determine which opportunities rightfully belong to the corporation, preventing corporate officers from exploiting those opportunities for personal gain.

A landmark case demonstrating the flexibility of the US approach is *Guth v Loft*. In this case, the Supreme Court of Delaware established criteria for determining whether a corporate opportunity exists. It ruled that directors could only be barred from taking advantage of an opportunity if it met certain criteria: it fell within the company's area of expertise, it was relevant to its business, and it was of practical significance to the business. This decision highlighted the court's willingness to consider various factors beyond strict ownership or conflict of interest rules in determining corporate opportunities.

The development of the COD in the US can be traced through a series of cases. The 1900 Alabama case of *Lagarde v Aniston Lime & Stone Company*,[65] set a precedent by establishing the 'interest or expectancy' test, which determined that an opportunity belongs to the corporation if it had an existing interest or expectancy in the opportunity. Subsequent cases, such as *Durfee*[66] and *Broz*[67] further refined the doctrine by introducing the fairness test and considering factors like the corporation's financial capability and line of business.[68]

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[63] *Vaishnav Shorilal Puri and Seaworld Shipping and Logistics Pvt Ltd v Kishore Kundanlal Sippy and Ors* [2004] 120 Comp Case 681 (Bom).
[64] Rao and Kumar (n 35).
[65] *Lagarde v Aniston Lime & Stone Company* 126 Ala 496 (1900).
[66] *Durfee v Durfee Canning* 80 N.E.2d 522 (1948).
[67] *Broz v Cellular Information Systems, Inc* 673 A.2d 148 (1996).
[68] Oluwaseun Adesanya, 'Corporate Opportunity Doctrine: An Impediment to Corporate Innovation' (2023) <http://dx.doi.org/10.2139/ssrn.4597752> accessed 14 November 2024.

In *Beam ex rel Martha Stewart Living Omnimedia, Inc v Stewart*,[69] the Delaware Supreme Court emphasized the importance of considering whether an opportunity falls within the corporation's line of business, and whether the corporation has an interest or expectancy in the opportunity. This case underscored the broader application of the 'line of business' test, which considers the corporation's reasonable aspirations for development and expansion.

Therefore, the US approach to COD prioritizes fairness and equity, allowing for a nuanced analysis of each situation. The doctrine has evolved from strict ownership-based rules to a more flexible framework that considers factors such as the corporation's interests, financial capability, and line of business. Through landmark cases like *Guth*, the US legal system has demonstrated its willingness to adapt and refine the doctrine to meet the needs of modern business practices.

B. UNITED KINGDOM'S STRICT APPROACH

Insofar as it assures that a director is prohibited from using knowledge she obtains as a result of her position as a director for personal gain, the COD's basic assumption is sound. In that regard, the theory just transforms a director's fiduciary duty to the company—a fundamental tenet of company law—into an obligation to show complete allegiance to the business. The issue emerges, though, when this rule is followed so strictly that it prevents directors from taking advantage of any opportunity that has a corporate character, inhibiting 'directorial entrepreneurialism'. The seminal decisions of *Keech v Sandford*[70] and *Regal (Hastings) v Gulliver*[71] best illustrate the longstanding stringent implementation of the norm in UK. In the *Regal*, Lord Russell elaborated on the law requiring fiduciaries to account for profit in order to support the liability of the directors in this case. It was decided that a profit accruing while serving as a fiduciary was all that was necessary for the COD to apply; disregarding any *bona fides*, fraud, or other circumstances – such as whether or not the company would have obtained the profit otherwise.[72]

[69] *Beam Ex Rel MSO v Stewart* 833 A2d 961 (Del Ch 2003).
[70] *Keech v Standford* (1726) 25 ER 223.
[71] *Regal (Hastings) v Gulliver* (1942) 1 All ER 378.
[72] Jennifer Ying, 'Guth v. Loft: The Story of Pepsi-Cola and the Corporate Opportunity Doctrine' (2009) <http://dx.doi.org/10.2139/ssrn.1414478> accessed 14 November 2024.

The concept of COD and related rules like the no-conflict rule, and the no-profit rule, were upheld in a number of subsequent instances, including *Industrial Development Bank v Cooley*[73] and *Phipps v Boardman*.[74] In fact, the rules were set up to be so rigorous that Professor Gower noted in his study that the decisions had resulted in an equitable rule being bent to unfair objectives.[75] In essence, it was determined by a series of English decisions that adopted the rigorous view that a director is required to answer to the company for any profits he makes if he uses a chance (a 'corporate opportunity') that presents itself to him while performing his duties for personal gain. Additionally, it was held that the fact that the opportunity wasn't 'open' to the corporation didn't serve as a defence. According to the ruling, there need only be a hypothetical potential of a conflict of interest to trigger the regulations.[76]

It may be argued that a number of following cases, starting with *Island v Umunna*,[77] *Balston v Headline Filters Ltd*,[78] and *Queensland Mines*,[79] lessened the strictness of the requirements. In the later instance, the Privy Council ruled that it was the actual likelihood of a conflict of interest that mattered, not just the theoretical possibility. Professor Gower's[80] criticism of *Regal* was mentioned by the Court of Appeal as late as 2007 in *Foster Bryant Surveying v Bryant*.[81] Courts now base their decisions on a fact-specific analysis rather than applying this rule rigidly without considering other factors, such as the credibility of the directors' actions, the source of the opportunity's information, the company's commercial impossibility of accepting the opportunity, and others. Therefore, it might be said that the 'newer' English strategy has been to mitigate whatever disparities that Regal might have caused.[82]

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[73] *Industrial Development Bank v Cooley* (1972) 2 All ER 288.
[74] *Phipps v Boardman* [1966] 3 WLR 1009.
[75] Paul L Davis and Sarah Worthington, *Principles of Modern Company Law* (9th edn, Gower & Davies 2012).
[76] Anthony O Nwafor and Chinwe Kate Okoli, 'The Corporate Opportunity Doctrine- An Inflexible or Flexible Rule' (2013) 9(2) Corporate Board: Role, Duties and Composition, 16-18.
[77] *Island Export Finance v Umunna* [1986] BCLC 784.
[78] *Balston v Headline Filters Ltd* [1990] FSR 385.
[79] *Queensland Mines Ltd v Hudson* (1978) 18 ALRI.
[80] Davis and Worthington (n 75).
[81] *Foster Bryant v Bryant* [2007] 2 BCLC 239.
[82] Genevieve Helleringer and Marco Corradi, *Self-Dealing, Corporate Opportunities and the Duty of Loyalty - A US, UK and EU Comparative Perspective* (Law Working Paper No 582/2021 in ECGI Working Paper Series in Law 2021) <https://www.ecgi.global/sites/default/files/working_papers/documents/corradihelleringerfinal.pdf> accessed 14 November 2024.

This watering down also seems to be consistent with other jurisdictions' practises. In the United States, as discussed before, *Guth* established that directors could only be barred from taking advantage of an opportunity if it met all of the following criteria: (a) it fell within the company's area of expertise, (b) it was relevant to its business, and (c) it was of practical significance to the business.

The recent *O'Donnell* [83] ruling from the Court of Appeals reaffirms the strictness of the test applied in cases concerning corporate opportunities. While the judgment extensively discusses the precedent set by the *Regal* case, it notably omits any mention of leniency or relaxation in the application of the doctrine. Moreover, the ruling explicitly rejects exceptions such as the 'scope of business' exception to the 'no profit' rule, emphasising the steadfastness of the principle. The Court's stance reflects a return to a traditional interpretation of corporate opportunity doctrine, where equitable principles are rigorously upheld. The rationale behind this return to strictness is somewhat unclear, both in terms of theoretical underpinnings and historical context.[84]

C. Case for Pragmatic Indian Approach

In the Indian context, the interpretation of the corporate opportunity doctrine remains ambiguous, with the landmark case of *Vaishnav Shorilal Puri* providing conflicting guidance. The absence of a clear framework for the doctrine in Indian legislation adds to the uncertainty. However, scholars argue that Indian courts should draw from the experiences of the US and UK approaches to develop a pragmatic and commercially viable interpretation of the doctrine.

Vaishnav Shorilal stands out as the landmark decision clarifying the law on corporate opportunity in the Indian context. The Puri Group's activities were clearly not in good faith, but the Court still decided in their favour. Inexplicably, the Court, while professing to follow the UK's common law norm, considered elements relevant under the US corporate opportunity concept, such as a third party's refusal to enter into a contract with the corporation. As a result, *Vaishnav Shorilal* could not really establish a uniform framework for the COD that Indian

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[83] *O'Donnell v Shanahan* [2009] EWCA Civ 751.

[84] David Kershaw, 'Lost in Translation: Corporate Opportunities in Comparative Perspective' (2005) 25(4) Oxford Journal of Legal Studies 603.

courts could consistently adopt. Hence, the corporate opportunity legislation in India currently lacks a clear direction.[85]

The 'no-conflicts principle' with regard to corporate directors is encapsulated in Section 166(4) of the Companies Act 2013 after the ruling in *Vaishnav Shorilal*, which is of major significance. When taken in isolation, it may be argued that this clause supports a rigorous interpretation of the corporate opportunity rule in India, consistent with the decisions in *Keech* and *Regal*. However, scholars have contended that Indian courts must adopt an open-ended construction of Section 166(4) in light of the aforementioned jurisprudential developments regarding the corporate opportunity in the UK and the Bombay High Court's decision in *Vaishnav Shorilal*, flawed though it may be.

In considering the adoption of a practical approach to the COD in India, several factors emerge as crucial for ensuring both commercial and legal viability. These factors encompass aspects related to the opportunity itself, the company's capabilities and objectives, and the legal framework and ethical considerations. Commercial viability hinges on understanding market dynamics, evaluating financial capability, assessing industry expertise, analysing the competitive landscape, and conducting a comprehensive risk assessment. Legal viability, on the other hand, revolves around adhering to fiduciary duties, regulatory compliance, transparency, fairness, and equity, as well as drawing insights from legal precedents. By considering these factors comprehensively, Indian courts can develop a robust framework that balances directorial entrepreneurialism with fiduciary duties, fostering growth and sustainability in India's corporate sector.[86]

The dimensions that allow for 'commercially viable' and 'legally justifiable' solutions in the US approach include the consideration of the corporation's interests and capabilities, as well as a focus on fairness and equity in decision-making. This flexibility enables directors to pursue opportunities that align with the company's objectives and contribute to its growth, while still upholding their fiduciary duties. In contrast, the UK approach's rigidity may lead to unjust outcomes where directors are unfairly penalized for actions that may benefit the

[85] Yifat Naftali Ben Zion, 'Cleaning up the Corporate Opportunity Doctrine Mess: A First Principles Approach' (2023) 80(4) Washington and Lee Law Review 1609.
[86] Gelter and Helleringer (n 59).

company but fall outside strict interpretations of the doctrine.[87] Therefore, the US approach's adaptability and consideration of broader factors contribute to a more commercially viable and legally justifiable framework for addressing corporate opportunity disputes.

Essentially, Indian courts should work to create a just and equitable corporate opportunity doctrine that balances the notion of directorial entrepreneurialism with the fiduciary duties of directors, rather than positing a rigid corporate opportunity doctrine that results in unjust decisions against directors.[88] Thus, the practical strategy advanced in the *Balston*[89] and *Island Export*[90] instances offer a road map for applying a corporate opportunity concept in India that is both commercially and legally viable.

IX. CONCLUSION

The analysis of the COD within the Indian context underscores the urgent need for clarity and coherence in the legal framework governing corporate opportunities. Despite the incorporation of provisions in the Companies Act of 2013, India's legislation on COD remains ambiguous, particularly concerning consent-based exceptions and defences. The intersection of COD with shareholder-stakeholder theories highlights the importance of balancing competing interests in corporate decision-making, emphasizing the need for inclusive approaches that account for the interests of all stakeholders.

The structure of a COD dispute involves multiple stages, including defining corporate opportunities and assessing disclosure. However, practical application is complicated by ambiguous characterizations and varying tests used to define corporate opportunities, such as the interest and expectancy test, the line of business test, and the fairness test. The analysis of rejection, ratification, and consent-based exceptions reveals the lack of clarity and consistency in India's legal framework. While common law doctrines offer potential defences, their applicability remains uncertain, necessitating a

[87] Clark Bryan and Benstock, 'UK Company Law Reform and Directors' Exploitation of Corporate Opportunities' (2006) 17(8) International Company and Commercial Law Review 231.

[88] Eric Talley, 'When Fiduciary Duties and Entrepreneurial Innovation Collide: AngioScore v. TriReme' (*The CLS Blue Sky Blog*, 03 July 2015) <https://clsbluesky.law.columbia.edu/2015/07/13/when-fiduciary-duties-and-entrepreneurial-innovation-collide-angioscore-v-trireme-2/> accessed 14 November 2024.

[89] *Balston v Headline Filters Ltd* [1990] FSR 385.

[90] *Island Export Finance Ltd v Umunna* [1986] BCLC 784.

pragmatic approach to addressing ambiguity and drawing from international experiences. Proposals such as the theory of non-ratifiable breaches offer potential solutions but face challenges in implementation and consistency.

The argument for a pragmatic approach in India's conception of COD. emphasizes the need for a coherent and commercially viable framework that comprehensively considers market dynamics, financial capability, regulatory compliance, and legal precedents. By striking a balance between directorial entrepreneurialism and fiduciary duties, Indian courts can foster the growth and sustainability of the corporate sector. In conclusion, the paper underscores the imperative for clarity, coherence, and pragmatism in India's conception and application of the corporate opportunity doctrine, advocating for nuanced understanding, effective legislative interventions, and equitable corporate governance practices.