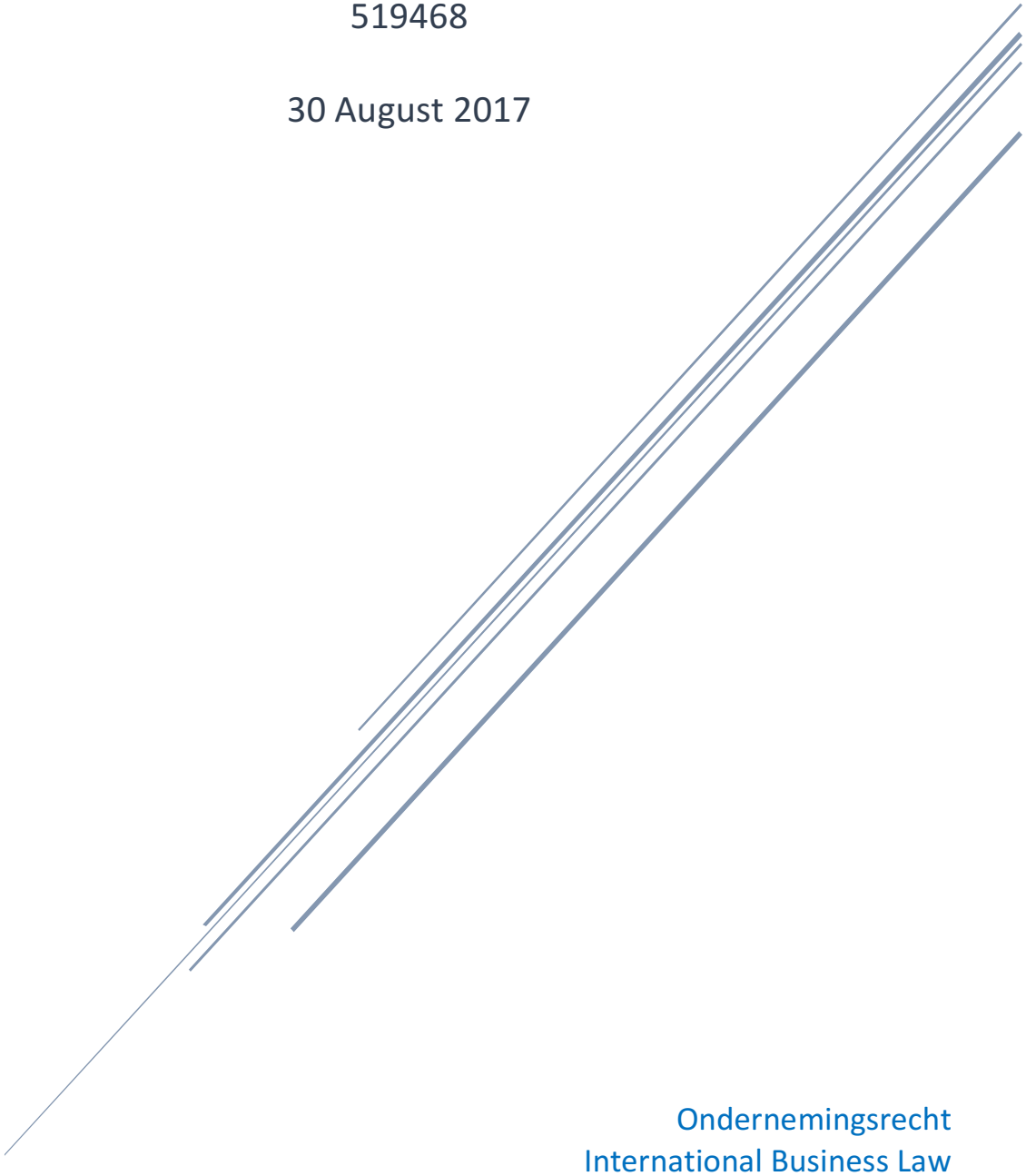
CORPORATE OPPORTUNITIES IN A COMPARATIVE PERSPECTIVE

Double Master's Thesis

Mika Klaus
519468

30 August 2017



Ondernemingsrecht
International Business Law
Tilburg University
Supervisors: C.F. van der Elst & J. Li

Table of contents

1 Introduction

In general terms, under the corporate opportunity doctrine it is believed that a corporate fiduciary (i.e. a board member or director) is not allowed to appropriate an opportunity belonging to the company to himself. In the United States, the United Kingdom and Germany, the corporate opportunity doctrine is well-defined. However in the Netherlands, it remains uncertain whether the corporate opportunity doctrine is an accepted legal doctrine.

The United Kingdom was the first of these jurisdictions to apply a strict conflict of interest rule in a 1726 case, a rule related to the corporate opportunity doctrine.[1] In a case in 1854, the basis for the current English corporate opportunity doctrine was laid down.[2] In the United States, the first case that applied the corporate opportunity doctrine was in the 1900s.[3] In Germany, the corporate opportunity doctrine has its basis in legal literature.[4] Due to it being discussed in legal literature, the corporate opportunity doctrine has been accepted by the Supreme Court for the first time in a 1977 case.[5]

In the Netherlands the corporate opportunity doctrine has been discussed in legal literature, for the first time in 1995.[6] In 2008, the corporate opportunity doctrine has been accepted and defined by a Dutch district court.[7] The court of appeals and the Supreme Court have not applied the corporate opportunity doctrine in its cases (yet). Therefore, it remains uncertain if the corporate opportunity doctrine actually is accepted in Dutch case law. The most recent case in which the corporate opportunity doctrine was applied, dates from 2014.[8]

The problem here is that it remains uncertain whether the corporate opportunity doctrine is accepted in the Netherlands. This leads to legal uncertainty in this field. This is problematic

[1] *Keech v. Sandford* 25 E.R. 223, (1726) Select Cases Temp. King 61.
[2] *Aberdeen Rail Co. v. Blaikie Brothers* (1854) 1 Macq. 461, [1843-60] AII E.R. Rep. 249, HL.
[3] *Lagarde v. Aniston* 126 Ala. 496, 28 So. 199 (Ala. 1900).
[4] Mestmäcker, *Verwaltung, Konzerngewalt und Rechte der Aktionäre* (1958), p. 1666ff; and Immenga, *Die personalistisch Kapitalgesellschaft* (1970), 156.
[5] German Supreme Court (Bundesgerichtshof) 10 February 1977 – II ZR 79/75, WM 1977, 361.
[6] A.F. Verdam, *Corporate opportunities – Over de toeeigening door functionarissen van aan de vennootschap toekomende business opportunities* (diss. Tilburg), Tilburg: Schoordijk Instituut Center for Company Law 1995.
[7] District court (rechtbank) Zwolle-Lelystad 30 January 2008, ECLI:NL:RBZLY:2008:BG0842, no. 4.11.
[8] District court (rechtbank) Midden-Nederland 19 February 2014, ECLI:NL:RBMNE:2014:457, no. 4.11.

for legal professions, for instance for attorneys that want to serve summons on a party or that need to conduct a party's defense in the field of corporate opportunities. It is also a problem for district courts (and courts of appeal) since these courts do not know if they should or should not apply the corporate opportunity doctrine. Therefore, this research aims to decrease the legal uncertainty by answering the following research question:

How can the Netherlands further develop its own corporate opportunity doctrine by looking at three major jurisdictions that have experience in this regard?

This research question will be answered on the basis of a comparative law analysis with the following sub-questions:

1. How did the corporate opportunity doctrine develop into its current state in the United States, more specifically, in the state of Delaware?
2. How did the corporate opportunity doctrine develop into its current state in the United Kingdom, more specifically, in English law?
3. How did the corporate opportunity doctrine develop into its current state in Germany?
4. What is the current state of the corporate opportunity doctrine in the Netherlands?
5. What are the differences and similarities of the corporate opportunity doctrines in the United States, the United Kingdom, Germany, and the Netherlands?

The first three questions will provide an analysis of the development of the corporate opportunity doctrine in the three jurisdictions of the United States (more specifically Delaware), the United Kingdom and Germany. The United States and the United Kingdom are relevant in this matter, since these states have a history of corporate opportunity applications for over a century. In the United States, every state has its own corporate law regulation and, as a result, the application of the corporate opportunity doctrine differs from state to state. Some states have overlapping applications of corporate opportunities, but this is not always the case. It is beyond the scope of this work to analyze every application of corporate opportunity doctrine in different states. The focus is, therefore, on Delaware, since it is the

dominant jurisdiction for corporations in the United States.[9] Delaware is home to more than half of all existing public corporations in the United States.[10]

The United Kingdom has three legal systems: English law (England and Wales), Northern Ireland law (Northern Ireland), and Scots law (Scotland). The focus on English law followed from the case law and literature findings from which it appeared that the corporate opportunity doctrine is more often dealt with in English law compared to Northern Ireland or Scots law. Besides the long history of corporate opportunity cases, the United Kingdom is also relevant as it is regarded, despite the North Sea, as a neighboring country of the Netherlands. This is relevant in cases of legislative proposals, since the law maker often compares the legal rules of neighboring countries in specific matters.[11]

Germany is (one of the few) civil law jurisdictions that applies a well-defined corporate opportunity doctrine. Since the Netherlands is also a civil law jurisdiction, a comparison to another civil law jurisdiction is desirable over more common law jurisdictions, as the United States and the United Kingdom both are common law jurisdictions. Moreover, as a neighboring country of the Netherlands, Germany is also, just like the United Kingdom, relevant to compare to due to comparisons made by the law maker in cases of legislative proposals.[12]

In order to answer the first three questions, written law, case law, and relevant literature of the mentioned jurisdictions is looked at. The fourth question will provide an analysis of the current state of the corporate opportunity doctrine in the Netherlands. The question will be answered on the basis of written law, case law, and relevant literature. In answering the fifth question, the findings of these analyses will be combined and compared to each other. With the answers to the sub-questions, an answer to the research question is formulated. Furthermore, in answering the research question, it is described how the Netherlands can

[9] See L.A. Bebchuk & A. Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering Competition Over Corporate Charters' (2002) 112 Yale L. J. 533, 553-554.
[10] L.S. Black, 'Why Corporations Choose Delaware' (2007) Delaware Department of State Division of Corporations.
[11] This was for instance the case in the legislative proposal of 2008 to modify Book 2 of the Dutch Civil Code. Kamerstukken II 31 763, no. 3 (Explanatory Memorandum to the Bill).
[12] This was for instance the case in the legislative proposal of 2008 to modify Book 2 of the Dutch Civil Code. Kamerstukken II 31 763, no. 3 (Explanatory Memorandum to the Bill).

further develop its own corporate opportunity doctrine. The answer of the research question results in recommendations to the Dutch courts regarding the application of the corporate opportunity doctrine.

The rest of this research is structured as follows. Chapter two describes the agency theory and its principal-agent problem, which is related to the corporate opportunity doctrine. In this chapter, the fiduciary duties, also related to the agency theory and the corporate opportunity doctrine, are discussed as well. Chapter three provides an analysis of the corporate opportunity doctrine in the United States, more specifically, in the state of Delaware. Then, chapter four discusses the corporate opportunity doctrine in the United Kingdom, more specifically, in English law. Following, in chapter five, the corporate opportunity doctrine in Germany is described. Chapter six analyses the corporate opportunity doctrine in the Netherlands. In chapter seven, the differences and similarities of the corporate opportunity doctrine between the four aforementioned jurisdictions. Chapter eight concludes.

2 Agency theory

2.1 Introduction

This chapter discusses the relation of the agency theory to the corporate opportunity doctrine. First, a general overview of the principal-agent problem is provided together with one of its solutions: board monitoring. Second, the fiduciary duties are described generally. This chapter contributes to a better understanding of the corporate opportunity doctrine and the related managerial and economically theories underlying the doctrine.

2.2 The principal-agent problem

Agency theory discusses the relation between a principal and an agent. The principal/agent relationship occurs when one party (the agent) is hired by another party (the principal) to take actions or make decisions that affect the principal.[13]

Agency theory has its roots in the issue of separation of ownership and control. Berle and Means were the first to describe the separation of ownership and control in a typical twentieth century corporation. The large corporation is owned by so many shareholders that no single shareholder has a significant share in the corporation. As a result, no single shareholder has the power to really control the actions of the officers of the corporation. In general, the officers themselves only own a small part of shares of their corporations. According to Berle and Means, the interests of the officers and shareholders diverge widely. An important objective of the shareholders is to earn the maximum profit compatible with a reasonable degree of risk. However, officers may wish to maximize their personal wealth, and they could pursue strategies and make decisions that enrich the officers themselves even though the shareholders do not necessarily benefit. Officers may wish to limit their personal risk and, as a result, avoid risky strategic initiatives although the shareholders view the risk as reasonable. Officers may wish to boost their prospects for another job and, consequently, take actions that improve the company in the short run even though the shareholders are harmed in the long run.[14]

[13] David Besanko et al., *Economics of Strategy,* (John Wiley & Sons 2010), 73.
[14] A. Berle & G. Means, *The Modern Corporation & Private Property,* (New York, Macmillan 1932). See also David Besanko et al., *Economics of Strategy,* (John Wiley & Sons 2010), 73-74; and Sytse Douma & Hein Schreuder, *Economic approaches to organizations* (Pearson 2013), 138-140.

The principal-agenct problem arises due to misalignment of desires and objectives between the principal and the agent and due to information asymmetries. Shareholders are primarily interested in obtaining a return on their investment, while the officers are interested in maximizing their own utility functions. These interests not always coincide. Moreover, officers are generally better informed compared to shareholders, which allows them to pursue their own goal without significant risk. Consequently, solutions for agency problems aim to narrow the gap between the interests and to reduce the information asymmetry between principal and agent.[15]

Internal monitoring by the (supervisory) board can offer a solution to reduce information asymmetry between officers and shareholders. In a company with a one-tier board, the board consists of inside and outside directors or executive and non-executive officers. The executive officers are involved in the day-to-day management of the company. The non-executive officers monitor the activities executed by the executives and contribute to the development strategy. In a one-tier board system, the board is responsible for both decision management and decision control. In a company with a two-tier board, the management board consists of inside directors or executive officers and the supervisory board consists of the outside directors or non-executive officers. In a two-tier board system, the executives and non-executives are completely separated. The management board is responsible for decision management, and the supervisory board is responsible for decision control. The two-tier board system is the standard in the United States and the United Kingdom, while the one-tier board system is the standard in intercontinental Europe, for instance in Germany and the Netherlands.[16] In Germany, a two-tier board system is even prescribed by law for listed companies.[17]

Although, inside monitoring may reduce agency problems, it does have its limitations. Regardless of a one-tier or two-tier board system, most non-executive officers do not spend more than a couple dozen days per year on the company's business. Furthermore, hiring non-

[15] See, e.g., Joseph A. McCahery & Erik M. Vermeulen, *Corporate governance of non-listed companies* (OUP 2010), 7; and Sytse Douma & Hein Schreuder, *Economic approaches to organizations* (Pearson 2013), 380-382.
[16] Sytse Douma & Hein Schreuder, *Economic approaches to organizations* (Pearson 2013), 393-394.
[17] German Corporate Governance Code (7 February 2017), 1.

executives can be quite costly. Depending the size of the company, the retaining fees frequently exceed $ 250,000 annually. On top of that, hiring non-executives often leads to another agency relationship layer. The non-executives may reduce the agency conflict between the executives and the shareholders, but the shareholders then have to worry about agency conflicts between themselves and the non-executives.[18]

The principal-agent problem is not necessarily present in non-listed corporations. In general, two different types of non-listed companies could be distinguished: companies with a relatively high number of shareholders and companies in which the owners are active managers themselves.[19] In the first kind of company, the same principal-agent problems occur as in listed companies with widely dispersed shareholders; the separation of ownership and control is present. In the latter kind of company, the owners and managers are not separated. The interests of the shareholders and the managers align as they are the same person. As a result, regardless of the company being listed or not, when the shareholders are widely dispersed, principal-agent problems are likely to arise.

The corporate opportunity doctrine is regarded a result of the principal-agent problem. The appropriation of an opportunity belonging to the company by a board member is an example of the misalignment of desires and objectives between the board member and the shareholder. The board member wants to appropriate the opportunity to himself as he wants to enrich himself. The shareholders want the board member to appropriate the opportunity to the company as this will be profitable for the company and results in a return on their shares.

A release by the (supervisory) board of the corporate opportunity is often allowed in the jurisdictions that apply the corporate opportunity doctrine. This is a way of internal monitoring by the non-executives or the supervisory board in which the supervisors are able to determine that the interests of the shareholders (and of the company) are not harmed.

[18] David Besanko et al., *Economics of Strategy,* (John Wiley & Sons 2010), 82.
[19] Joseph A. McCahery & Erik M. Vermeulen, *Corporate governance of non-listed companies* (OUP 2010), 7.

Despite the fact that the principal-agent problem mostly occurs when the shareholders of the company are widely dispersed, misappropriation by directors of corporate opportunities also occurs in small non-listed companies. This is, for instance, when there is one director and one shareholder which are not the same person. The director could appropriate an opportunity belonging to the company to himself, while the shareholder wants the company to appropriate the opportunity. Moreover, the corporate opportunity doctrine also plays a role in forms of cooperation, such as partnerships and joint ventures. Misappropriation of corporate opportunities does not occur when the company is managed and owned by one and the same person.

2.3 Fiduciary duties

Besides monitoring, the fiduciary duties are a tool of law to ensure that corporate fiduciaries serve the interests of the company (or the shareholders) and, thus, to reduce the principal-agent problem. The corporate opportunity doctrine is related to the fiduciary duty of loyalty. The fiduciary duties are well-established in United States' case law, but they are also referred to and applied by the other jurisdictions. The fiduciary duties can be distinguished in the duty of care and the duty of loyalty.[20]

The duty of care ensures that corporate fiduciaries exercise informed business judgment in their management of the company, establishing liability if a fiduciary acts (or fails to act) without being adequately informed first.[21] This duty could reasonably reach almost any major decision by corporate decision-makers.

The duty of loyalty prohibits corporate fiduciaries from benefiting inappropriately from financial conflicts of interest. The duty of loyalty requires fiduciaries to "exercise their authority in a good-faith attempt to advance corporate purposes."[22] The duty of loyalty prohibits self-interested action by officers or directors, which involves a conflict of interest with the corporation itself. The corporate opportunity doctrine is regarded a fundamental

[20] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev.*, 8.
[21] *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).
[22] W.T. Allem & R. Kraakman, *Commentaries and Cases on the Law of Business Organization* 229, 246 (5th ed. 2016); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

component of the duty of loyalty,[23] although it has developed its own rules, standards and tests.[24]

The next chapter will discuss the corporate opportunity doctrine in the United States.

[23] *In re Cumberland Farms, Inc.*, 249 B.R. 341, 349 (Bankr. D. Mass. 2000). See also M.T. Steele, 'Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies' (2007) 32 Del. J. Corp. L. 1, 10.
[24] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 10.

3 United States

3.1 Introduction

In this chapter, the development of the corporate opportunity doctrine in the United States, and more specifically in the state of Delaware is discussed. Firstly, the fiduciary duties in American law are shortly described, as the corporate opportunity doctrine is related to fiduciary duties. Secondly, the relevant case law in the United States regarding the establishment and development of the corporate opportunity doctrine is analyzed. As a common law state, the corporate opportunity doctrine is established and developed in case law in the United States. Therefore, case law from different states is analyzed since these first cases are important for the establishment of and the development into the current corporate opportunity doctrine is analyzed. Thirdly, in the fourth subsection, the tests used in United States' case law to determine if an opportunity is regarded a corporate opportunity are described. This provides a better understanding of the scope of the corporate opportunity doctrine. Fourthly, as corporate opportunity cases become more common, the focus is laid on Delaware cases since it is beyond the scope of the scope of this research to discuss the corporate opportunity doctrines of every separate state of the United States. Moreover, not every Delaware case involving the corporate opportunity doctrine is mentioned, but only the cases that are important for the analysis, which particularly are cases in which new rules are established. Fifthly, the corporate opportunity doctrine mentioned in the Principles of Corporate Governance is discussed. Lastly, the somewhat recent development of corporate opportunity waivers is described. As a result, this chapter provides a complete overview of the corporate opportunity doctrine in the state of Delaware.

3.2 Fiduciary duties

In the previous chapter, the fiduciary duties are described. The fiduciary duties play a large role in case law of the United States. In short, under the duty of care, fiduciaries are liable in case they make decisions without being first adequately informed.[25] In the United States, the scope of the duty of care is limited by various judicial and private limitations. One of these limitations is the business judgment rule, which is a "presumption that in making a business

[25] *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[26] Besides the business judgment rule, corporations are permitted to insure their directors and officers against breaches of the duty of care, and to compensate their directors for expenses incurred in connection with the defending against allegations of these breaches.[27] Furthermore, Delaware and the vast majority of other states (of the United States) allow parties to contract around the duty of care in various instances. For example, Delaware permits a corporation to adopt a charter provision limiting or eliminating the personal liability of corporate directors for breaching the duty of care.[28]

Under the duty of loyalty, fiduciaries are prohibited to inappropriately benefit from financial conflicts of interests. The corporate opportunities doctrine is regarded a fundamental component of the duty of loyalty.[29] Especially, the duty of loyalty is relevant for the corporate opportunity doctrine. In opposition to the duty of care, it is traditionally prohibited to contract around the duty of loyalty. For example, the aforementioned Delaware statute that enables corporate charters to limit or eliminate directors' monetary liability for breaches of fiduciary duty, expressly excludes the duty of loyalty from its reach.[30] Moreover, unlike with the duty of care, the business judgment rule is also inapplicable to the duty of loyalty.[31]

3.3 The development of corporate opportunities in case law

Lagarde v. Aniston Lime & Stone Company, an Alabama case of 1900, is known as the earliest case providing a doctrinal analysis of a corporate opportunity claim.[32] Prior to the 1900s, the corporate opportunity concept did not exist, since only limited purpose corporations were permitted. As a consequence, the directors of a corporation were limited to the company's

[26] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
[27] See, e.g., Del. Code Ann. Tit. 8, § 145(a)-(g).
[28] Del. Code Ann. tit. 8, § 102(b)(7) (empowering corporations to eliminate "the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director").
[29] *In re Cumberland Farms, Inc.*, 249 B.R. 341, 349 (Bankr. D. Mass. 2000). See also M.T. Steele, 'Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies' (2007) 32 Del. J. Corp. L. 1, 10.
[30] Del. Code Ann. tit. 8, § 102(b)(7) (specifically precluding a corporate charter from eliminating or limiting director liability "[f]or any breach of the director's duty of loyalty to the corporation or its stockholders").
[31] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 9.
[32] *Lagarde v. Aniston* 126 Ala. 496, 28 So. 199 (Ala. 1900).

chartered purposes – the ultra vires doctrine.[33] Regardless of the lack of "general corporations" prior to 1900, there were opportunities that would fall within the meaning of today's corporate opportunities doctrine. For instance, in the nineteenth-century New England banking industry it was common for officers and directors of banks to routinely exploit business opportunities for themselves that may have been attractive and appropriate for the corporations they served.[34] In fact, this was not only common practice, but also expected. The nineteenth-century banks would lend large portions of their assets to its fiduciaries in order to supply its directors with money.[35]

In *Lagarde*, the corporation, Aniston, was interested in purchasing land containing a valuable quarry. Previously, the corporation had purchased a one-third interest in the land. Further, Aniston had a contractual commitment to lease and buy a second one-third interest in the land, and, for a longer period of time, Aniston had been in negotiations to purchase the remaining one-third interest in the land. The corporation had three directors from which John and Louis Lagarde are two of them. In spite of Aniston's dealings, John and Louis Lagarde went out and personally purchased the two outstanding one-third interests in the land.[36]

In its determination whether John and Louis Lagarde had breached their fiduciary duties, the Alabama court determined that an opportunity belonged to the corporation only if the opportunity was one in which the corporation had an existing interest or an expectancy growing from an existing interest, or if the fiduciaries' activities would "balk the corporation in effecting the purposes of its creation."[37] If none of those circumstances existed, there was no fiduciary duty.

In this judgment, the Alabama court laid down the "interest or expectancy" test to determine whether the opportunity belongs to the corporation. Under this approach, a corporation's

[33] The ultra vires doctrine implies that acts attempted by a corporation that are beyond the scope of its charter (as granted by the corporation's articles of incorporation, for instance) are void or voidable. See also J. Ying, '*Guth v. Loft: The Story of Pepsi-Cola and the Corporate Opportunity Doctrine'* (May 8, 2009) 19. Available at https://ssrn.com/abstract=1414478.
[34] W. Savitt, 'A New New Look at Corporate Opportunities' *Columbia Law Sch. Ctr. For Law & Econ. Stud. Working Paper No. 235* 10. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=446960.
[35] N.R. Lamoreaux & C. Glaisek, 'Vehicles of Privilege or Mobility? Banks in Providence, Rhose Island, During the Age of Jackson' (1991) 65 Bus. Hist. Rev. 502, 507-511.
[36] *Lagarde v. Aniston* 126 Ala. 496, 28 So. 199 (Ala. 1900), 200-201.
[37] *Lagarde v. Aniston* 126 Ala. 496, 28 So. 199 (Ala. 1900), 201.

"interest" consists of plans or activities over which the corporation had an existing contractual right. Similarly, a corporation has "expectancy" in plans or activities that have not yet been guaranteed as contractual rights but are likely, due to the corporation's current rights, to develop into contractual rights in the near future.[38] An example of these are contracts between a corporation and its repeat clients, in which periodical continuation is not expressly provided for but could be reasonably assumed.[39] Eventually, the interest or expectancy test defines a corporate opportunity based on a corporation's current or pre-existing activities, but does not look at the corporation's prospective or future activities.[40]

After the *Lagarde* case, the corporate opportunity doctrine remained a relatively unused doctrine until the 1930s and 1940s.[41]

The case *Meinhard v. Salmon* was decided in 1928 within the more general framework of the duty of loyalty, although the case had the potential to be judged within the framework of the corporate opportunity doctrine. In *Meinhard*, Salmon had signed a twenty-year lease on a building owned by the Gerry family, with the agreement to change the building from a hotel into shops and offices. Salmon was unable to fund this project and entered into an agreement with Meinhard. Meinhard would provide the investment capital and Salmon would manage the activities. The profits would be shared and the risks of this joint adventure would be bore almost equally.[42]

When the twenty-year lease had almost expired and the joint venture was about to be dissolved, the Gerry family approached Salmon and offered him an opportunity to lease a much larger piece of property, including the current building, for a much larger re-development project. Salmon agreed and entered into a new lease contract between himself and the Gerry family, without informing or involving Meinhard. When Meinhard learned of

[38] R.C. Clark, *Corporate Law* (A.A. Balkema 1986), 225; J.D. Cox et al., *Corporations* (Aspen Law & Business 1997), 236-237.
[39] I.R. Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under the Classical, Neoclassical, and Relational Contract Law' (1978) 72 Nw. U. L. Rev. 854.
[40] E. Talley, 'Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunity Doctrine' (1998) 108 Yale L. J. 227, 292.
[41] J. Ying, '*Guth v. Loft: The Story of Pepsi-Cola and the Corporate Opportunity Doctrine*' (May 8, 2009) 21. Available at https://ssrn.com/abstract=1414478.
[42] *Meinhard v. Salmon* 164 N.E. 545, 545-547 (N.Y. 1928).

this deal, he sued Salmon on the grounds that the opportunity to renew the lease belonged to the joint venture, and not to Salmon alone.[43]

The New York Court of Appeals found that Salmon and Meinhard were subject to the fiduciary duties of partners since they were 'co-adventurers'. When Salmon entered into the new lease without informing or involving Meinhard, he had "excluded his co-adventurer from any chance to compete, from any chance to enjoy the opportunity for benefit that had come to him alone by virtue of his agency."[44] In the words of Judge Cardozo: "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty."[45] In applying this more general duty of loyalty standard, Cardozo focused closely on the specific circumstances of the case, stating that it would be different if Salmon had received a proposition to lease a building at a location far removed. The circumstance that the subject-matter of the new lease was an extension and enlargement of the subject-matter of the old lease was decisive.[46]

As follows, by the late 1920s there were two lines of reasoning by which a court could analyze potential corporate opportunity problems. The first involved a more explicit standard, known as the "interest or expectancy" test. The second concerned a more general duty of loyalty analysis.[47]

Guth v. Loft, Inc. is known as the leading case in defining the modern corporate opportunity doctrine.[48] Loft was a manufacturer and retailer of candy, syrups, drinks, and food. It did not manufacture a cola syrup, but sold Coke in its retail outlets. Charles Guth was the president and a director of Loft. The Pepsi-Cola Corporation (Pepsi) was struggling at that time. Guth bought Pepsi shares and gained effective control of Pepsi. In secret, Guth used Loft funds, facilities, and employees to get Pepsi off the ground.[49] Loft later sued Guth on the grounds that the chance to acquire Pepsi was a corporate opportunity. In other words, Loft alleged

[43] *Meinhard v. Salmon* 164 N.E. 545, 546-547 (N.Y. 1928).
[44] *Meinhard v. Salmon* 164 N.E. 545, 546 (N.Y. 1928).
[45] *Meinhard v. Salmon* 164 N.E. 545, 546 (N.Y. 1928).
[46] *Meinhard v. Salmon* 164 N.E. 545, 548 (N.Y. 1928).
[47] K.V. Riley, 'Corporation's Right to Profits Made by Directors' (1916) 4 Minn. L. Rev. 513.
[48] J. Ying, '*Guth v. Loft: The Story of Pepsi-Cola and the Corporate Opportunity Doctrine*' (May 8, 2009) 1. Available at https://ssrn.com/abstract=1414478.
[49] *Guth v. Loft* 5 A.2d 503, 505-507 (Del. 1939).

that Guth had a duty to give Loft an informed chance to acquire Pepsi before doing so himself. The court held "that, if there is presented to a corporate officer or a director a business opportunity which the corporation is financially able to undertake, is, from its nature, in the line of the corporation's business and is of practical advantage to it, is one in which the corporation has an interest or a reasonable expectancy, and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself."[50]

Much of the court's analysis focused on what is now known as the line of business test: Is the business venture in question intimately or closely associated with the existing or prospective businesses of the corporation?[51] The court held Pepsi was directly within Loft's lines of business, since Loft was both a manufacturer and purchaser of soft drink syrups. Although Loft did not manufacture cola syrups, the court held that the line of business test had to allow for future development or expansion of the firm. Consequently, making cola syrups was within Loft's reasonable future business, since Loft had a continuing business need for cola syrups to supply its retail outlets.[52] Back then, cola-flavored syrups were already the major soft drink product. Guth, as president of Loft, terminated Loft's contract with Coca-Cola, which greatly exacerbated the on-going need for cola syrups in Loft's retail outlets. Moreover, Loft also had the knowledge, experience, and resources necessary to exploit the Pepsi opportunity. The combination of the need and the ability brought the Pepsi opportunity within Loft's line of business.

Loft believed that although it never legally owned Pepsi, it did, in fact, own the cola company because it had paid Pepsi's startup expenses under Guth. Loft's position was that the opportunity to buy Pepsi had come to Guth in his capacity as president of Loft, and it had been Loft's money that made the purchase possible. Furthermore, due to Loft's retail outlets, capital resources, and its executives and sales, the Pepsi venture became successful. Because

[50] *Guth v. Loft* 5 A.2d 503, 511 (Del. 1939).
[51] *Guth v. Loft* 5 A.2d 503, 514 (Del. 1939).
[52] *Guth v. Loft* 5 A.2d 503, 514 (Del. 1939).

Guth lacked sufficient personal funds, he could not have undertaken it himself. Accordingly, Loft argued that Guth could take the opportunity only for Loft's benefit, not his own.[53]

At the time of the hearings before the Delaware Supreme Court, the corporate opportunity doctrine case law consisted either of the interest or expectancy test, or an analysis under the general duty of loyalty framework.[54] The Supreme Court summarized the rule of corporate opportunity as "merely one of the manifestations of the general rule that demands of an officer or director the utmost good faith in his relation to the corporation which he represents."[55]

The true issue, according to the Court, was whether the Pepsi opportunity was "so closely associated with the existing business activities of Loft, and so essential thereto, as to bring the transaction within that class of cases where the acquisition of the property would throw the corporate officer purchasing it into competition with his company."[56] This question marked a distinct departure from the *Lagarde* decision that applied the interest or expectancy test.[57]

Under the Court's view, an "opportunity" must be "reasonably within the scope of a corporation's activities," and, further, the definition must account for a corporation's development and expansion. If the definition did not include consideration of a company's development and expansion, it would "deny the history of industrial development." According to the Court, because Pepsi was in the business of manufacturing cola syrups, and the manufacturing of cola syrups was important to Loft's retail outlets, the link between Loft and Pepsi was "close".[58]

The standard of the Supreme Court used in *Loft* is known as the line of business test and signaled a decisive move beyond the narrow formulation of the older interest or expectancy

[53] *Guth v. Loft* 5 A.2d 503, 514 (Del. 1939); M.W. Martin, *Twelve Full Ounces* (Holt, Rinehard and Winston 1962), 87; B. Stoddard, *Pepsi: 100 Years* (General Publishing Group 1997), 74.
[54] R.C. Clark, *Corporate Law* (A.A. Balkema 1986), §7.3.
[55] *Guth v. Loft* 5 A.2d 503, 510 (Del. 1939).
[56] *Guth v. Loft* 5 A.2d 503, 513 (Del. 1939).
[57] *Lagarde v. Aniston* 126 Ala. 496, 28 So. 199 (Ala. 1900).
[58] *Guth v. Loft* 5 A.2d 503, 514 (Del. 1939).

test.[59] In literature it is recognized that the Supreme Court was forced, to some extent, to expand the definition of a corporate opportunities as a result of the growing popularity of general corporations. At that time, corporations were no longer being chartered for a limited purpose and, therefore, there was a need for creating a more flexible standard in which the growing business's needs could be evaluated.[60]

In *Durfee v. Durfee & Canning, Inc.*, the court, in applying the corporate opportunity doctrine, held that the test is not whether the corporation has an existing interest or an expectancy thereof in the property involved, but "that the true basis of the governing doctrine rests fundamentally on the unfairness in the particular circumstances of a director, whose relation to the corporation is fiduciary, taking advantage of an opportunity [for his personal profit] when the interests of the corporation justly call for protection. This calls for the application of ethical standards of what is fair and equitable … [in] particular sets of facts".[61] This court finding is referred to as the fairness test.

3.4 The corporate opportunity tests

The three cases *Lagarde*, *Guth* and *Durfee* laid down the basis of the corporate opportunity doctrine. These three cases each developed a different test in order for courts to identify whether a business opportunity is regarded a corporate opportunity.

The first test was held in the Alabama case *Lagarde v. Aniston Lime & Stone Co.*[62] and is referred to as the interest or expectancy test. Under this test, the corporation may exclusively claim opportunities to which it already has a contractual right, an interest, or which are likely to become into a contractual right following from a pre-existing corporate initiative, an expectancy, for instance a long term contractual relationship.[63]

[59] W. Savitt, 'A New New Look at Corporate Opportunities' (*Columbia Law Sch. Ctr for Law & Econ. Stud. Working Paper No. 235*) 25. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=446960.
[60] V. Brudney & R. Clark, 'A New Look at Corporate Opportunities' (1988) 94 Harv. L. Rev. 998, 998.
[61] *Durfee v. Durfee Canning* 323 Mass. 187, 199 (Mass. 1948).
[62] *Lagarde v. Aniston* 126 Ala. 496, 28 So. 199 (Ala. 1900).
[63] E. Talley, 'Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporatie Opportunity Doctrine' (1998) 108 Yale L. J. 277, 292.

The second test is the line of business test as established by the Delaware Supreme Court in *Guth v. Loft*.[64] The test claimed that in case a business prospect can be said to be within the corporation's line of business, the prospect is designated as a corporate opportunity.

The third test is the fairness test that was established by the Massachusetts Supreme Judicial Court in *Durfee v. Durfee & Canning, Inc.* This test laid down that the true basis of the corporate opportunity doctrine is the unfairness of a corporate director or officer that takes an opportunity when the interest of the corporation justly calls for protection. In order to safeguard against such unfairness, the court must apply ethical standards of what is fair and ethical.[65] However, the court did not provide any content to the ethical standards.

3.5 Corporate opportunities in Delaware case law

In this subsection the most significant corporate opportunity cases in Delaware case law are discussed. In the 1956 case *Johnston v. Greene*, the director who was offered the relevant opportunity was involved in the management of many similar businesses. Each of these businesses had a possible interest in the offer. The director had received the offer in his individual capacity as the offerer was not aware of his affiliations with these businesses.[66] The Court found that the key corporation in question had no well-defined line of business.[67] The court stated that it was applying the *Guth* rule and focused on the line of business test and the fact that the director had received the offer in his personal capacity.[68] The court held that, in case an officer receives an offer in his individual capacity, a much stricter standard should be applied to determine if the opportunity is one to which the corporation is entitled.[69] Then, it must be shown that the opportunity is either directly or closely related to the corporation's business, or one to which the corporation has a specific interest or expectancy.[70] The court also repeatedly referenced "fairness" in the analysis, stating that "whether an opportunity is

[64] *Guth v. Loft* 5 A.2d 503 (Del. 1939).
[65] *Durfee v. Durfee & Canning* 80 N.E.2d 522, 529 (Mass. 1948).
[66] *Johnston v. Greene* 121 A.2d 919, 923 (Del. 1956).
[67] *Johnston v. Greene* 121 A.2d 919, 921 (Del. 1956).
[68] *Johnston v. Greene* 121 A.2d 919, 923 (Del. 1956).
[69] *Johnston v. Greene* 121 A.2d 919, 923-925 (Del. 1956).
[70] *Johnston v. Greene* 121 A.2d 919, 923 (Del. 1956).

corporate or personal depends on the facts – upon the existence of special circumstances that would make it unfair for the director or officer to take the opportunity for himself."[71]

In the 1971 case *Kaplan v. Fenton*, the director purchased shares in a corporation for his own account, but only after a similar offer was rejected by the board of the corporation months before and the director disclosed the second offer to the CEO of the corporation and asked him whether it should be presented to the entire board. The CEO told the director it should not be presented to the entire board.[72] The Delaware Supreme Court held these two events to be relevant to their analysis and to their findings that, first, the offer was not one in which the corporation had an interest (as it had been expressly disclaimed), second, it was not an opportunity that was essential to the corporation, and third, it was not an opportunity in which the corporation's resources had been improperly put to use.[73]

In the 1996 case *Broz v. Cellular Information Systems, Inc.*, Robert Broz was the sole shareholder and president of RFB Cellular, Inc., a small cell phone company. Broz was also a member of the board of Cellular Information Systems, Inc. (CIS), a competing cell phones service provider. A broker informed Broz of an opportunity to acquire a cellular telephone service license called Michigan-2, with which would be entitled to provide cell phone service to an area in rural Michigan. RFB Cellular already owned and operated a similar license known as Michigan-4.[74]

Broz mentioned the opportunity informally to Richard Treibick, the CEO of CIS, and to Peter Schiff, a board member of CIS. Both expressed a lack of interest in the offer. After that, Broz bought Michigan-2 for RFB Celullar. Broz never formally offered the opportunity to CIS. At that time, CIS was in financial difficulty and was in the process of being acquired by another cellphone operator PriCellular, Inc. PriCellular had competed with Broz for the Michigan-2 license. Shortly after RFB Celullar successfully bought the Michigan-2 license, the acquisition

[71] *Johnston v. Greene* 121 A.2d 919, 924 (Del. 1956).
[72] *Kaplan v. Fenton* 278 A.2d 834, 835 (Del. 1971).
[73] *Kaplan v. Fenton* 278 A.2d 834, 836 (Del. 1971).
[74] *Broz v. CIS* 673 A.2d 148, 151 (Del. 1996).

of CIS by PriCellular was completed. CIS sued Broz for breaching his fiduciary duties, claiming that Broz had taken the Michigan-2 opportunity for himself.[75]

The Delaware Supreme Court held Broz had not violated his fiduciary obligation to CIS by failing formally to offer the Michigan-2 license to CIS.[76] The Court stressed that formal processes were not required. Broz did not have to formally present the opportunity to CIS' board, nor did that board have to formally reject the opportunity, before Broz was free to take it. Formal processes may create a safe harbor, but they are not required.[77]

Furthermore, the Delaware Supreme Court identified four considerations relevant to determining whether a particular business activity constitutes a corporate opportunity: First, is the corporation financially able to take the opportunity? Second, is the opportunity in the corporation's line of business? Third, does the corporation have an interest or expectancy in the opportunity? Fourth, does an officer or director create a conflict between his self-interest and that of the corporation by taking the opportunity for himself?[78]

In the case of 2003 *In Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, Stewart and Doerr was being sued on the grounds that they usurped an opportunity allegedly from Martha Stewart Living Omnimedia (MSO) by selling some of their MSO stock to a group of investors. Plaintiff alleged that Stewart and Doerr took a corporate opportunity by selling said stocks to a group of investors. This opportunity was one of raising capital by selling stock.[79] The Chancery Court applied the *Broz* test and held that no single factor is dispositive, instead the Court must balance all factors as they apply to a particular case.[80] The Court concluded that Stewart and Doerr had not usurped a corporate opportunity from MSO.[81] The Court described the line of business test in this case as asking whether the opportunity entails "an activity as to which [the corporation] has fundamental knowledge, practical experience and ability to pursue."[82] The court then held: "Simply stated, selling stock is not the same line of

[75] *Broz v. CIS* 673 A.2d 148, 152-153 (Del. 1996).
[76] *Broz v. CIS* 673 A.2d 148, 159 (Del. 1996).
[77] *Broz v. CIS* 673 A.2d 148, 157-158 (Del. 1996).
[78] *Broz v. CIS* 673 A.2d 148, 155 (Del. 1996).
[79] *Beam Ex Rel. MSO v. Stewart* 833 A.2d 961 (Del. Ch. 2003).
[80] *Beam Ex Rel. MSO v. Stewart* 833 A.2d 961, 972 (Del. Ch. 2003).
[81] *Beam Ex Rel. MSO v. Stewart* 833 A.2d 961, 975 (Del. Ch. 2003).
[82] *Beam Ex Rel. MSO v. Stewart* 833 A.2d 961, 973 (Del. Ch. 2003).

business as selling advice to homemakers. Further, I would presume that a company's 'line of business' is one that is intended to be profitable. By definition, a company's issuance of its stock does not generate income."[83]

Further, the Court stated that "[a] corporation has an interest or expectancy in an opportunity if there is 'some tie between that property and the nature of the corporate business'."[84] The court concluded with the circumstance that plaintiff did not allege any facts that would imply that MSO was in need of additional capital, seeking additional capital, or even remotely interested in finding new investors.[85]

As follows from these cases, the line of business test is the dominant test in Delaware, as well as in most other states.[86] Although, it is not always clear what sorts of activities a judge will determine to be within a corporation's line of business. Generally, the interest or expectancy test is viewed as the narrowest common law formulation of the corporate opportunity doctrine.[87]

3.6 Principles of Corporate Governance

The American Law Institute (ALI) promulgated a corporate opportunity principle in its Principles of Corporate Governance of 1994. The Principles of Corporate Governance provide an analysis of legal requirements and recommendations. In general, ALI promotes the clarification and simplification of Unites States common law and writes summaries of legal principles from court decisions.

ALI's corporate opportunity principle tracks the line of business as it is stated that the corporate opportunity can be established if through the use of corporate information or property the resulting opportunity is one that the director should reasonably be expected to believe would be of interest to the corporation, or is closely related to a business in which the

[83] *Beam Ex Rel. MSO v. Stewart* 833 A.2d 961, 973 (Del. Ch. 2003).
[84] *Beam Ex Rel. MSO v. Stewart* 833 A.2d 961, 973 (Del. Ch. 2003).
[85] *Beam Ex Rel. MSO v. Stewart* 833 A.2d 961, 973 (Del. Ch. 2003).
[86] See, e.g., ALI PCG (1992), § 5.05; and E. Talley, 'Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporatie Opportunity Doctrine' (1998) 108 Yale L. J. 277, 292.
[87] E. Talley, 'Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporatie Opportunity Doctrine' (1998) 108 Yale L. J. 277, 292.

corporation is engaged or expects to engage.[88] Furthermore, an opportunity is regarded a corporate opportunity when a director encounters the opportunity in connection with the performance of functions as a director, or under circumstances that should reasonably lead the director to believe that the person offering the opportunity expects it to be offered to the corporation.[89] From the comments to ALI's Principles, it follows that ALI did not want to limit the application of the corporate opportunity doctrine to a particular 'line of business', but rather wanted to establish a more flexible standard for application to particular cases. Consequently, ALI also sought to incorporate the interest or expectancy test, although the principle does not specifically refer to this test.[90]

In addition, the Principles prescribe that a director or senior executive may not take advantage of a corporate opportunity unless the director first offers the corporate opportunity to the corporation and makes disclosure concerning the conflict of interest and the corporate opportunity, and unless the corporate opportunity is rejected by the corporation.[91] The rejection must satisfy the following conditions: (A) the rejection of the opportunity must be fair to the corporation; (B) the opportunity must be rejected in advance, following such disclosure, by disinterested directors in a manner that satisfies the standards of the business judgment rule; or (C) the rejection must be authorized in advance or ratified, following such disclosure, by disinterested shareholders, and the rejection must not be equivalent to a waste of corporate assets.[92] In this manner, the ALI approach to corporate opportunity doctrine involves a two-pronged analysis. First, the threshold determination must be made as to whether the business opportunity is a corporate opportunity that belongs to the corporation. Second, the analysis shifts to focus on the manner in which the corporate fiduciary goes about taking personal advantage of this opportunity. The taint of corporate opportunity is removed from the prospective business opportunity if the corporation made the decision to reject pursuing the business opportunity.[93] In other words, the ALI approach allows the fiduciary to take advantage of a business opportunity, but only if the fiduciary has fully disclosed to the

[88] ALI Principle of Corporate Governance, § 5.05 (b)(1)(B)-(2).
[89] ALI Principle of Corporate Governance, § 5.05(b)(1)(A).
[90] ALI Principle of Corporate Governance, § 5.05(b) cmt. B(2). See also Matthew R. Salzwedel, 'A Contractual Theory of Corporate Opportunity and a Proposed Statute' (2002) 23 Pace L. Rev. 83, 105-106.
[91] ALI Principle of Corporate Governance, § 5.05(a)(1)-(2).
[92] ALI Principle of Corporate Governance, § 5.05(a)(3). See also Matthew R. Salzwedel, 'A Contractual Theory of Corporate Opportunity and a Proposed Statute' (2002) 23 Pace L. Rev. 83, 105-106.
[93] ALI Principle of Corporate Governance, § 5.05.

corporation all material facts concerning the opportunity and the corporation has rejected the relevant opportunity. This disclosure-oriented approach provides a clear procedure for the fiduciary to protect itself against liability.[94] Several courts have used the ALI formulation of the corporate opportunity doctrine.[95]

3.7 Corporate opportunity waivers

Historically, it was considered taboo to contract around (or out of) the duty of loyalty in advance since the duty of loyalty is regarded one of the few mandatory components of corporate law.[96] However, in the late twentieth century there were several attempts in case law to shape the edges of this common view with regard to corporate opportunity waivers.[97]

The best-known example of these attempts was the 1989 Delaware Chancery Court decision in *Siegman v. Tri-Star Pictures, Inc.*[98] In *Siegman*, Tri-Star Pictures (Tri-Star) acquired the entertainment assets of Coca-Cola, and Coca-Cola received a large number of shares of newly issued Tri-Star common stock.[99]

The plaintiffs challenged the validity of several proposed amendments to Tri-Star's certificate of incorporation. One such amendment asserted to eliminate liability for Tri-Star's directors for breach of the duty of loyalty under specified circumstances involving the appropriation of corporate opportunities.[100] Another amendment provided that neither Coca-Cola nor Time, as significant block stockholders of Tri-Star, would be liable for any breach of fiduciary duty following from having pursued a corporate opportunity belonging to Tri-Star.[101] The business

[94] T.H. Maynard, 'Spinning in a Hot IPO: A Matter of Business Ethics' (October 2002, *Loyola-LA Public Law Research Paper No. 22*). Available at https://ssrn.com/abstract=337300.
[95] See, e.g., *Northesast Harbor Golf Club, Inc. V. Harris*, 661 A.2d 1146 (1995); *Demoulas*, 677 N.E.2d 159, 180 (1997).
[96] See, e.g., J.N. Gordon, 'The Mandatory Structure of Corporate Law' (1989) 89 Colum. L. Rev. 1549, 1598-1599; J.C. Coffee, Jr., 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 Colum. L. Rev. 1618, 1690-1691.
[97] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 12.
[98] *Siegman v. Tri-Star Pictures* 15 Del. J. Corp. L. 218 (Del. Ch. 1989).
[99] *Siegman v. Tri-Star Pictures* 15 Del. J. Corp. L. 218 (Del. Ch. 1989).
[100] *Siegman v. Tri-Star Pictures* 15 Del. J. Corp. L. 218 (Del. Ch. 1989).
[101] *Siegman v. Tri-Star Pictures* 15 Del. J. Corp. L. 218 (Del. Ch. 1989).

combination was approved by both Tri-Star and Coca-Cola, and the proposed amendments were then approved by shareholders.[102]

The essence of the complaint centered on the director provision, asserting that the corporate opportunity waiver appeared to eliminate and/or limit liability in a way that was simply impermissible under Delaware law. Specifically, § 102(b)(7) of the Delaware General Corporation Law (DGCL) laid down what were (at the time) the exclusive circumstances where a charter could (and could not) eliminate or limit the personal monetary liability of a director for breach of fiduciary duty. The statute provides express limitations on exoneration provisions and excludes any waiver "[f]or any breach of the director's duty of loyalty to the corporation or its stockholders."[103] Consequently, the plaintiffs argued that the corporate opportunity waiver amendment is meant to do exactly this: reduce the director's liability exposure for a particular type of duty of loyalty breach (an appropriation of corporate opportunities). According to plaintiffs, this was infringing the immutable boundaries of § 102(b)(7) DGCL. The defendants countered that the provision was valid and enforceable under Delaware law, and they moved to dismiss.[104]

Vice Chancellor Jacobs held that the appropriate judicial analysis for a motion to dismiss in this context "requires that the motion must be denied if under any plausible construction or operation," the corporate opportunity waiver "arguably would contravene" Delaware law.[105] Consequently, Jacobs found that at least one plausible set of facts would – under the articulated terms of the charter provision – eliminate or limit the liability of Tri-Star directors for breach of their fiduciary duty of loyalty. Jacobs concluded that such a result was impermissible under the limits established by § 102(b)(7) DGCL.[106]

[102] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 13.
[103] Del. Code. Ann. Tit. 8, § 102(b)(7) (2009).
[104] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 14.
[105] *Siegman v. Tri-Star Pictures* 15 Del. J. Corp. L. 218, 235 (Del. Ch. 1989).
[106] *Siegman v. Tri-Star Pictures* 15 Del. J. Corp. L. 218, 236 (Del. Ch. 1989).

The result of *Siegman* was that the question of how and when corporate opportunities were waivable was put to rest. The duty of loyalty was simply not contractible, be it though a corporate governance provision, via a board resolution or through a contractual provision.[107]

By the end of the twentieth century, a wave of novel corporate structures began, including spin-offs, partial IPOs, venture capital, private equity and equity carve-outs. As a result, many of these innovations extended the families of corporate affiliates with partially overlapping lines of business. This placed pressure on the corporate opportunity doctrine that was based on the traditional undivided loyalty model. It was judicially impossible for a fiduciary to divide loyalty, however, it was increasingly common for fiduciaries to extend their fiduciary duties to multiple entities. The question here is how the fiduciary should allocate her offered corporate opportunities.[108]

It has long been recognized that the undivided loyalty model is not well adapted for corporations that share fiduciaries. The cases *Thorpe v. CERBCO*[109] and *In Re Digex*[110] helped to emphasize the resulting challenges of the innovation of corporate structures. Both cases focused centrally on corporate opportunities claims made by shareholders of a controlled subsidiary, asserting that the parent had usurped a corporate opportunity related to an acquisition of the subsidiary. In both cases, the plaintiffs alleged that the controller had seized takeover negotiations with a third-party buyer, redirecting the buyer's interest towards the parent and away from the subsidiary, thereby impeding the control premium of the subsidiary's minority shareholders. In both cases, the corporate opportunities claims lost, under the theory that the prospective acquisition deal was not a corporate opportunity since the parent possessed the power (and the right) to use its voting shares to veto any proposed transaction at the subsidiary level. However, both opinions recognized the challenges posed by corporate opportunities claims in cases involving overlap in ownership, board and/or industries. The cases made apparent that there might be some value to allowing parties to pre-arrange how they would divide property rights over corporate opportunities.

[107] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 14.
[108] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 15.
[109] *Thorpe v. CERBCO* 676 A.2d 436 (Del. 1996).
[110] *In Re Digex* 789 A.2d 1176 (Del. Ch. 2000).

Consequently, the stage was set for a legal reform push by the beginning of the twenty-first century.[111]

In the summer of 2000, the Delaware Assembly amended the state's statutes to add subsection (17) to § 122 of the DGCL, explicitly permitting corporate opportunity waivers. The subsection provides that a Delaware corporation has the power to:

> *(17) Renounce, in its certificate of incorporation or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or stockholders.*

According to the legislative synopsis by the amendment, subsection (17) "is intended to eliminate uncertainty regarding the power of a corporation to renounce corporate opportunities in advance",[112] referring to *Siegman v. Tri-Star Pictures, Inc.* The synopsis continues that corporations are permitted "to determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity of the corporation rather than to address such opportunities as they arise."[113] Further, "[t]he subsection does not change the level of judicial scrutiny that will apply to the renunciation of an interest or expectancy of the corporation in a business opportunity, which will be determined based on the common law of fiduciary duty, including the duty of loyalty."[114]

The 2009 case *Wayne County Employees' Ret. Sys. v. Corti*,[115] appears to be the only Delaware opinion to date to involve the statutory framework for corporate opportunity waivers explicitly. *Corti* was a purported shareholder class action challenging a business combination involving a waiver of corporate opportunities. The combination consisted of Vivendi S.A. (Vivendi) to transfer its subsidiary Vivendi Games, Inc. to Activision, Inc. (Activision) in return

[111] See L.S. Black, Jr. & F.H. Alexander, *Analysis of the 2000 Amendments to the Delaware General Corporation Law* (Aspen 2000), 1, 2.
[112] Delaware Bil Summary, §. 363, 140th Gen. Assembly (Del. 2000); 72 Del. Laws, c. 343, § 3 (2000).
[113] Delaware Bil Summary, §. 363, 140th Gen. Assembly (Del. 2000); 72 Del. Laws, c. 343, § 3 (2000).
[114] Delaware Bil Summary, §. 363, 140th Gen. Assembly (Del. 2000); 72 Del. Laws, c. 343, § 3 (2000).
[115] *Wayne County Employees' Ret. Sys. v. Corti* No. CIV.A. 3534-CC, 2009 WL 2219260, 1 (Del. Ch. July 24, 2009), *aff'd*, 996 A.2d 795 (Del. 2010).

for newly issued shares of Activision and a post-closing tender offer by Vivendi for up to half of Activision's remaining shares.[116] Consequently, Vivendi's acquisition of shares through the business combination and back-end tender would result in Vivendi acquiring a majority of Activision voting stock, which it then renamed Activision Blizzard. The charter of the surviving corporation (Activision Blizzard) included a broadly-worded corporate opportunity waiver.[117]

Plaintiffs – shareholders of the target Activision – claimed, *inter alia*, that the corporate opportunity was invalid under Delaware law, because it contravened § 122(17)'s limitations through its sweeping language. Plaintiffs argued that the provisions did not specify explicitly which corporate opportunities (or classes/categories thereof) were being renounced as the § 122(17) requires.[118] Rather, the provision categorically swept away all liability exposure with the exception of opportunities that were expressly offered to Activision fiduciaries in their capacity as such.[119] In short, according to plaintiffs, the Activision waiver fell outside the boundaries laid down in § 122(17).[120]

Chancellor Chandler hold that "[t]he mere existence of [the broadly worded corporate opportunity waiver] does not threaten plaintiff with harm that justifies expending judicial resources to render a declaratory judgment on the issue of whether the corporate opportunities allegedly renounced by [the corporate opportunity waiver] are sufficiently 'specified.'"[121] Chandler concluded that any plausible harm to plaintiff due to the wording of the waiver "is too remote and speculative to justify rendering a declaratory judgment, and plaintiff is not entitled to a declaratory judgment merely because it is able to conjure up hypothetical situations in which the challenged provisions may be applied contrary to Delaware law."[122] In the end, Chandler took no position on the question of whether such

[116] *Wayne County Employees' Ret. Sys. v. Corti* No. CIV.A. 3534-CC, 2009 WL 2219260, 1 (Del. Ch. July 24, 2009).
[117] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 18.
[118] *Wayne County Employees' Ret. Sys. v. Corti* No. CIV.A. 3534-CC, 2009 WL 2219260, 1 (Del. Ch. July 24, 2009).
[119] *Wayne County Employees' Ret. Sys. v. Corti* No. CIV.A. 3534-CC, 2009 WL 2219260, 1 (Del. Ch. July 24, 2009).
[120] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 19.
[121] *Wayne County Employees' Ret. Sys. v. Corti* No. CIV.A. 3534-CC, 2009 WL 2219260, at 18 (Del. Ch. July 24, 2009).
[122] *Wayne County Employees' Ret. Sys. v. Corti* No. CIV.A. 3534-CC, 2009 WL 2219260, at 19 (Del. Ch. July 24, 2009).

hypothetical situations might actually arise down the road, in which case the Activision-Blizzard corporate opportunity waiver might be invalidated under the statute.[123]

After *Corti*, there appear to be no other opinions endeavoring to interpret § 122(17). Although parties in a few post-*Corti* cases have advanced theories touching on the applicability and scope of a purported waiver, none of these opinions has discussed the section explicitly, and in each of them the waiver argument has been either struck down on other grounds or avoided so as to shed little additional light on how § 122(17) is likely to be applied in future Delaware cases.[124]

In 2014, the Corporate Laws Committee of the American Bar Association proposed to amend the Model Business Corporation Act to permit advance waivers of corporate opportunities.[125] The Model Business Corporation Act is a model set of law and is followed by twenty-four states.

3.8 Concluding remarks

In sum, the development of the corporate opportunity doctrine in the United States, and more specifically in Delaware, is as follows (sub-question one). In the United States there are generally three tests that courts use in their determination if a business opportunity is regarded a corporate opportunity, that are the interest or expectancy test, the line of business test and the fairness test. Under the interest or expectancy test, a business opportunity is a corporate opportunity if the corporation already has a contractual right or an interest in the opportunity or it is likely that the corporation will have a contractual right following from an expectancy. Under the line of business test, a business opportunity is a corporate opportunity when it is said to be within the corporation's line of business. Under the fairness test, a business opportunity is a corporate opportunity when the interest of the corporation justly

[123] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 19.
[124] G.V. Rauterberg & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia L. Rev*., 19.
[125] American Bar Association Corporate Laws Committee, 'Amendments to Sections 2.02 and 8.70 (and Related Changes to Sections 1.43, 8.31 and 8.60) Permitting Advance Action to Limit or Eliminate Duties Regarding Business Opportunity' (2014) 69 Bus. Law. 717. Available at https://apps.americanbar.org/dch/committee.cfm?com=cl270000.

calls for that opportunity and it is unfair if the fiduciary takes the opportunity for himself. Currently, in Delaware the dominant corporate opportunity test is the line of business test.

Furthermore, from Delaware case law it follows that a corporate fiduciary is not allowed to exploit a corporate opportunity without first offering it to the corporation, disclosing his or her conflict of interest, and, usually obtaining the consent of the corporation. As follows from *Broz v. CIS*, it is not required under the doctrine that the fiduciary formally needs to present the opportunity to the board or that the board needs to formally reject the opportunity, before the fiduciary is free to take the opportunity. Formal processes definitely create a safe harbor, but are not required.

Since 2000 the DGCL contains a principle that explicitly permits Delaware corporations to waive interest in certain (classes or categories of) corporate opportunities, although it was historically believed that it was not legally disallowed to contract around (or out of) the duty of loyalty in advance. The amendment to the DGCL was made in order to eliminate uncertainty regarding the power of a corporation to renounce corporate opportunities in advance. The amendment did not change the level of judicial scrutiny in the application of the corporate opportunity doctrine.

4 United Kingdom

4.1 Introduction

In this chapter, the development of the corporate opportunity doctrine in the United Kingdom is discussed, mainly focused on English law. Firstly, the rule on which the English corporate opportunity doctrine is based is shortly described. Secondly, the relevant case law regarding the development of the corporate opportunity doctrine is analyzed. Similar to the United States, the United Kingdom has, as a common law legal system, established and developed the corporate opportunity doctrine in case law. Not all cases regarding corporate opportunities are described, only the most relevant and most-cited cases that have been important for the development of the corporate opportunity doctrine. Thirdly, in the fourth subsection, the corporate opportunity tests used in case law are described and analyzed further. This contributes to a better understanding of the scope of the corporate opportunity doctrine. Fourthly, the Companies Act 2006 that codified the duty to avoid conflict of interest rule is discussed. In this subsection, the relevant section of the Act relating to corporate opportunities is analyzed as well as its meaning in practice. Consequently, this chapter gives an overview of the duty to avoid conflict of interests in English law, and its underlying corporate opportunity doctrine.

4.2 Duty to avoid conflicts of interest

The corporate opportunity doctrine in English law is generally based on the duty to avoid conflicts of interest, which is an element of the fiduciary duties. The duty to avoid conflicts of interest entails that directors must not put themselves in positions where their interests conflict with those of the firm. However, depending on the facts and circumstances of a certain case, the corporate opportunity doctrine may be rooted in other legal principles besides this general duty to avoid conflict of interest, such as illegitimate taking of company property and misuse of corporate information.[126] How exactly the corporate opportunity doctrine and the duty to avoid conflicts of interest evolve in English law is laid out in the next subsection.

[126] Bryan Clark, 'UK company law reform and directors' exploitation of "corporate opportunities" (2006) 17(8) International Company and Commercial Law Review (I.C.C.L.R.) 231, 232-233.

4.3 The development of corporate opportunities in case law

The 1726 case *Keech v. Sandford* was the first English case applying a strict conflict of interest rule.[127] As a child, Keech had inherited a lease and Sandford was entrusted to look after the lease until Keech matured. The landlord did not want to renew the lease, instead, he offered Sandford the opportunity for the lease, which he accepted. The judge held that the trustee, in this case Sandford, is the only person of all mankind who might not have the lease. By having the lease for himself, Sandford put himself in a position of conflict of interest. Reason for the application of the strict rule here was that it should be prevented that trustees exploit trust property for themselves instead of looking after it.[128]

The basis for the current English corporate opportunity doctrine was laid down in 1854, in *Aberdeen Rail Co. v. Blaikie Brothers*.[129] Facts of the case were, in short, that Blaikie Brothers had a contract with Aberdeen Railway. At the time of the contract, the chairman of Aberdeen Railway was the managing director of Blaikie Brothers. Aberdeen Railway argued they were not bound to the contract because there was a conflict of interest. It was held that no fiduciary is allowed to enter into engagements in which he has or can have a conflicting personal interest or which possibly may conflict with the interests of those whom he is bound to protect.[130]

The judgment in the case *Aas v. Benham*[131] was based on the illegitimate taking of company property in conjunction with a conflict of interest of the fiduciary. In *Aas v. Benham*, it was held that entitlement to the information does not depend on the source from which the fiduciary acquired it, but on the use to which the fiduciary applied it.[132] Subsequently, if the fiduciary applied the information for the purpose of a personal interest which is within the scope of the partnership's business, then he is using information to which the partnership is entitled.[133] Here, the judge explicitly recognized a line of business test, meaning that a director will only be able to exploit an opportunity if it is not within the line of business of the company

[127] *Keech v. Sandford* 25 E.R. 223; (1726) Select Cases Temp. King 61.
[128] *Keech v. Sandford* 25 E.R. 223; (1726) Select Cases Temp. King 61, [62].
[129] *Aberdeen Rail Co. v. Blaikie Brothers* (1854) 1 Macq. 461; [1843-60] AII E.R. Rep. 249, HL.
[130] *Aberdeen Rail Co. v. Blaikie Brothers* (1854) 1 Macq. 461; [1843-60] AII E.R. Rep. 249, 252.
[131] *Aas v. Benham* [1891] 2 Ch. 244.
[132] *Aas v. Benham* [1891] 2 Ch. 244, per Lindley L.J. at 256.
[133] *Aas v Benham* [1891] 2 Ch. 244 at 255-256.

because it is not in the interests of the company to exploit an opportunity that is not in its line of business.[134]

The rationale of the conflict of interest rule was determined in *Bray v. Ford*.[135] Accordingly, the judge held that the conflict of interest rule was not founded upon principles of morality, but rather based on the consideration that there is danger in circumstances when the person holding a fiduciary position acts according to personal interest rather than to duty, consequently, prejudicing those the fiduciary was bound to protect.[136]

The aforementioned conflict of interest cases until the nineteenth century have laid down the basis of the contemporary corporate opportunity doctrine in English law. Especially, *Aberdeen Rail Co. v. Blaikie Brothers* is an important case in this respect. The conflict of interest rule held in that case still applies. In the following part the most relevant conflict of interest cases from the second part of the twentieth century and upwards will be discussed.

In *Boardman v. Phipps*,[137] Boardman was the solicitor of a family trust, which had a 27% holding in a company. Boardman thought that a majority shareholding in the company was required in order to protect the trust, due to concerned accounts of the company. After going to a shareholders' general meeting of the company together with a beneficiary, they realized they could turn the company around. They suggested to a trustee to acquire a majority shareholding, but that was rejected. Subsequently, Boardman and Phipps decided to purchase the shares themselves with the knowledge of the trustees. However, they did not obtain the fully informed consent of all the beneficiaries. One of the beneficiaries sued for their profits, claiming there was a conflict of interest. In the House of Lords, the majority opinion was that there was a possibility of a conflict of interest. The solicitor and beneficiary were negotiating over the use of the trust's shares and, therefore, they had a (fiduciary) duty to avoid any possibility of a conflict of interest. Regarding the nature of the information, the majority did not agree. One of the majority Lords, Cohen, held Boardman to be liable because he acquired

[134] Michael Hadjinestoros, 'Exploitation of business opportunities: how the UK courts ensure that directors remain loyal to their companies' (2008) 19(2) International Company and Commercial Law Review (I.C.C.L.R.) 70, 73-74.
[135] *Bray v. Ford* [1895-99] AII ER Rep 1011, [1896] AC 44.
[136] *Bray v. Ford* [1895-99] AII ER Rep 1011, [1896] AC 44, 51.
[137] *Boardman v. Phipps* [1966] 3 AII ER 721, [1967] 2 AC 46.

the information in the course of the fiduciary relationship and because of the fiduciary relationship. He held that information is not truly property.[138] The other two majoring Lords, Hodson and Guest, held that information can constitute property in appropriate circumstances, which was the case here. Consequently, Boardman was held liable as he was speculating with trust property. [139]

In *Regal Hastings Ltd v. Gulliver*,[140] four directors were held liable and had to account to the company for the profit they personally made on the purchase and re-sale of shares in a subsidiary of Regal Hastings Ltd. It was accepted that the company could not have exploited the opportunity itself and that the directors acted in good faith. However, the rationale for the liability of the directors was that the opportunity arose by reason and in the course of their directorships.[141] In the judgment, Lord Russell pointed out that the directors could have protected themselves by a resolution either antecedent or subsequent of the Regal shareholders in a general meeting.[142]

In *IDC v. Cooley*,[143] the director of a company resigned in order to contract in personal capacity with a third party to carry out work he was supposed to obtain for the company. The third party had negotiated with the company before contracting with the resigned director, however, as was clear from the facts of the case, it would not have contracted with the company. The judge held that the director's conflict of interest arose in the period before the director resigned. During that time, the director had spent time furthering his own personal interests rather than the company's interests. Although the director had resigned before contracting with the third party, the director was held liable for the profit he made from the contract.[144]

[138] *Boardman v. Phipps* [1966] 3 AII ER 721, [1967] 2 AC 46, 104.
[139] *Boardman v. Phipps* [1966] 3 AII ER 721, [1967] 2 AC 46, 111-112 and 117-118.
[140] *Regal Hastings Ltd v. Gulliver* [1967] A.C. 134n.
[141] *Regal Hastings Ltd v. Gulliver* [1967] A.C. 134n, 147.
[142] *Regal Hasting Ltd v. Gulliver* [1967] 2 A.C. 134 per Lord Russell at 147.
[143] *IDC v. Cooley* [1972] 2 AII ER 162.
[144] Hans C. Hirt, 'The law on corporate opportunities in the Court of Appeal: Re Bhullar Bros Ltd' (2005) Nov. Journal of Business Law (J.B.L.) 669, 673.

In *Framlington Group Plc v. Anderson,*[145] the Chancery Division held that there was no breach of fiduciary duties. The facts in *Framlington Group Plc v. Anderson* were that FIM, one of the plaintiffs, agreed to sell a part of FIM's private client fund management business, Rathbone (one of the defendants), which was managed by the other three defendants (who were employees and directors of Framlington). FIM was owned by Framlington. Rathbone was sold at two per cent of the value of the funds under management, of which one per cent was payable to Framlington, and one per cent was expected to be payable to the defendants in return for entering into five-year service contracts containing post-employment restrictions via a company set up by the defendants to supply their services to Rathbone (consideration shares). When Framlington found out about the defendants supplying their services to Rathbone, the management of Framlington told the defendants that the defendants were excluded from any involvement in the negotiations between Framlington and Rathbone. Before the court, Framlington argued that negotiating the transfer of the consideration shares to the defendants themselves was a breach of their duty of good faith and of their fiduciary duty as directors of FIM and of Framlington. Consequently, plaintiffs argued the consideration shares and the benefits derived from those shares belonged to them.[146] The Chancery Division dismissed the action and held that the consideration shares did not represent a payment to the defendants for an asset which belonged to FIM, nor did they acquire the shares by the use of some property or confidential information of FIM which came to them as directors of FIM. Consequently, the defendants did not divert to themselves any maturing business opportunity which should have been made available to plaintiffs. Moreover, it was held that there was no evidence what part the defendants were expected to play within FIM, and regarding the sale to Rathbone, the defendants were instructed not to take part in the sale negotiations.[147]

In one of the most-cited cases *Bhullar v. Bhullar*,[148] the company was owned and managed by two brothers, Mohan and Sohan, and their families. The relationship between the brothers became difficult and negotiations were held to bring the company to a close. However, these negotiations were never concluded. The board resolved not to acquire any further investment properties. The sons of Sohan, Inderjit and Jatinderjit, who were also directors of the

[145] *Framlington Group plc v. Anderson* [1995] B.C.C. 611.
[146] *Framlington Group plc v. Anderson* [1995] B.C.C. 611.
[147] *Framlington Group plc v. Anderson* [1995] B.C.C. 611, 611-612.
[148] *Bhullar v. Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711.

company, discovered by chance in a personal capacity that an adjacent property to the company's investment property was for sale. They purchased the property for themselves in a private capacity and did not disclose this to the company. Mohan and his family raised an unfair prejudice action claiming that Inderjit and Jatinderjit were in breach of their fiduciary duties as directors.[149] In first instance, the court decided that Inderjit and Jatinderjit were in breach of their fiduciary duties and that the property and the profits made from the property should be transferred to the company. On appeal, the court upheld the first instance decision. Parker L.J. quoted the rule laid down in *Aberdeen*, stating that no fiduciary shall be allowed to enter into contracts in which he has a personal interest conflicting with the interests of the company.[150] Moreover, Parker L.J. emphasized that, at the material time, the directors had one capacity and one capacity only, namely as directors of the company.[151] However, Parker L.J. acknowledged that although the rule should be strict, it should be flexible enough in its application to enable it to be applied only to the particular facts of the particular case in question.[152] Parker L.J. concluded that it was not the point whether the company could or would have taken the opportunity had it been made aware of it. The existence of the opportunity was information which was relevant for the company to know, and as a consequence, the directors were under a duty to communicate the information to the company.[153] Thus, what led to a breach of fiduciary duty in this case is that Inderjit and Jatinderjit purchased property without disclosing its availability to the company. In other words, there was a real sensible possibility of conflict that gave rise to a duty to communicate or disclose the availability of the opportunity to the company.[154]

In *O'Donnell v. Shanahan*,[155] a third party asked the company, that provided clients with financial advice and assistance, whether it had clients who might be interested in buying property. The defendants, who were directors and shareholders, while acting for the company, found a purchaser and brokered a deal, in which the third party would pay a

[149] Bryan Clark, 'UK company law reform and directors' exploitation of "corporate opportunities" (2006) 17(8) International Company and Commercial Law Review (I.C.C.L.R.) 231, 233-234.
[150] *Bhullar v. Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711, [24].
[151] *Bhullar v. Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711, [41].
[152] *Bhullar v. Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711, [28].
[153] *Bhullar v. Bhullar* [2003] EWCA Civ 424; [2003] B.C.C. 711, [41].
[154] Hans C. Hirt, 'The law on corporate opportunities in the Court of Appeal: Re Bhullar Bros Ltd' (2005) Nov. Journal of Business Law (J.B.L.) 669, 678.
[155] *O'Donnell v. Shanahan* [2009] EWCA Civ 751; [2009] B.C.C. 822.

commission fee to the company. However, the deal failed. A substitute purchaser was found who would be willing to take 50 per cent stake in the company on the condition that the defendant directors agreed to take the other 50 per cent. The defendant directors agreed to do so. As part of the agreement, the new purchaser refused to pay the commission fee to the company. The other shareholder of the company claimed that the defendant shareholders acted in breach of their fiduciary duties by the acquisition of the investment property, since the opportunity to purchase had encountered to them in the course of the company's business. Moreover, by appropriating the opportunity to themselves, the company missed out on the commission fee. In first instance, the judge applied the scope of business test as laid down in *Aas v. Benham*, holding that the acquisition was outside the scope of the company's business and, therefore, the directors did not breach their fiduciary duties by the acquisition of the property. However, the Court of Appeal rejected this decision and held that the directors breached the no-conflict and no-profit rule and were liable to account for the earned profit.[156]

4.4 The corporate opportunity tests

In English law, a precise definition of the corporate opportunity doctrine has not been established.[157] The prohibition to appropriate corporate opportunities refers to a range of different factual situations. Consequently, the corporate opportunity doctrine is rooted in different legal principles depending on the factual circumstances of any particular case.[158]

The two rules that describe the corporate opportunity doctrine are the no-conflict and no-profit rule, together referred to as the no conflict-no profit rule. These rules comprise that persons in fiduciary positions are not allowed to make a profit nor put themselves in positions where their interests and their duties conflict with those of the firm.[159]

Under the no-conflict rule, it is prohibited for a director to act in such a way that there is a reasonable possibility of conflict between his personal interests and the interests of the

[156] *O'Donnell v. Shanahan* [2009] EWCA Civ 751; [2009] B.C.C. 822.
[157] D.D. Prentice and J. Payne, 'The corporate opportunity doctrine' (2004) 120 L.Q.R. 198.
[158] Bryan Clark, 'UK company law reform and directors' exploitation of "corporate opportunities" (2006) 17(8) International Company and Commercial Law Review (I.C.C.L.R.) 231, 232-233.
[159] See Gareth Jones, 'Injust enrichment and the fiduciary's duty of loyalty' (1968) 84 L.Q. Rev. 472, 472-272.

company. The rationale of the no-conflict rule is to prevent fiduciaries from being guided by acting in his own interests rather than those of the company.[160] Consequently, in applying the rule, judges try to avoid creating temptation for directors, and will prefer to broadly define the company's interest and not so much taking into account the limits to the company's ability to act. As a result, the director has little possibilities to defend himself from a corporate opportunity claim.[161]

Under the no-profit rule, it is prohibited for a director to make undisclosed profit for himself from the use of corporate assets, opportunities and information.[162] This is a result of the consideration that corporate opportunities are regarded assets of the company and that directors are not allowed to exploit them for their personal benefit. The no-profit rule has its origins in the no-conflict rule and can be considered a branch of that rule.[163] Here, the rationale of the no-profit rule is also to prevent directors from being tempted to act in their own interests rather than those of the company.[164]

The no conflict-no profit rule is generally strictly complied with by the English courts. However, there are some cases in which the courts apply the corporate opportunity doctrine under a flexible approach. Under the strict approach, liability is automatically caused when a director enters into a contractual obligation with which he has, or can have, a personal interest conflicting or which may possibly conflict with that of the company, without the company's informed consent. If the director makes profit from this contractual obligation, the profits need to be allocated to the company.[165] In applying the strict rule, the courts do not take into consideration whether the company could or would have exploited the opportunity, whether the company has been harmed by the director, whether the director has acted in good faith or whether the third party refuses to contract with the company.[166]

---

[160] Michael Hadjinestoros, 'Exploitation of business opportunities: how the UK courts ensure that directors remain loyal to their companies' (2008) 19(2) International Company and Commercial Law Review (I.C.C.L.R.) 70, 71.
[161] Martin Gelter & Geneviève Helleringer, 'Corporate Opportunities in the US and in the UK' (2017) ECGI Working Paper Series in Law – Working Paper No. 346/2017, 15-16. Available at SSRN: https://ssrn.com/abstract=2877205.
[162] See generally A.J. Boyle et al., eds, *Gore Browne on Companies* (44th ed., Jordans, Bristol, 1986), para. 27.15; G. Morse, ed., *Palmer's Company Law* (25th ed., Sweet & Maxwell London, 1992), paras. 8.536-8.539.
[163] See P.L. Davies, *Gower's Principles of Modern Company Law* (6th ed., Sweet & Maxwell, London, 1997), 610 and 615.
[164] Simon Witney, 'Corporate Opportunity Law and the Non-Executive Director' (2016) 16 J. Corp. L. Stud. 145, 149.
[165] Ernest Lim, 'Directors' fiduciary duties: a new analytical framework' (2013) 129 Law Quarterly Review (L.Q.R.) 242.
[166] R. Edmunds and J. Lowry, 'The no conflict-no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism' (2002) J.B.L. 122, 130; and Ernest Lim, 'Directors' fiduciary duties: a new analytical framework' (2013) 129 Law Quarterly Review (L.Q.R.) 242.

The rationales why it is irrelevant whether the company could not or would not exploit an opportunity are the following. The first rationale is the removal of a director's temptation to prefer his own interests over the company's interests. This is, because directors, as human beings, cannot be trusted to make decisions when conflict between their personal interest and the company's interest is strongly present and where the temptation to give in to self-interest is most evident. The second rationale derives from the asymmetry between the director and the company. The director has control of and access to resources, consequently, he can manipulate information on the financial ability of a company or the value of a project in order to justify his decision to appropriate the project at the expense of the company.[167]

Under the flexible approach, the court undertakes a fact-intensive investigation of all the relevant facts and circumstances. These facts and circumstances include, among others, whether the company is able to exploit the opportunity, whether the opportunity is within the company's line of business, whether the opportunity came to the director in his private capacity and whether the director had acted in good faith. None of these single factors are decisive. The court has to evaluate the entire circumstances as a whole in order to determine whether a director has breached his fiduciary duties in appropriating the opportunity.[168] The flexible approach was applied in, for instance, *Aas v. Benham*[169] and in the first instance case of *O'Donnell v. Shanahan*.[170]

There are strict limits to contractually waive conflicts of interest, since the main rationale is to avoid these conflicts. As a consequence, it is hardly possible to contract out corporate opportunities.[171]

[167] Ernest Lim, 'Directors' fiduciary duties: a new analytical framework' (2013) 129 Law Quarterly Review (L.Q.R.) 242, 246-251.
[168] Ernest Lim, 'Directors' fiduciary duties: a new analytical framework' (2013) 129 Law Quarterly Review (L.Q.R.) 242.
[169] *Aas v. Benham* [1891] 2 Ch. 244.
[170] *O'Donnell v. Shanahan* [2009] EWCA Civ 751; [2009] B.C.C. 822.
[171] Martin Gelter & Geneviève Helleringer, 'Corporate Opportunities in the US and in the UK' (2017) ECGI Working Paper Series in Law – Working Paper No. 346/2017, 14. Available at https://ssrn.com/abstract=2877205.

4.5 The restatement of the corporate opportunity doctrine

As of October 2008, the corporate opportunity doctrine is restated in section 175 of the Companies Act 2006. The Companies Act 2006 restates the common law rules. Goal of restatement is to make the law more accessible for anyone. Old case law will still be applicable by interpreting the restatement.[172]

Prior to the restatement, a loud voice has been calling for softening the strict approach of the English courts. Nevertheless, the final version of the Companies Act 2006 eventually laid down the traditional, conflict avoidance approach.[173]

Section 175, paragraph one of the Companies Act 2006 codifies the conflict of interest rule as established by many courts in the past centuries and determines that a director of a company must avoid situations in which he (can) has(/have) a direct or indirect interest that (possibly may) conflict with the interests of the company. The Act does not define which business opportunities are considered corporate. Whether a business opportunity is considered corporate is still up to the courts to determine.[174]

Although, there is no a statutory definition of a conflict of interest, it is regarded that a conflict of interest includes anything or any connection that could potentially cause the director to put his own, or a third party's, interests before the company's.[175]

The range of conflict situations under section 175 is very wide, since it also covers situations where a conflict may possibly exist. It is regarded that only situations where a reasonable man, looking at the relevant facts and circumstances of the particular case in the context of a relationship, would think there was no real, sensible possibility of conflict, fall outside the

[172] Barney Hearnden and Simon Howley, 'Directors' conflicts under the Companies Act 2006 considered' (2008) 239 Co. L.N. 1.
[173] Jie Li, 'The Peso Silver case: an opportunity to soften the rigid approach of the English courts on the problem of corporate opportunity' (2011) 32(3) Company Lawyer (Comp. Law.) 68.
[174] Martin Gelter & Geneviève Helleringer, 'Corporate Opportunities in the US and in the UK' (2017) ECGI Working Paper Series in Law – Working Paper No. 346/2017, 19-20. Available at https://ssrn.com/abstract=2877205.
[175] Barney Hearnden and Simon Howley, 'Directors' conflicts under the Companies Act 2006 considered' (2008) 239 Co. L.N. 1, 2.

scope of section 175. Subsequently, the assessment of (possible) conflict situations depends very much on the particular facts and circumstances of the case.[176]

Paragraph two of section 175 specifically states that it is immaterial whether the company can take advantage of the property opportunity or information. This means that, if the situation is reasonably regarded to give rise to conflict, arguments as to whether the company could or could not have exploited the opportunity are irrelevant. Furthermore, the financial ability of the company is also irrelevant. This is, because evidence about the financial abilities, the expertise of the company and its ability to exploit the opportunity are usually within the control of the directors who wish to exploit the opportunity. Moreover, the director would be acting in the best interest of the company when he uses his skills to obtain the necessary funding for the company to exploit the opportunity, instead of using his energy to exploit the opportunity himself.[177]

Paragraph three of section 175 states that the duty to avoid conflicts of interest does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company, a transactional conflict. A transactional conflict is not an obstacle to the director if he properly complies with the section, meaning that he will not have to account to the company for benefits derived from his interest, and the transaction will not be liable to be set aside on ground of conflict. However, the articles of association of the company may provide otherwise. Under section 177, the director still has a fiduciary duty to declare the nature and extent of his interest to other directors. A conflict of interest could arise, for instance, if the director is a counterparty to the transaction, or the counterparty is a company in which the director, or someone connected to him, is interested.[178]

In paragraph four of section 175 it is laid down that the duty to avoid conflicts of interest is not infringed if (a) the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or (b) if the matter has been authorized by the directors. Further, paragraph five

[176] Barney Hearnden and Simon Howley, 'Directors' conflicts under the Companies Act 2006 considered' (2008) 239 Co. L.N. 1, 1-2.
[177] Michael Hadjinestoros, 'Exploitation of business opportunities: how the UK courts ensure that directors remain loyal to their companies' (2008) 19(2) International Company and Commercial Law Review (I.C.C.L.R.) 70, 76.
[178] Barney Hearnden and Simon Howley, 'Directors' conflicts under the Companies Act 2006 considered' (2008) 239 Co. L.N. 1, 3-4.

states in which ways authorization may be given by the directors. It follows from the paragraph that in cases of a private company, unless the articles of association invalidate such authorization, authorization may be given by proposing the matter to the directors. In cases of a public company, authorization is only possible if the articles of association include a provision enabling directors to authorize the matter and the matter is proposed to and authorized by the directors in accordance with the articles of association. According to paragraph six of the section, authorization is only effective if (a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other director, and (b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

4.6 Concluding remarks

Altogether, sub-question two is answered as follows. English law has had a long development of the corporate opportunity doctrine, and also of the relating duty to avoid conflicts of interest, as the first relevant case dates from 1726. The currently still-applied conflict of interest rule (see, for instance, section 175 of the Companies Act 2006) had already been determined in 1854 in *Aberdeen Rail Co. v. Blaikie Brothers*, holding that no fiduciary is allowed to enter into engagements in which he has or can have a conflicting personal interest or which possibly may conflict with the interests of those whom he is bound to protect.[179] Furthermore, under English law, it does not matter if the company could or would exploit the opportunity itself and/or that the directors acted in good faith. Even resigned directors can be held liable for conflicting the company's interests in case the opportunity came to the director in the period before (s)he resigned.

The two rules that describe the scope of the corporate opportunity doctrine are the no-conflict and no-profit rule. Under the no-conflict rule, a director is prohibited to act in such a way that there is a reasonable possibility of conflict between his personal interests and the interests of the company. Under the no-profit rule, a director is prohibited to make undisclosed profit for himself for the use of corporate assets, opportunities and information. The English courts strictly apply the no conflict-no profit rule. As a consequence, liability is

[179] *Aberdeen Rail Co. v. Blaikie Brothers* (1854) 1 Macq. 461; [1843-60] AII E.R. Rep. 249, 252.

automatically caused when a director enters into an engagement in which he has or can have a conflicting personal interest or which possibly may conflict with the interests of those whom he is bound to protect, without the company's informed consent. The director who is held liable has to account for the profits made from this engagement.

The corporate opportunity doctrine is codified as a restatement in section 175 of the Companies Act 2006. Old case law prior to 2008 will still be applicable by interpreting the restatement. The most important rule of the section is the conflict of interest rule as laid in section 175(1) that holds that a director of a company must avoid situations in which (s)he (can) has(/have) a direct or indirect interest that (possibly may) conflict with the interests of the company. Whether a business opportunity is considered corporate is not defined in the Act and is still up to the courts to determine. Moreover, the section lays down conditions in order to grant authorization from the company for the situation giving rise to a conflict of interest.

5 Germany

5.1 Introduction

In this chapter, the development of the corporate opportunity doctrine in Germany is discussed. Firstly, the corporate opportunity doctrine in German legal literature is described. In this subsection, the roots of corporate opportunities in Germany are mentioned, as well as relating principles to the doctrine. Secondly, the development of the corporate opportunity doctrine in German case law is analyzed. In this subsection, case law situations of unlawful appropriation of corporate opportunities by fiduciaries is described. Furthermore, attention is drawn to defenses that are brought up by defendants in procedures. In addition, the facts of two different cases are shortly discussed in order to provide an insight in the corporate opportunity cases dealt with by the Supreme Court. Thirdly, the possibility of release of corporate opportunities by the company and the conditions thereto are described. Lastly, the corporate opportunity principle as laid down in the German Corporate Governance Code is discussed as well as the meaning of the principle. Consequently, this chapter provides an overview of the corporate opportunity doctrine in Germany.

5.2 The corporate opportunity doctrine in legal literature

Under the influence by Mestmäcker and Immenga and their comparative corporate law of the United States and Germany,[180] attempts have been made to develop a German corporate opportunity doctrine decades ago. Later, the corporate opportunity doctrine is often discussed in legal literature.

In German literature, it is stated that the corporate opportunity doctrine divides the social sphere of the company on the one hand and the private sphere of board members on the other hand.[181] Board members are allowed to carry out private transactions, including not only transactions for personal needs, but also business motivated private reasons, for instance private investments.[182] However, not all transactions executed by board members can be concluded for their own account. Otherwise, the company would miss out on revenues that

[180] Mestmäcker, *Verwaltung, Konzerngewalt und Rechte der Aktionäre* (1958), 1666ff; and Immenga, *Die personalistisch Kapitalgesellschaft* (1970), 156.
[181] Merkt, ZHR 195 (1995), 423, 424.
[182] Schiessl, *GmbHR* (1988), 53, 54.

the board member earns with the appropriation of the corporate opportunity. These actions affect the shareholders that participated in the company through capital contributions.[183]

Furthermore, similar to the United States and the United Kingdom, it is believed that the corporate opportunity doctrine has its basis in the duty of loyalty.[184] The duty of loyalty lays down the positive duty on fiduciaries to act in accordance to the interests of the company and the negative duty not to act in a way that damages the company's interests.[185] As a consequence of the negative duty, the prohibition arises of the fiduciary to appropriate corporate opportunities belonging to the company.[186]

Besides, it is held that the corporate opportunity doctrine originates from the prohibition of competition and that both principles are closely related to each another.[187] The purpose of the prohibition of competition is to prevent that board members use the knowledge and influence acquired from their positions in the company in order to promote their own interests at the expense of the company. The prohibition of competition is laid down in § 88 of the Aktiengesetz (*German Stock Corporation Act,* hereinafter: AktG). In short, § 88 AktG states that members of the management board are not allowed to engage in any trade nor enter into transactions in the company's line of business on their own or others' behalf, without consent of the supervisory board. In cases of violation of this prohibition, the company may claim damages. Instead of claiming damages, the company may require that the board member treat the transaction made for his/her own account as having been made on behalf of the company. The prohibition of competition is not specifically regulated with respect to members of the supervisory board. However, according to established dogmatic, such a prohibition of competition already exists based on the general loyalty obligations of the supervisor.[188]

[183] Weisser, *DB 1989* (2010); Röhricht, *WPg* (1992), 766, 775. See also Lars Lawall, 'Verdeckte Gewinnausschüttungen unde Geschäftschancenlehre im GmbH-Recht' (1997) NJW 1742, 1743.
[184] Schiessl, *GmbHR*, (1981) 53.
[185] Windbichler, Gesellschaftsrecht, 22. Aufl. 2009, S. 64.
[186] Zekiye Kaya, 'Die Anwendung der Geschäftschancenlehre auf die Gesellschaft bürgerlichen Rechts: Zugleich eine Besprechung des BGH-Urteils vom 4. 12. 2012, II ZR 159/10' (2013) DStR 1088, 1089-1090.
[187] Hauschka, Moosmayer, Lösler, *Corporate Compliance* (2016), § 4 Geschäftschancenlehre und Interresenkonflikt, no. 9-10.
[188] Hauschka, Moosmayer, Lösler, *Corporate Compliance* (2016), § 4 Geschäftschancenlehre und Interresenkonflikt, no. 7-8.

Contrary to the prohibition of competition, the purpose of the corporate opportunity doctrine is not to prevent competition, but rather to prohibit the director from using opportunities belonging to the company on his/her own account.[189] Although, both principles could overlap. The director could compete with the company by appropriating a corporate opportunity, but competition is not necessary for the application of the corporate opportunity doctrine. Still, it is generally agreed that the requirements and legal consequences of the prohibition to competition are carefully used in analogy for the purpose of shaping the corporate opportunity doctrine.[190]

The corporate opportunity doctrine is primarily a concern of members of the management board as they typically have to deal with these kinds of opportunities. However, corporate opportunities could also be relevant to members of the supervisory board, in particular when the opportunity came to the supervisor in his/her capacity of supervisor, for example, by exercising his/her right to information.[191]

5.3 The development of corporate opportunities in case law

The corporate opportunity doctrine does not have a specific basis in black-lettered law, but the corporate opportunity doctrine is accepted in case law. Compared to the United States and the United Kingdom, the corporate opportunity doctrine found a relatively late entrance into German law. In the mid-seventies, the German Supreme Court first passed a judgment accepting the corporate opportunity doctrine.[192] Currently, there are dozens of Supreme Court decisions.[193]

In general, the German Supreme Court bases the corporate opportunity doctrine on the principle to avoid conflicts of interest, meaning that a director should at all times act in accordance with the company's interests.[194]

[189] Michalski, *GmbHG* (2010), § 13 Juristische Person; Handelsgesellschaft, no. 248.
[190] Fleischer, *Handbuch des Vorstandsrecht*, (2006) §9 Treuepflicht des Vorstandsmitglieder, no. 24.
[191] Häublein / Hoffmann-Theinert, *BeckOK HGB* (2017), HGB § 112 [Wettbewerbsverbot], no. 31-34.
[192] German Supreme Court (Bundesgerichtshof) 10 February 1977 – II ZR 79/75, WM 1977, 361.
[193] Fleischer, *Handbuch des Vorstandsrecht*, (2006) §9 Treuepflicht des Vorstandsmitglieder, no. 23.
[194] Fleischer, *Handbuch des Vorstandsrecht*, (2006) §9 Treuepflicht des Vorstandsmitglieder, no. 24.

According to case law, an opportunity belongs to the company if the company already has concluded the contract relating to the opportunity,[195] or when the contractual negotiations are in such a phase that the final grant is only a formality.[196] The same applies in case a board member has already entered into the contractual negotiations on behalf of the company,[197] or in case the opportunity was offered to a board member in his/her capacity as a representative of the company.[198] Furthermore, the opportunity also belongs to the company in case the company has already taken the decision to carry out the opportunity itself,[199] or at least expressed interest in opportunities of this nature.[200] Lastly, the opportunity belongs to the company when the appropriation of the opportunity is realized using resources of the company. Resources in this sense includes both the use of financial and human resources as well as the use of information that could only be obtained as a result of the fiduciary relationship.[201]

In all the aforementioned cases, the will of the company to perceive a particular opportunity is clear.[202] For a board member, this implies an obligation to respect the company's right of first access and to do everything in its power to act in accordance with the company's interests. This is only different in case the board member has laid the foundation for the corporate opportunity in his/her capacity as a private person before the existence of the company.[203]

Moreover, there are also cases in which the law already allocated opportunities to the company. These cases are clear-cut, since the distinction between the private and company sphere of opportunities is given by general civil law, for instance property law. The company is entitled to the full right of exploitation as a legal owner, unauthorized access to this

[195] German Supreme Court (Bundesgerichtshof) 11 October 1976 – II ZR 104/75, WM 1977, 194, 195.
[196] German Federal Labour Court (Bundesarbeitsgericht) 11 December 1967 – 3 AZR 22/67, BB 1968, 504.
[197] German Supreme Court (Bundesgerichtshof) 8 May 1989 – II ZR 229/88, NJW 1989, 2687, 2688.
[198] German Supreme Court (Bundesgerichtshof) 8 May 1967 – II ZR 126/65, WM 1967, 679; German Supreme Court (Bundesgerichtshof) 10 February 1977 – II ZR 79/75, GmbHR 1977, 129, 130.
[199] German Supreme Court (Bundesgerichtshof) 8 May 1989 – II ZR 229/88, BGH NJW 1989, 2687, 2688.
[200] German Supreme Court (Bundesgerichtshof) 24 November 1975 – II ZR 104/73, WM 1976, 77.
[201] German Supreme Court (Bundesgerichtshof) 24 November 1975 – II ZR 104/73, WM 1976, 77.
[202] German Supreme Court (Bundesgerichtshof) 8 May 1989 – II ZR 229/88, NJW 1989, 2687, 2688.
[203] German Supreme Court (Bundesgerichtshof) 3 November 1997 – II ZR 353/96, NJW 1998, 1225, 1226.

entitlement is a breach of the duty of loyalty. The same applies in case a board member intervenes in existing contracts between the company and third parties.[204]

Subsequently, the opportunity belongs to the company, ether based on a formal or on a material connection. Cases in which the opportunity is allocated to the company on the basis of a formal connection[205] are for instance: the company came into contact with the opportunity first,[206] the shareholders' meeting has (implicitly) decided to allow the opportunity to be perceived by the company,[207] and the company has shown interest in the transaction in a different way.[208] Similar to the aforementioned, in case the company already entered into contractual negotiation or a contract offer has been submitted, that opportunity belongs to the company. Moreover, in case the company already has taken measures in order to execute the opportunity (transaction), the opportunity belongs to the company.[209]

The opportunity could also be allocated to the company on the basis of a material connection. These cases are for instance: cases in which the opportunity falls within the scope of activities of the company,[210] and when the opportunity is necessary to the company, for instance for its business activities.[211] An opportunity also belongs to the company in case the opportunity has a cost-saving effect and the company can gain a competitive advantage due to the opportunity.[212]

More difficult to determine are cases in which the will of the company to pursue a particular opportunity has not yet been shown.[213]

The procedural defense that the company was not able to appropriate the opportunity itself due to lack of financial funds was rejected by the German Supreme Court in 1986. In that case,

[204] Winter, *Mitgliedschaftliche Treuebinduningen im GmbHR* (1988), 244.
[205] Schiessl, GmbHR 1988, 54; Wichmann, GmbHR 1993, 635, 636; Merkt, ZHR 159 (1995), 423 (439).
[206] German Supreme Court (Bundesgerichtshof) 8 May 1989 – II ZR 229/88, NJW 1989, 2687.
[207] German Supreme Court (Bundesgerichtshof) 8 May 1989 – II ZR 229/88, NJW 1989, 2687.
[208] German Supreme Court (Bundesgerichtshof) 24 November 1975 – II ZR 104/73, NJW 1976, 797.
[209] Lars Lawall, 'Verdeckte Gewinnausschüttungen unde Geschäftschancenlehre im GmbH-Recht' (1997) NJW 1742, 1744.
[210] German Supreme Court (Bundesgerichtshof) 8 May 1989 – II ZR 229/88, NJW 1989, 2687.
[211] German Supreme Court (Bundesgerichtshof) 23 September 1985 – II ZR 257/84, NJW 1986, 584.
[212] German Supreme Court (Bundesgerichtshof) 23 September 1985 – II ZR 246/84, NJW 1986, 585. See also Lars Lawall, 'Verdeckte Gewinnausschüttungen unde Geschäftschancenlehre im GmbH-Recht' (1997) NJW 1742, 1745.
[213] Hauschka, Moosmayer, Lösler, *Corporate Compliance* (2016), § 4 Geschäftschancenlehre und Interresenkonflikt, no. 11.

the court held that the board member was not allowed to appropriate the opportunity to himself. In order to appropriate the opportunity on behalf of the company, the board member should have looked for suitable solutions, for instance raising loans or the execution of a capital increase.[214] Furthermore, the defense of the board member that (s)he did not take advantage of the corporate opportunity until (s)he left the company is not accepted by the courts. It is generally accepted that the board member should remain loyal to the company after the termination of his position as a continuing duty of loyalty.[215] Moreover, the Supreme Court has held that the obligation of the board member to defend and prevent damage to the company is not constituted on whether (s)he has learned of the business opportunity in the capacity as a board member or private person, rather the obligation is constituted on his/her indivisible duty of diligence and loyalty to the company.[216] Consequently, the defense of the board member that (s)he learned from the opportunity in his/her private capacity, will not be upheld by the courts.

In multiple cases, the German Supreme Court held that the corporate opportunity doctrine is also applicable to general partnerships (*offene Handelsgesellschaft*).[217] In the case of 8 May 1989 before the Supreme Court, the *de facto* managing partner, on behalf of the limited partnership, negotiated for several years the purchase of land which he ultimately acquired himself. The German Supreme Court held that the partner cannot take on any opportunity that belongs to the company based on certain specific circumstances. In this case, the specific circumstances constituted of the negotiations in which the partner was involved on behalf of the company. Based on these negotiations, the opportunity already belonged to the company.[218]

In the judgment of 4 December 2012,[219] the German Supreme Court dealt with a damage claim from a private company. The complaining company was founded in 2000 by the defendant and his two siblings. The purpose of the company's business was to acquire, hold and manage

[214] German Supreme Court (Bundesgerichtshof) 23 September 1985 – II ZR 257/84, NJW 1986, 584, 585.
[215] Fleischer, *Handbuch des Vorstandsrecht*, (2006) §9 Treuepflicht des Vorstandsmitglieder, rn. 38.
[216] German Supreme Court (Bundesgerichtshof) 23 September 1985 – II ZR 246/84, NJW 1986, 585, 586.
[217] German Supreme Court (Bundesgerichtshof) 23 September 1985 – II ZR 257/84, NJW 1986, 584, German Supreme Court (Bundesgerichtshof) 8. May 1989 – II ZR 229, 88, NJW 1989, 2687.
[218] German Supreme Court (Bundesgerichtshof) 8 May 1989 – II ZR 229, 88, NJW 1989, 2687.
[219] German Supreme Court (Bundesgerichtshof) 4 December 2012 – II ZR 159/10, DStR 2013, 600.

residential and commercial buildings as well as undeveloped land. All directors were jointly appointed to manage and represent the company. Eventually, the defendant, acting until 31 December 2006 as managing director and as the authorized representative, resigned from the company. At the end of 2004, the defendant, in his capacity as managing director and representative of the company, brought negotiations on the purchase of land property which was to be used for the operation of a parking lot. He informed his co-directors about the possible real estate acquisition, discussed any purchase and future use with the architect and the tax consultant of the company. Furthermore, he looked into the possibility of setting up a parking lot on the plots of the land. However, the company did not react to further inquiries by the district administrative authority in connection with the acquisition of land in June and December 2005. In November 2005, the defendant, together with his wife, founded a joint-stock company in which both of them were half-members. The newly founded company bought the land and operated a parking lot for payment on the land. The applicant company had not agreed to these procedures and claimed damages.[220] The starting point for the consideration of the court was the duty of loyalty, which imposes on the board member the prohibition to exploit corporate opportunities for himself that belong to the business area of the company. Consequently, the Supreme Court upheld the applicant's claim for damages and considered that the board member appropriated a corporate opportunity belonging to the company.

5.4 Release of corporate opportunities by the company

In case law, there is consensus on the possibility to release the corporate opportunity to the board member. However, it is still unclear how the release exactly works. Regarding the prohibition of competition, according to § 88(1) AktG, the supervisory board can release a board member from the prohibition of a competition. Release by the supervisory board of the corporate opportunity is used in analogy to the prohibition of competition. However, this is only possible in companies that have a supervisory board.[221]

[220] German Supreme Court (Bundesgerichtshof) 4 December 2012 – II ZR 159/10, DStR 2013, 600. See also Zekiye Kaya, 'Die Anwendung der Geschäftschancenlehre auf die Gesellschaft bürgerlichen Rechts: Zugleich eine Besprechung des BGH-Urteils vom 4. 12. 2012, II ZR 159/10' (2013) DStR 1088, 1089.
[221] Hauschka, Moosmayer, Lösler, *Corporate Compliance* (2016), § 4 Geschäftschancenlehre und Interresenkonflikt, no. 17.

In case there is no supervisory board, in principle, the board member has to seek approval from the shareholders' meeting. A release of the co-members of the management board is not sufficient. The shareholders' meeting has to take due account of the minority shareholders' interests in its decision. Moreover, before deciding, the shareholders meeting needs to be fully informed on all the details of the transaction, the following in particular:

- circumstances and possibilities of the transaction;
- possible conflicts arising from the transaction
- the benefit of the company in its own execution; as well as
- the efforts undertaken to acquire the opportunity for the company.[222]

It is still unclear to what extent a general permission for the appropriation of corporate opportunities may be granted to board member in contracts. If a specific release is laid down in the articles of association, the release is permissible. However, if the release is laid down in the employment contract, it is not permitted. Moreover, a general release given by the management board is also not permitted.[223] In any case, the Supreme Court held that the decision of the supervisory board regarding the release of the opportunity must be obtained before the board member appropriates a corporate opportunity himself.[224]

5.5 Corporate opportunities in the German Corporate Governance Code

The German Corporate Governance Code (hereinafter: GCGC) contains two principles regarding conflicts of interest and the appropriation of corporate opportunities. Article 4.3.1 GCGC states that members of the management are bound to observe the best interests of the company. When taking decisions, they must not pursue any personal interests, they are subject to comprehensive non-competition arrangements during their terms of office and they must not exploit for themselves business opportunities to which the company is entitled. Article 5.5.1 states that every member of the supervisory board is bound to observe the company's best interests. No member of the supervisory board may pursue personal interests

[222] Hauschka, Moosmayer, Lösler, *Corporate Compliance* (2016), § 4 Geschäftschancenlehre und Interresenkonflikt, no. 19.
[223] Hauschka, Moosmayer, Lösler, *Corporate Compliance* (2016), § 4 Geschäftschancenlehre und Interresenkonflikt, no. 21.
[224] German Supreme Court (Bundesgerichtshof) 23 September 1985 – II ZR 257/84, NJW 1986, 584, 585; German Supreme Court (Bundesgerichtshof) 10 February 1977 – II ZR 79/75, WM 1977, 361, 362. See also Fleischer, *Handbuch des Vorstandsrecht*, (2006) §9 Treuepflicht des Vorstandsmitglieder, no. 33.

in their decisions or exploit for themselves business opportunities to which the company is entitled.

In the GCGC, significant statutory requirements for the management and supervision of German listed companies are incorporated. The goal of the GCGC is to contribute to an understandable and transparent German Corporate Governance system. The CGCG emphasizes the management and supervisory boards' obligations to ensure continued existence of the company and its sustainable value creation in line with the company's best interests. According to the CGCG, these principles not only require compliance with the law, but also require ethically sound and responsible behavior.[225]

In the foreword of the CGCG, it is explained that recommendations in the GCGC are indicated in the text by use of the word "shall", suggestions are indicated by use of the word "should". The remaining passages of the GCGC that do not use the words "shall" or "should" relate to descriptions of statutory requirements and explanations, says the GCGC.[226] From this it follows that articles 4.3.1 and 5.5.1 relate to descriptions of statutory requirements and explanations, since in the articles the words "shall" or "should" are not used. Instead, in article 4.3.1 GCGC the word "must" is used, whilst in article 5.5.1 the word "may" is used. It is clear that both management directors and supervisory directors are not allowed to appropriate opportunities to themselves that belong to the company, but there is a slight difference in wording.

Based on § 161 AktG, the GCGC has a legal basis. Section 161 states, in short, that the management board and supervisory board of listed companies shall declare annually that the recommendations of the GCGC have been and will be complied with or which recommendations have not been or will not be applied and why. Consequently, only listed companies are obliged to comply with the corporate opportunity principle in the GCGC.

[225] The German Corporate Governance Code (7 February 2017), 1.
[226] The German Corporate Governance Code (7 February 2017), 2.

5.6 Concluding remarks

In sum, the development of the corporate opportunity doctrine in Germany is as follows (sub-question three). The corporate opportunity doctrine first appeared in the mid-seventies in Germany due to influence of the United States. In general, the corporate opportunity doctrine is often seen in relation with the prohibition of competition principle. Although there are differences between the two principles, the legal requirements and consequences of the prohibition to competition are often carefully used in analogy for the purpose of shaping the corporate opportunity doctrine.

The corporate opportunity doctrine is accepted in German case law. From case law it follows that an opportunity belongs to the company if there is a formal or a material connection. There is a formal connection between the opportunity and the company if the shareholders meeting has (implicitly) decided to allow the opportunity to be perceived by the company, the company has shown interest in the opportunity in any way, and the company has already taken measures in order to execute the opportunity. There is a material connection if the opportunity falls within the scope of activities of the company, if the opportunity is necessary to (the business activities of) the company, and if the opportunity has accost-saving effect and the company can gain a competitive advantage due to the opportunity.

The appropriation of a corporate opportunity by a board member due to lack of financial funds is not accepted as a defense by the German Supreme Court. The Supreme Court held that the board member should have looked for solutions in order to appropriate the opportunity on behalf of the company, for instance raising loans or the execution of capital increase. Furthermore, the Supreme Court did not accept the defense that the board member appropriated an opportunity belonging to his previous company after he resigned. The board member should remain loyal to the company even after resignation for some period of time. Lastly, the defense that the board member learned of the opportunity in a private capacity is not accepted by the Supreme Court, since the board member has an indivisible duty of loyalty to the company.

Release of the corporate opportunity by the company is possible, however, it is not yet clear how exactly release can be provided for. In any case, the supervisory board can release an

opportunity that belongs to the company and make it able to appropriate by the board member. In case there is no supervisory board, the board member has to seek approval from the shareholders meeting. To what extent a general release of corporate opportunities may be laid down in contracts is still debated.

In the GCGC, the appropriation of opportunities that belong to the company by members of the management and supervisory board is specifically prohibited. However, only listed companies are obliged to comply with the GCGC.

6 The Netherlands

6.1 Introduction

In this chapter, the development of the corporate opportunity doctrine in the Netherlands is discussed. Firstly, the legal classification used in relation to the appropriation of corporate opportunities and the claim of damages is described. Secondly, relevant cases in the Netherlands in which corporate opportunities were at stake in district courts, courts of appeal and the Enterprise Division of the Amsterdam court of appeal are analyzed. Thirdly, the possibility of the release of corporate opportunities by the company is described. Lastly, principle relating to the appropriation of corporate opportunities by members of the management and supervisory board in the Dutch Corporate Governance Code is discussed. In sum, this chapter provides an overview of the corporate opportunity doctrine in the Netherlands.

6.2 Legal classification of the corporate opportunity doctrine

Verdam was the first who extensively described the application of the corporate opportunity doctrine in Dutch law. Although there was (and still is) not a specific principle regarding the (mis)appropriation of corporate opportunities, Verdam determined that the corporate opportunity doctrine could play a role in the determination of open norms.[227]

Furthermore, Verdam described that the corporate opportunity doctrine relates to the conflict of interest doctrine. In both cases, the interest of the company is at odds with the interest of the fiduciary. In addition, there is a relation with the non-competition principle. The appropriation of a corporate opportunity by a fiduciary could be seen as competition with the company.[228] According to Verdam, in Dutch law a more general duty of loyalty exists on which the corporate opportunity doctrine can be based. The Dutch duty of loyalty is about relations between parties in which the one party legitimately trusts that the other party will act according to the interests of the first party or according to their joint interests, without taking to account its own interests. Consequently, the duty of loyalty means that the party

[227] A.F. Verdam, *Corporate opportunities: Over de toeëigening door functionarissen van aan de venootschap toebehorende business opportunities* (Schoordijk Instituut 1995), 70.
[228] A.F. Verdam, *Corporate opportunities: Over de toeëigening door functionarissen van aan de venootschap toebehorende business opportunities* (Schoordijk Instituut 1995), 70.

that has to act in accordance to the interests of the other party, may not use the position or knowledge following from the relation to benefit on its own account.[229]

Principles relating to conflicts of interest and the duty of loyalty are laid down in Book 2 of the Dutch Civil Code. For instance, in case of a board member of a private company, article 2:239, paragraph 5 DCC states that the board member has to act in accordance with the interests of the company. Paragraph 6 of article 2:239 DCC determines that, in case the board member has a contradictory private interest to a certain decision, the board member is not allowed to participate in the decision-making process. Article 2:129 DCC contains similar principles relating to the public company, and the articles 2:140 and 2:150 DCC contain similar principles relating to conflict of interests of supervisory board members in private and public companies. Article 2:45 DCC lays down a conflict of interest principle relating to board members of an association.

Moreover, it is generally accepted that the prohibition of board members to appropriate corporate opportunities to themselves, follows from articles 8 and 9 of the Dutch Civil Code Book 2 (hereinafter respectively: 2:8 and 2:9 DCC). In article 2:8, paragraph 1 DCC it is stated that a (legal) person who by virtue of the law and its articles (of association) are concerned with the organization of the company must conduct themselves in accordance with reasonableness and fairness. In article 2:9 DCC it is stated that each officer or board member shall be responsible towards the legal person for the proper performance of his duties (paragraph 1), and that each board member shall be responsible for the general course of affairs. The board member shall be wholly liable for improper management, unless no serious reproach can be made against him and he was not negligent in acting to prevent the consequences of improper management (paragraph 2). Consequently, based on these principles, a board member can be held liable for damages of the company resulting from the improper performance of his duties (*onbehoorlijke taakvervulling*).[230]

[229] A.F. Verdam, *Corporate opportunities: Over de toeëigening door functionarissen van aan de venootschap toebehorende business opportunities* (Schoordijk Instituut 1995), 73-74.
[230] M.W.E. Evers, 'Aandeelhouders en ongeschreven non-concurrentienormen' (2011) 5 Tijdschrift voor de Ondernemingsrechtpraktijk 200, 201.

6.3 The development of corporate opportunities in case law

Currently, the Dutch Supreme Court has not dealt with a corporate opportunity case. Corporate opportunities have been a matter of debate in district courts and courts of appeal, as well as in the survey proceedings before the Enterprise Division of the Amsterdam court of appeal. Since the Supreme Court has not specifically accepted nor rejected the doctrine, in literature, it is still a debate whether the corporate opportunity doctrine is actually applicable in Dutch proceedings. Nevertheless, the following paragraphs will describe the most relevant cases in which corporate opportunities were at stake in district courts, courts of appeal and the Enterprise Division.

6.3.1 District courts and courts of appeal

Compared to the United States, the United Kingdom and Germany, the Netherlands was late, even later than Germany, in its application of the corporate opportunity doctrine in case law. In 2008, the first Dutch court that laid down a definition of corporate opportunities in the Netherlands was the district court of Zwolle-Lelystad.[231] The district court defined the following: a corporate opportunity could be regarded as a possibility that occurs for the company to arrange a transaction or to perform business activities that fall within the sphere of the business operations, and from which it is apparent that the company has or could have a reasonable interest in the transaction or business activity. The questions that follows is if board members of a company are obliged to let the company have these possibilities or if board members also have the freedom to personally exploit the possibility. The district court ruled that board members must not withhold any corporate opportunity from the company. According to the court this rule results, inter alia, from the obligation of board members to keep the interests of the company in mind at all times while performing their duties, which rule is also embodied in articles 2:8 and 2:9 DCC. It must be expected from a board member that he will accrue a corporate opportunity to the company and renounces the use of the corporate opportunity to himself or third parties. Furthermore, the district court ruled that the board member that appropriates a corporate opportunity contrary to the foregoing does

[231] District court (rechtbank) Zwolle-Lelystad 30 January 2008, ECLI:NL:RBZLY:2008:BG0842.

not properly perform his duties and acts in conflict with the norm embodied in article 2:9 DCC.[232]

The facts of this case are the following. Unterlinden and De Bruin established the private company Dyna Music Systems BV (hereinafter: Dyna) in 2003. The activities of the company were doing business in and producing (parts of) music instruments and holding patents. In 2004, Unterlinden applied for a (and obtained the) patent of a new flute head system. However, instead of placing the patent as asset of Dyna, he placed the patent in another private company called Flauto Forte BV (hereinafter: Flauto Forte). The latter company was directed and owned by Unterlinden's wife. Dyna claims damages resulting from the appropriation by Flauto Forte of the opportunity belonging to Dyna.[233]

Regarding the exploitation of the flute head system by Flauto Forte, the district court held that it is regarded a corporate opportunity belonging to Dyna. According to the statute of establishment of Dyna, the purpose of the company is, among others, trading and producing music instruments, parts and accessories, as well as products relating to that. The court furthermore determined that the Flauto Forte-system could have been exploited and appropriated by Dyna. It had neither been argued, nor had it become evident that Dyna was not able to exploit the Flauto Forte-system. Defendant did not have a legitimate interest or necessity to appropriate the system to another company than Dyna. In addition, it had not become evident that Dyna had a choice to whether or not exploit the Flauto Forte-system or that the defendant mentioned the opportunity to Dyna. The district court concludes that defendant acted in breach of article 2:9 DCC.[234]

In appeal, Dyna complained that the district court was too narrow with its application of the corporate opportunity doctrine. According to Dyna, the compensation of damages must not only constitute of the missed profits relating to withholding the corporate opportunity, but must also constitute of the transfer of the international patent rights to the flute head system of Flauto Forte. The court of appeal held that Dutch laws and the Patent Law Treaty have no

[232] District court (rechtbank) Zwolle-Lelystad 30 January 2008, ECLI:NL:RBZLY:2008:BG0842, no. 4.11.
[233] District court (rechtbank) Zwolle-Lelystad 30 January 2008, ECLI:NL:RBZLY:2008:BG0842, no. 2.
[234] District court (rechtbank) Zwolle-Lelystad 30 January 2008, ECLI:NL:RBZLY:2008:BG0842, no. 4.12-4.13.

grounds for transferring the patent and international patent applications to Dyna. Furthermore, the court held that the fact that Flauto Forte invented and patented the flute head system, gives not rise to unlawful act nor to breach of articles 2:8 or 2:9 DCC. However, Uiterlinden, as board member of Dyna, was not allowed to establish a company that directly competed with Dyna. For Uiterlinden this was a serious accusation in the execution of his tasks as a board member and therefore he is held liable to pay damages towards Dyna. According to the court of appeal, the compensation of damages constituted of the missed damages of Dyna that Flauto Forte earned with the flute head system.[235] Here, the court of appeal did not hold Uiterlinden liable based on the corporate opportunity doctrine, but on the basis of prohibition of competition.

Already in 2005, the Enterprise Division of the Amsterdam court of appeal, in a different legal procedure, dismissed Unterlinden as board member. Referring to this, the court of appeal held that the dismissal of Unterlinden does not free him from his liability for damages resulting from the unlawful competition with Dyna. Based on the proceedings of the director, the way his directorship ended and his subsequent behavior as majority shareholder, the court of appeal held that the claim for damages of Dyna had not ceased with the dismissal of the director, but continued for two years after the dismissal. The two-year term is based on analogy with the maximum allowed period of non-competition agreements as secondary restriction in mergers and acquisitions.[236]

In a case before the district court of Leeuwarden,[237] plaintiff claimed that defendants acted unlawfully towards plaintiff by withholding a corporate opportunity from plaintiff and appropriate the opportunity for the private company of defendants. Defendants stated that they needed to act in this way, since third parties involved in the transaction, would not have accepted that plaintiff would be involved in the transaction. According to defendants, acting in this way was necessary to have plaintiff involved in the transaction. The court held that defendants did not substantiate their defense and plaintiff disputed the defense, and therefore the court did not accept the defense. Since there was no proof of the necessity of

[235] Court of appeal (gerechtshof) Arnhem 29 March 2011, LJN BQ0581, no. 8-14.
[236] Court of appeal (gerechtshof) Arnhem 29 March 2011, ECLI:NL:GHARN:2011:BQ0581, no. 16.
[237] District court (rechtbank) Leeuwarden 16 June 2010, ECLI:NL:RBLEE:2010:BY1308.

the actions of defendants, the court concluded that the transactions took place in order to withhold a corporate opportunity from plaintiff and to appropriate the opportunity to defendant's private company.[238]

In a case before the district court of mid-Netherlands,[239] the court iterated the definition of corporate opportunities as was determined in the Dyna case. Furthermore, the court stated that it follows from the articles 2:8 and 2:9 DCC that a director must appropriate these opportunities on the account of the company. In case a board member appropriates a corporate opportunity on his own (or third parties') account, without the opportunity being released by the company, the board member falls short in the execution of his task. In case the improper management was attributable to the director, he is liable for damages towards the company on the ground of 2:9 DCC. In principle, there is reason for improper management in case the board member acted in accordance with its own interest instead of the interest of the company.[240] Furthermore, the court held that it was not a case of corporate opportunities.[241]

In a case before the district court of North-Netherlands, plaintiff did not specifically claim it was withheld a corporate opportunity, however, the court stated that is understands the claim of plaintiff that by the actions of defendant, defendant withheld a corporate opportunity from plaintiff.[242]

6.3.2 The Enterprise Division of the Amsterdam court of appeal

The Enterprise Division of the Amsterdam court of appeal is not a regular court. The Enterprise Division only deals with so-called inquiry proceedings, and does not deal with, for instance, property disputes. Inquiry proceedings mean that the Enterprise Division can order, upon request, an investigation into the policies and affairs of a company. In addition, the Enterprise Division can order interim measures, for instance, the suspension of a director, the temporary

[238] District court (rechtbank) Leeuwarden 16 June 2010, ECLI:NL:RBLEE:2010:BY1308, no. 4.1., 4.3.1.-4.4.
[239] District court (rechtbank) Midden-Nederland 19 February 2014, ECLI:NL:RBMNE:2014:457.
[240] District court (rechtbank) Midden-Nederland 19 February 2014, ECLI:NL:RBMNE:2014:457, no. 4.11.
[241] District court (rechtbank) Midden-Nederland 19 February 2014, ECLI:NL:RBMNE:2014:457, no. 4.13.
[242] District court (rechtbank) Noord-Nederland 13 March 2013, ECLI:NL:RBNNE:2013:BZ6236, no. 4.12.1.

transfer of shares or the temporary appointment of a board member. The results of the inquiry proceeding can give rise to a procedure on director's liability, for instance.

The Enterprise Division used the corporate opportunity doctrine several times in its inquiry proceedings. In the case Van Tricht v. De Merwede before the Enterprise Division,[243] Van Tricht claimed that De Merwede did not treat its shareholders equally. Van Tricht stated that De Merwede made itself dependent on the majority shareholder, Van Nieuwpoort, which is almost the only client of De Merwede. According to Van Tricht, De Merwede charged a too low price, not in accordance with the market, to Van Nieuwpoort. Besides, Van Tricht drew attention to the double role of Peterse, who was both board member of Van Newpoort as well as board member of De Merwede. This double role entails the risk of conflict of interest.[244]

Regarding the suggested conflict of interest position of Peterse, the Enterprise Division held that the risk of conflict of interest is at stake in this case in relation to corporate opportunities. The opportunity here was the acquisition of the company Guido Clemens Schotterwerke. In his capacity as director of De Merwede, Peterse spent a lot of time on the preparation of that acquisition. Furthermore, in a note to the supervisory board, Peterse stated to be positive about the acquisition. The supervisory board decided not to go on with the acquisition for the purpose of De Merwede. Eventually, Van Nieuwpoort went on with the acquisition. Based on these circumstances, the Enterprise Division held that the appropriation of the opportunity by the majority shareholder of De Merwede, Van Nieuwpoort, was not in the interest of De Merwede. Based on the conflict of interest situation regarding the acquisition and also because of the performance of the supervisory board of De Merwede, the Enterprise Division concluded that there were grounded reasons to doubt the management of De Merwede and ordered an investigation into the policies and affairs of the company.[245]

[243] Court of appeal (gerechtshof) Amsterdam (Enterprise Division, *Ondernemingskamer*) 31 August 2001, JOR 2001, 208.
[244] Court of appeal (gerechtshof) Amsterdam (Enterpise Division, *Ondernemingskamer*) 31 August 2001, JOR 2001, 208, no. 3.4.
[245] Court of appeal (gerechtshof) Amsterdam (Enterprise Division, *Ondernemingskamer*) 31 August 2001, JOR 2001, 208, no. 3.7-3.10. See also C.S. Goedel, 'De positie van de minderheidsaandeelhouder in geval van belangenverstrengeling tussen de vennootschap en de meerderheidsaandeelhouder' (2002) 4 Vennootschap & Onderneming 65, 68.

In the Begemann case,[246] the corporate opportunity consisted of the execution of the warrants on the Tulip-shares by the company and, as a result, the company could take advantage of the profitable position of Tulip after the acquisition of Devil Computer. The Enterprise Division of the Amsterdam Court of Appeal held that the actions of Van Waeyenberge, board member of Begemann, led to Begemann missing out on the corporate opportunity. This is because of his leading role in the Devil Computer acquisition by Tulip, which means he had access to information from which he could derive the consequences of the acquisition for the revenues and results of Tulip before this was communicated to the market. According to the court, the access of Van Waeyenberge to this information led to the decision of Begemann to buy the warrants on the Tulip shares and sell them to Sivex. As a result, Sivex took advantage of the significant value increase of these warrants causing a disadvantage to Begemann and its shareholders.[247]

In another case before the Enterprise Division, the Enterprise Division held that a corporate opportunity was withheld from the company and that this was attributable to the board member who, as a board member of two companies, should have acted in accordance with the interests of these companies and must have taken these interests into consideration during the negotiations of the opportunity.[248]

From this it follows that the appropriation of a corporate opportunity plays a role in inquiry proceedings before the Enterprise Division. Moreover, it follows that the Enterprise Division is not reluctant to use corporate opportunities in its considerations. An unlawful appropriation of opportunities belonging to the company by the board member, could lead to investigations into the policies and affairs of the company. The Enterprise Division actually never determined a definition of a corporate opportunity. At this moment, such a determination is not necessary anymore, since the district court of Zwolle-Lelystad already determined such a definition (unless corporate opportunities have a different meaning according to the Enterprise

[246] Court of appeal (gerechtshof) Amsterdam (Enterprise Division, *Ondernemingskamer*) 28 December 2006, *ARO* 2007/6.
[247] Court of appeal (gerechtshof) Amsterdam (Enterprise Division, *Ondernemingskamer*) 28 December 2006, *ARO* 2007/6, no. 3.15. See also .M. Soerjating, 'Begemann: tegenstrijdig belang en corporate opportunity' (2007) 2 Tijdschrift voor de Ondernemingsrechtprakijk 79, 81.
[248] Court of appeal (gerechtshof) Amsterdam (Enterprise Division, *Ondernemingskamer*) 21 December 2012, ECLI:NL:GHAMS:2-12:BY9760, no. 3.6.

Division). However, the Enterprise Division already used the term corporate opportunities before the judgment of the district court of Zwolle-Lelystad.

6.4 The release of corporate opportunities by the company

It could occur that a company does not want to or is not able to appropriate a corporate opportunity. One could for instance think of the situation that the company does not want to appropriate the corporate opportunity for it is not interested in it. One could also think of the situation that the company is not able to appropriate the corporate opportunity due to insufficient financial means or legal problems that occur when the appropriation of the corporate opportunity is not possible in accordance with the articles of association or in accordance with the law. Moreover, it could be the case that a third party is not willing to do business with the corporation. In these situations, one could question if the board member is allowed to appropriate the corporate opportunity. According to literature, the board member should not automatically assume that (s)he is allowed to appropriate the corporate opportunity. Besides, when the board member appropriates a corporate opportunity, (s)he creates a situation where his/her personal interest conflicts with his/her company's interest. Therefore, it is suggested in literature that it would be prudent that a board member asks prior permission from the company. This is also assumed in English, German and American law.[249] Contrary to for instance Germany, the release of corporate opportunities by the company in Dutch law is only discussed in legal literature. There is no case law relating to the release of corporate opportunities.

In order to avoid conflicts of interest between the board member's personal interest and the company's interest, two conditions should be met regarding the release of a corporate opportunity:

1) disclosure by the board member of the nature and scope of the board member's involvement to a transaction;

2) permission or approval by an independent corporate body.[250]

[249] See e.g. M. Koelemeijer, 'Redelijkheid en billijkheid in het vennootschapsrecht' (1994) 6154 WPNR 714, 718.
[250] M. Koelemeijer, 'Redelijkheid en billijkheid in het vennootschapsrecht' (1994) 6154 WPNR 714, 718.

It will be clear that in any case the permission granting authority needs to receive all the required information in due time that it reasonably needs to form a sound opinion on a certain opportunity. A possibility is to have the management board decide on the permission. By definition, a corporate opportunity is a matter that concerns the management board. However, the problem here is that the board member that wants to appropriate the opportunity is part of the management board, and therefore part of the decision whether (s)he may appropriate the opportunity or not. Moreover, the other board members could also have a conflict of interests. In other words, the management board is not an independent corporate body. A solution could be that some of the board members are not allowed to be part of the decision-making process and need to abstain their vote about the opportunity involving their personal interest. In order to avoid conflict of interest situations in the management board and difficult decision-making processes due to abstained votes, it is suggested to have the supervisory board decide whether or not a board member is allowed to appropriate an opportunity. In companies without a supervisory board, a certain decision can be presented to and accounted for in the shareholders' meeting.[251]

In case all the mentioned requirements are met, i.e. the provision of all relevant information and the permission or approval, the permission to appropriate a corporate opportunity could still be contrary to the principle of reasonableness and fairness towards for instance minority shareholders. In other words, the permission or approval needs to meet the principle of reasonableness and fairness.[252]

6.5 The Dutch Corporate Governance Code

The Dutch Corporate Governance Code (hereinafter: DCGC) contains a principle relating to the appropriation of corporate opportunities by members of the management and supervisory board. Article 2.7.1, among others, states that members of the management and supervisory board are alert to conflicts of interests and should refrain from competing with the company (subparagraph i) and from taking advantage of business opportunities to which the company is entitled to themselves or to their families (subparagraph iv).

[251] See e.g. M. Koelemeijer, 'Redelijkheid en billijkheid in het vennootschapsrecht' (1994) 6154 WPNR 714, 718.
[252] M. Koelemeijer, 'Redelijkheid en billijkheid in het vennootschapsrecht' (1994) 6154 WPNR 714, 718.

The DCGC applies to all Dutch companies whose shares (or depositary receipts for shares) have been admitted to trading on a regulated market or a comparable system, and to all large Dutch companies with a balance sheet value of more than € 500 million, and whose shares (or depositary receipts for shares) have been admitted to trading on a multilateral trading facility or a comparable system. Within Dutch listed companies, the purpose of the DCGC is to assist the progress of a sound and transparent system of checks and balances.[253]

The DCGC contains principles and best practice provisions. The principles reflect widely held general views on good corporate governance. The best practice provisions supplement the principles of good corporate governance. Departure from the principles and best practice provisions is allowed on the condition that the companies give reasons for doing so. The companies have to 'comply or explain'. Each year, companies have to set out the broad outline of their corporate governance in a separate chapter of the management report or published on the company's website. There the company explicitly states which principles of the DCGC are complied with and which are not. In case the company does not comply with a principle, it has to state why and to what extent it deviates from the principle.[254]

The DCGC is formed by self-regulation and, therefore, it has not the same status as black-lettered law. Nevertheless, the DCGC is based on legislation and case law, as well as relevant corporate governance trends. Overlap between legislation and the DCGC has been avoided as much as possible.[255]

6.6 Concluding remarks

As well as in Germany, in the Netherlands there is not a specific black-lettered law rule that prohibits the appropriation of an opportunity belonging to the company by a board member. The corporate opportunity doctrine, however, plays a role in the determination of open norms. The principle that is most often used to hold a director liable for the damages resulting from the appropriation of a corporate opportunity is article 2:9 DCC.

[253] The Dutch Corporate Governance Code (8 December 2016), 7.
[254] The Dutch Corporate Governance Code (8 December 2016), 7 and 11.
[255] The Dutch Corporate Governance Code (8 December 2016), 8.

The current state of the corporate opportunity doctrine in the Netherlands is as follows (sub-question four). The definition of corporate opportunities as determined in case law by the district court of Zwolle-Lelystad is that a corporate opportunity could be regarded as a possibility that occurs for the company to arrange a transaction or to perform business activities that fall within the sphere of the business operations, and from which it is apparent that the company has or could have a reasonable interest in the transaction or business activity. This definition was later iterated by the district court of mid-Netherlands.

The appropriation of corporate opportunities by board members plays a role in the inquiry proceedings before the Enterprise Division of the Amsterdam court of appeal. An unlawful appropriation of opportunities belonging to the company by the bard member could lead to an order of investigations into the policies and affairs of the company given by the Enterprise Division.

There are no cases relating to the release of corporate opportunities by the company, but in legal literature the possibility of release been discussed. It has been suggested that two conditions should be met in order to avoid a conflict of interest when releasing the corporate opportunity to a board member. First, disclosure by the board member of the nature and scope of the board member's involvement to a transaction, and, second, permission or approval by an independent corporate body. The independent corporate body could be the supervisory board in two-tier boards, the non-executives of the board in one-tier boards or the shareholder's meeting in case there are no supervisory board members.

The DCGC contains a principle that board members should refrain from taking advantage of business opportunities to which the company is entitled. The DCGC is a self-regulatory code and is applicable to large listed companies. The companies are allowed to deviate from the principles of the DCGC but have to explain why and to what extent they deviate from the specific principle.

7 Comparison

7.1 Introduction

Based on the findings in the previous chapters, this chapter describes the differences and similarities between the corporate opportunity doctrines of the United States (Delaware), the United Kingdom (England and Wales), Germany and the Netherlands (sub-question five). First, the origins of the corporate opportunity doctrines are addressed. Second, the different tests of the doctrines are described. Third, the different corporate governance principles relating to corporate opportunities and the possibilities for the company to release corporate opportunities are discussed. Fourth, it is described if and how it is possible to contractually waive corporate opportunities in the different jurisdictions. Last, recommendations for the further development of the corporate opportunity doctrine in the Netherlands are given.

7.2 Origins of the corporate opportunity doctrines

Before comparing the origins of the corporate opportunity doctrines, a recap of the four jurisdictions is given.

In the United States the first case relating to corporate opportunities dates from 1900. Prior to 1900 there were opportunities that would fall within the meaning of today's corporate opportunity doctrine, however, it was common (and expected) that, for instance, officers of the banks routinely exploited business opportunities for themselves that may have been attractive for the corporations they served. In the United States the corporate opportunity doctrine is a component of the duty of loyalty which prohibits self-interested action by corporate fiduciaries.

In English law, the first case that applied a strict conflict of interest rule, which is regarded the basis of the English corporate opportunity doctrine, dates from 1726. The corporate opportunity doctrine in English law is generally based on the duty to avoid conflicts of interest, which is an element of the fiduciary duties. In short, the duty to avoid conflicts of interest means that directors (or fiduciaries) must not put themselves in positions where their interests conflict.

In Germany, the corporate opportunity doctrine is established under the influence of comparative corporate law literature of the United States. In 1977, the corporate opportunity doctrine was accepted by the German Supreme Court. In German literature it is stated that the corporate opportunity doctrine has its basis in the duty of loyalty, and furthermore, that the doctrine originates from the prohibition of competition. The prohibition of competition prevents board members to use the knowledge and influence acquired from their positions in the company in order to promote their own interests at the expense of the company. The purposes of the corporate opportunity doctrine and the prohibition of competition differ. Where the prohibition of competition aims to prevent competition, the corporate opportunity doctrine aims to prohibit the director from using opportunities belonging to the company on his own account. The German Supreme Court bases the corporate opportunity doctrine on the principle to avoid conflicts of interest, meaning that a director should act in accordance with the company's interests at all times.

In the Netherlands, the corporate opportunity doctrine is extensively described in legal literature for the first time in 1995. In 2008, a Dutch court of first instance applied and defined the corporate opportunity doctrine. However, the courts of appeal and the Dutch Supreme Court have not applied the corporate opportunity doctrine in its judgments. In Dutch literature, it is described that the corporate opportunity doctrine relates to the conflict of interest doctrine. Furthermore, it is also believed that there is a relation with the non-competition principle, since the appropriation of a corporate opportunity by a fiduciary could be regarded as competition with the company.

Regarding the roots of the corporate opportunity doctrine, these are similar in all jurisdictions. All jurisdictions base their corporate opportunity doctrine on the duty of loyalty or a derivative principle thereof, such as the non-competition principle and the duty to avoid conflicts of interest.

As mentioned before, the United Kingdom and the United States have a rich history of corporate opportunity cases. A reasonable explanation for this could be that the application of the corporate opportunity doctrine is more relevant in common law systems. Apparently, until the 1970's, there was no need for such a rule in Germany. In case of the Netherlands, the

need for such a rule came only in 2008. Probably influenced by the common law jurisdictions, such as the United Kingdom and the United States, the civil law jurisdictions became interested in the corporate opportunity doctrine, as they felt it could also offer added value to their systems. What the particular change of situation was that resulted in the application of the doctrine by German courts in the 1970s remains unclear. Also, it is still unclear why the Dutch district court applied the doctrine for the first time in 2008. It is difficult to think of any change in Dutch law that would have sparked the need to apply the corporate opportunity doctrine from 2008 on. In any case, the court of appeal in the aforementioned Dyna case did not think it was desirable to apply the doctrine as it came to the same result, namely director's liability, without the application of the corporate opportunity doctrine. Although, there does not necessarily need to be a reason or a change in law to apply the corporate opportunity doctrine. The rationale of the application of the corporate opportunity doctrine by the German and Dutch courts could also have been the use of a supplementary tool to establish director's liability besides the already existing tools. However, since civil law judges do not express their line of thoughts in their judgements, contrary to judges of common law jurisdictions, it remains unclear why the German courts started applying the doctrine and why some Dutch district courts applied it. Nevertheless, at least in case of the Netherlands, it is likely that the Dutch district courts applied the doctrine as a supplementary way of establishing director's liability. This also might be the reason why the Dutch courts of appeal and the Supreme Court are reluctant in applying the doctrine, as they not necessarily see a need for the application of a 'new' rule since director's liability can also be established by already existing rules.

7.3 Corporate opportunity tests

The four jurisdictions each have their own tests of corporate opportunity. These are first summed up, before comparing them.

The United States' courts have been using three separate tests to determine whether a business opportunity is regarded a business opportunity: the interest or expectancy test, the line of business test and the fairness test. Under the interest or expectancy test, an opportunity belongs to the company if the company has a contractual right or an interest in

the opportunity, or it is likely that the company will have a contractual right following from an expectancy. With regard to the line of business test, an opportunity belongs to the company when it is said to be within the company's line of business. According to the fairness test, an opportunity belongs to the company when the interest of the company justly calls for that opportunity and it is unfair if the fiduciary takes the opportunity for himself. In Delaware, the dominant corporate opportunity test is the line of business test.

In *Broz v. CIS*, the Delaware Supreme Court held that the following four considerations are relevant in the determination whether an opportunity belongs to the company: (i) the financial ability of the company to take the opportunity; (ii) whether the opportunity is in the company's line of business, (iii) whether the company has an interest or expectancy in the opportunity; (iv) whether the director creates a conflict of interest with the company by the appropriation of the opportunity.

In the English case *Aas v. Benham*, the line of business test was explicitly recognized. Among others, the line of business test is a way to determine whether the opportunity belongs to the company under the flexible approach. However, the English courts usually apply the strict approach, and with the restatement of the corporate opportunity doctrine in the Companies Act 2006, the strict approach is regarded the currently applied approach.

Under the strict approach, the corporate opportunity doctrine is described by the no-conflict and no-profit rules. Under the no-conflict rule, it is prohibited for a director acting in a way that there is a reasonable possibility of conflict between his personal interests and the interests of the company. Under the no-profit rule, it is prohibited for a director to make undisclosed profit for himself from the use of corporate assets, opportunities and information. These rules are strictly complied with by the courts, resulting that liability automatically occurs when a director enters into a contractual obligation (or appropriates an opportunity), without the company's informed consent, with which he has (or can have) a conflict of interest. The courts do not take into consideration whether the company (financially) could or would have exploited the opportunity, whether the company has been harmed by the director, whether the director has acted in good faith or whether the third party refuses to contract with the

company. When the director appropriates an opportunity which possibly may conflict with the interests of the company, the director is held liable.

It follows from German case law that there are two criteria to determine whether an opportunity belongs to the company: either a formal or a material connection. There is a formal connection between the opportunity and the company when the company has shown interest in the opportunity. The company has shown interest in the opportunity in the following cases: the board member entered into contractual negotiations on behalf of the company, the company expressed interest in opportunities of this nature, and the contractual negotiations are in such a phase that the final grant is only a formality. There is a material connection when the opportunity falls within the scope of activities of the company, when the opportunity is necessary to the business activities of the company, or when the opportunity has a cost-saving effect to the company. It is irrelevant whether the company is financially able to appropriate the opportunity. Moreover, it is irrelevant whether the board member has learned of the opportunity in the capacity as board member or private person, since the board member has an indivisible duty of diligence and loyalty to the company.

In Dutch case law, a corporate opportunity is specified as a possibility that occurs for the company to arrange a transaction or to perform business activities that fall within the sphere of the business operations, and from which it is apparent that the company has or could have a reasonable interest in the transaction or business activity. In other words, an opportunity belongs to the company when the opportunity falls within the sphere of the company's business operations and when the company has or could have a reasonable interest in the opportunity.

Except for the United Kingdom, the corporate opportunity tests of the other jurisdictions are very much alike. The corporate opportunity tests of Germany and the Netherlands are both based on a combination of the American line of business test and the interest or expectancy test. This is not surprising, as the corporate opportunity doctrines of Germany and the Netherlands are largely based on the American doctrine. On the contrary, the United Kingdom has its very own doctrine and test as it applies a strict corporate opportunity doctrine approach. Consequently, it does not matter whether the opportunity falls within the line of

business of the company or whether the company has an interest or expected interest in the opportunity. Even when the opportunity possibly may conflict with the interests of the company, the director is obliged to appropriate such an opportunity.

Similar to the United Kingdom, in Germany it is held irrelevant whether the company is financially able to appropriate the company. Furthermore, in Germany it is regarded irrelevant whether the board member has learned of the opportunity in the capacity as board member or as private person. It follows from the strict approach of the corporate opportunity doctrine that this is also regarded irrelevant in the United Kingdom. Moreover, in the United Kingdom it is also held irrelevant whether the company has been harmed by the director, whether the director has acted in good faith or whether the third party refuses to contract with the company.

In the Netherlands, the corporate opportunity doctrine is the most undeveloped of these four jurisdictions and, as a result, these kinds of circumstances have not been determined (yet). That the doctrine is underdeveloped follows from the fact that there are very little Dutch cases regarding corporate opportunities. There have not been any cases in which one of these specific circumstances have occurred, such as whether the third party refuses the contract or whether the company is financially able to appropriate the opportunity. When the corporate opportunity doctrine is applied more often in case law, the different circumstances of each case will be addressed which will contribute to the development of the doctrine.

7.4 Corporate governance and the release of the corporate opportunity

Before comparing the different systems of corporate governance and possible ways for releasing corporate opportunities, a refresher on the four jurisdictions is provided.

According to the corporate opportunity principle in the ALI Principles of Corporate Governance, an opportunity belongs to the company if the director should reasonably expect that the opportunity would be of interest to the company, or the opportunity is closely related to a business in which the corporation is engaged or expects to engage. Furthermore, the principle prescribes under what conditions the director is allowed to take advantage of a

corporate opportunity. According to these Principles of Corporate Governance, before the director is allowed to appropriate a corporate opportunity, (s)he needs to offer the opportunity to the company and has to disclose the conflict of interest with the opportunity and, furthermore, the opportunity needs to be rejected by the company. Regarding the rejection by the company, the following conditions must be met: the rejection of the opportunity must be fair to the company; the opportunity must be rejected in advance by disinterested directors in a manner that satisfies the standards of the business judgment rule; or the rejection must be authorized in advance or ratified by disinterested shareholders and the rejection must not be equivalent to a waste of corporate assets.

Regarding the release of a corporate opportunity, from the Delaware case *Broz v. CIS* it followed that the director does not need to formally present the opportunity to the board or that the board needs to formally reject the opportunity, before the director is free to exploit the opportunity. Formal processes create a safe harbor, but are not required.

The corporate governance code of the United Kingdom does not contain any principles relating to the corporate opportunity doctrine. Nevertheless, the United Kingdom restated the corporate opportunity doctrine in section 175 of the Companies Act 2006. The Act states that a director of a company must avoid situations in which (s)he (can) has(/have) a direct or indirect interest that (possibly may) conflict with the interests of the company. Paragraph two of the section specifically states that it is irrelevant whether the company is (financially) able to take advantage of the opportunity. Paragraph four of the section specifically states that the duty to avoid conflicts of interest is not infringed if the situation cannot reasonable be regarded as likely to give rise to a conflict of interest, or if the matter has been authorized by the directors. In paragraph five it is determined when and how directors may authorize corporate opportunities. In the case of a private company, unless the articles of association invalidate such authorization, authorization may be given by proposing the matter to the directors. In the case of a public company, authorization is possible if the articles of association include a provision enabling directors to authorize the matter and, furthermore, the matter has to be proposed to and authorized by the directors in accordance with the articles of association.

The German Corporate Governance Code contains principles regarding conflicts of interest and the appropriation of corporate opportunities board addressed to the management board member as well as the supervisory board member. Articles 4.3.1 and 5.5.1 determine that management board members and supervisory board members must (for supervisory board members: may) not pursue any personal interests in their decisions and they must (or may) not exploit for themselves business opportunities to which the company is entitled. The GCGC does not state whether a release of the corporate opportunity is possible.

According to German case law, it is held possible to release a corporate opportunity to a board member, although it is still unclear how the release exactly works. The release of a corporate opportunity is applied in analogy to the prohibition of competition, which determines that the decision of release has to be made by the supervisory board. In corporations without a supervisory board, the board member has to seek approval from the shareholders meeting, since a release of a co-member of the board is not permitted.

The Dutch Corporate Governance Code contains a principle regarding the appropriation of corporate opportunities by members of the management and supervisory board. Article 2.7.1 determines that members of the management and supervisory board should refrain from taking advantage of business opportunities to which the company is entitled for themselves or for their families. As the corporate governance code is self-regulated, listed companies find it important that members of the management and supervisory boards do not appropriate corporate opportunities. This could be a reason for the Dutch courts to apply the doctrine at least in the case of listed companies. However, in the district court cases in which the doctrine has been applied, the companies were non-listed. Therefore, this does not make clear why the courts applied the corporate opportunity doctrine in those cases.

In Dutch law, the release of corporate opportunities by the company is only discussed in legal literature. It is suggested that, in order to avoid conflicts of interest between the board member's personal interest and the company's interest, the release should be fully disclosed by the board member and the permission or approval has to be given by an independent corporate body. Regarding the independent corporate body, it is suggested that this should

be the supervisory board. In companies without a supervisory board, the decision of release can be given by the shareholders' meeting.

The principles in the corporate governance codes relating to the appropriation of corporate opportunities are general. ALI's Principles of Corporate Governance as well as section 175 of the Companies Act 2006 are similar to the extent that these principles are regarded restatements of what is already determined in case law. As a result, the contents of the principles diverge, as the rules held by American and English courts in corporate opportunity cases are different. The corporate governance codes of Germany and the Netherlands are similar. Both codes contain broad principles that members of the management and supervisory board are not allowed to appropriate corporate opportunities.

Regarding the release of the corporate opportunity, ALI's Principles of Corporate Governance and section 175 of the Companies Act 2006 both describe how corporate opportunities can be released by the company, although the contents of the principles are different. According to ALI's Principles of Corporate Governance, the director has to offer the opportunity to the company and disclose the conflict of interest. The opportunity then needs to be rejected by the company or, in other words, released to the director. The rejection has to meet conditions that is must be fair to the company, that the opportunity must be rejected in advance, that the rejection must be authorized or ratified by disinterested shareholders in advance, and that the rejection must not be equivalent to a waste of corporate assets. The corporate opportunity principle in the Companies Act 2006 is less extended, as, in case of a private company, the director only has to propose the release of the opportunity to the other directors (unless the articles of association invalidate this). In case of a public company, the process is the same, however the articles of association need to include a principle that enables directors to authorize the opportunity, and the authorization process needs to be applied in accordance with the articles of association.

The German and Dutch corporate governance codes do not mention the possibility of release. In German case law it is accepted that the release of corporate opportunities by the company is possible, however, it is not exactly determined how the release works. In Dutch law, the release of corporate opportunities has only been discussed in legal literature. The suggested

ways of release in Germany and the Netherlands are similar: the supervisory board has to decide on the release. In companies without a supervisory board, the decision on the release has to be given by the shareholders' meeting. Regarding the suggested approach, a few comments can be made. Although two-tier boards are most common in the Netherlands, Dutch companies are also allowed to have one-tier boards. When the suggested approach is followed in the case of a one-tier board, the decision whether a director is allowed to appropriate a corporate opportunity will be given by the shareholders' meeting. However, this decision is actually a typical decision that should be made by the board and, furthermore, shareholders' meetings are not held on a regular basis, particularly in listed companies with many shareholders, which means that it will take a while before the decision is made whether the company releases the opportunity. Therefore, in cases of one-tier boards, a better approach would be the American one, which is having the disinterested directors decide about the release of the corporate opportunity.

Furthermore, in the suggested approach no distinction is made between non-listed and listed companies, despite the fact that these companies could have very different director/ownership-structures. Small non-listed companies often do not have a supervisory board, which means that the shareholders have to make the decision. As there are often few shareholders in non-listed companies that also are closely involved with the everyday management of the company, this is not necessarily a problem. However, it could be the case that there are two directors and one shareholder (that is not involved in the management of the company) and the shareholder approves the release while the other director would have disapproved the release. This situation is unfair to the other managing director as (s)he, as a loyal director, is the one that is harmed by the consequences of the shareholder's decision. In any case, the director/ownership-structures between non-listed and listed companies could differ a lot. Consequently, it would be better to have a standard rule that fits most situations, yet allows companies to change the way and procedures of releasing corporate opportunities in its articles of association as the company feels that it will better fit the specific situation. This is somewhat similar to the United Kingdom approach in section 175 of the Companies Act 2006.

7.5 Corporate opportunity waivers

Corporate opportunity waivers are dealt with differently in the four jurisdictions. Before comparing them, they are recapitulated.

Since 2000, Delaware corporations have the opportunity to renounce corporate opportunities in advance in their certificates of incorporation or by action of its board of directors, according to § 122(17) of the DGCL. The renunciation is only allowed for classes or categories of business opportunities that the corporation has specified in advance.

In English law, due to the rationales of the corporate opportunity doctrine, there are strict limits to contractually waive conflicts of interest and corporate opportunities. The rationales of the corporate opportunity doctrine are the removal of a director's temptation to act in his/her own interests rather than the company's interests, and to reduce (the consequences resulting from) the information asymmetry between the director and the company (and its shareholders). That there are strict limits to corporate opportunity waivers is a logical consequence of the strict corporate opportunity approach. It would be contrary to the strict approach if these waivers are not strictly limited, since the rationales of the doctrine will not be met then.

In German law, it is still unclear to what extent a contractual general permission for the appropriation of corporate opportunities may be granted to board members. A specific corporate opportunity renunciation in the articles of association is permitted, however, a release laid down in the employment contract of a board member is not permitted. Moreover, a general release given by the management board is also not permitted.

In Dutch law, it is unclear whether it is allowed and/or possible to contractually waive corporate opportunities. It does not follow from case law, nor from literature. Reason for this is the fact that there is very little case law concerning corporate opportunities. Despite the fact that the corporate opportunity doctrine is more frequently discussed in literature, there is no literature that addresses this issue. This is a result of the undeveloped Dutch corporate opportunity doctrine.

In sum, Delaware is the only jurisdiction that specifically allows corporate opportunity waivers in its corporate law. According to English law, waiving corporate opportunities is strictly limited and in practice hardly allowed. In Germany it is not clear how and to what extend a corporate opportunity waiver is allowed, however, a specific corporate opportunity renunciation in the articles of association is permitted. In the Netherlands, the possibility of corporate opportunity waivers has not been discussed (yet).

Consequently, whether corporate opportunity waivers are possible is irrespective of a common or civil law system, as these waivers are specifically allowed in the Delaware's corporate law but are hardly allowed in the United Kingdom. As a result of the strictly applied corporate opportunity doctrine in combination with the strict limit on corporate opportunity waivers in English law, directors of English companies could have difficulties with, for instance, private investments since there is a greater chance that these private investments are considered corporate opportunities, compared to directors of Delaware-based companies. The distinctions between Delaware and English law could be explained by cultural differences. The strict application of corporate opportunities fits with the English corporate opportunity rationales, while Delaware corporate law is known to be business friendly. The possibility of corporate opportunity waivers could (additionally) be a reason for directors (or founders) to base their company in Delaware.

The general rule in German law is that corporate opportunity waivers are permitted, but the company has to specifically provide which corporate opportunities may be waived. In other words: the company has to specify the conditions. Thus, companies can lay down conditions that fit the company, which generally works better than specified conditions in law that apply to every company as there are different types of companies that ask for different approaches. The German approach would also fit the Dutch corporate law system as this is something which regularly occurs, for instance the rule that allows companies to deny the voting rights on decisions of certain people in its articles of association (article 2:12 DCC), but there are more similar examples to be found in Book 2 of the Dutch Corporate Code.

7.6 The further development of the Dutch corporate opportunity doctrine

As is apparent from this research, the Dutch corporate opportunity doctrine is the most undeveloped doctrine of the four jurisdictions. Since the corporate opportunity doctrine is not broadly applied in Dutch case law, there are a lot of uncovered circumstances. As follows from the comparison, it is not exactly determined which specific circumstances are relevant or not in applying the corporate opportunity doctrine, for instance whether it matters if the company is financially able to appropriate the opportunity. Furthermore, case law has not dealt with a situation whether it is possible that the company releases an opportunity to the board member. This has only been discussed in literature. Moreover, whether it is possible to contractually waive a corporate opportunity has also not been dealt with in case law nor in literature.

The application of the corporate opportunity doctrine in the Netherlands is not necessary in the sense that Dutch corporate law is not able to function in a right(eous) way without applying the doctrine. Nevertheless, the corporate opportunity doctrine could be used in addition to the existing rules for the determination of director's liability. Furthermore, the Dutch corporate governance code contains a principle prohibiting the appropriation of corporate opportunities by members of the management and supervisory board, meaning that the listed companies find the corporate opportunity doctrine an important good faith principle. The first steps in developing the doctrine have already been made: the district courts already applied the doctrine and the corporate governance code contains a principle on corporate opportunities.

Answering the research question regarding the further development of the Dutch corporate opportunity doctrine, it is advised that the court of appeal or the Supreme Court take the second step in a case involving a corporate opportunity. These courts need to ensure whether the corporate opportunity doctrine is applicable in the Netherlands or not, instead of prevaricating around the matter. In case the higher courts decide the corporate opportunity doctrine should not be applied in the Netherlands, the corporate opportunity case is closed. In case the higher courts decide the doctrine is applicable in the Netherlands, the doctrine needs to be developed further. There are two complementary ways. The first is discussing the corporate opportunity doctrine in legal literature on an in-depth and regular basis. In

literature, authors should discuss as much solutions for different circumstances as possible. A starting point for this would be to discuss the aforementioned aspects and circumstances that could occur in cases that are not addressed in literature. As an example for the Dutch corporate opportunity doctrine, it is preferable to look at what German courts decided and what German lawyers/authors suggested, since German corporate law and Dutch corporate law are, in general, similar to each other. This is specifically the case when Dutch corporate law is compared to that of the United States and the United Kingdom. Although, it would not harm the development of the corporate opportunity doctrine if the corporate opportunity doctrines of the United States and the United Kingdom are also looked into, especially in cases where certain circumstances of the German corporate opportunity doctrine are still unclear, for instance under which specific circumstances corporate opportunity waivers are possible. Also, in circumstances where a specific way of application of the German corporate opportunity doctrine does not fit Dutch law, other jurisdictions such as the United States and the United Kingdom should be looked at.

The second way is that lawyers have to claim before the courts that the corporate opportunity doctrine is applicable in their case and why. Courts are then obliged to determine whether it is a case of a corporate opportunity or not and have to explain why. This will contribute to the development of the corporate opportunity doctrine, as it will become clearer when the corporate opportunity doctrine could be applied and when it cannot and what exactly the consequences are. On top of that, it will also reduce legal uncertainty in the field of the corporate opportunity doctrine. Besides, when courts have to decide whether the corporate opportunity doctrine is applicable in a certain case and how certain circumstances are relevant or irrelevant for the corporate opportunity doctrine, the courts will look into literature to gain knowledge of what is written about that matter. It does not necessarily mean that the court will follow the literature in its judgement, but it will definitely help the courts as it will give the judges more tools to guide them in their cases. As the corporate opportunity doctrine is a hardly-developed rule, it is up to legal authors, lawyers and the courts to further develop the doctrine.

However, there is still a large chance that the Dutch higher courts stay reluctant in applying the corporate opportunity doctrine in their judgments as there is not an instant need for the

application of this doctrine. When the situation occurs that the current rules are not sufficient and/or righteous and the corporate opportunity doctrine is the only rule that will fit to these specific situations, higher courts will probably start applying the doctrine.

8 Concluding remarks

This research analyzes and compares the corporate opportunity doctrines of the United States (Delaware), the United Kingdom (England and Wales), Germany and the Netherlands, and answers the question how the Netherlands can further develop its corporate opportunity doctrine by looking at the other three jurisdictions. The purpose of this research is to provide recommendations to Dutch judges in the field of corporate opportunities.

Over the years, in United States' case law, three tests to determine whether an opportunity belongs to the company and, thus, is a corporate opportunity have been established: the interest or expectancy test, the line of business test and the fairness test. In the state of Delaware, the dominant test applied in case law is currently the line of business test. Furthermore, in a somewhat recent development in 2000, the Delaware General Corporation Code permitted that Delaware corporations can waive interest in certain (classes or categories of) corporate opportunities.

In English case law, two rules that describe the scope of the corporate opportunity doctrine have been established: the no-conflict and no-profit rules. These rules have been strictly applied by the English courts. In 2008, the corporate opportunity doctrine has been restated in the Companies Act 2006. In the restatement, it is described that the director must avoid situations in which he (can) has/(have) a direct or indirect interest that (possibly may) conflict with the interests of the company. Moreover, the restatement lays down how and under what conditions a release of the corporate opportunity by the company is possible.

In German case law, it is held that an opportunity is regarded a corporate opportunity when there is a formal or material connection between the opportunity and the company. Furthermore, in the German Corporate Governance Code, the appropriation of corporate opportunities by members of the management and supervisory board is specifically prohibited.

In Dutch case law, a corporate opportunity is defined as a possibility that occurs for the company to arrange a transaction or to perform business activities that fall within the sphere

of the business operations, and from which it is apparent that the company has or could have a reasonable interest in the transaction or business activity. Further, the Dutch Corporate Governance Code contains a principle that specifically mentions that members of the management and supervisory board should refrain from taking advantage of business opportunities to which the company is entitled.

As follows from the analyses of law, case law and literature, on certain points the corporate opportunity doctrines are similar, while they diverge on other points. A similarity found in all jurisdictions is that they base their corporate opportunity doctrines on the duty of loyalty or a derivative principle thereof, such as the non-competition principle and the duty to avoid conflicts of interest. Regarding the corporate opportunity tests, it is found that the tests of the United States, Germany and the Netherlands are similar. However, due to the strict approach of the English courts in the application of the corporate opportunity doctrine, their test is different from those of the other jurisdictions. Regarding the corporate governance principles, and in the case of the United Kingdom the restatement, ALI's Principles of Corporate Governance of the United States and the restatement in the Companies Act 2006 of the United Kingdom are similar to the extent that both principles are restatements of what is already determined in case law. Moreover, both principles describe under what conditions corporate opportunities can be released by the company. However, both have different contents, since the corporate opportunity doctrine is not similar in both jurisdictions. The principles in the German and Dutch corporate governance codes have a similar meaning as both principles (more or less) state that members of the management and supervisory board are not allowed to appropriate corporate opportunities. The differences between the jurisdictions are the greatest regarding the possibility to waive corporate opportunities. In Delaware, a waiver of specific (classes or categories of) corporate opportunities is specifically made possible by law. In English law, waiving corporate opportunities is strictly limited and practically hardly allowed. From German case law, it follows that the possibility exists, however, it is not clear to what extent a contractual waiver of certain corporate opportunities is permitted. In the Netherlands, the possibility of corporate opportunity waivers has not been discussed (yet).

As follows from the findings of this research, the Dutch corporate opportunity doctrine is the least developed doctrine of the four researched jurisdictions. Regarding the development of

the Dutch corporate opportunity doctrine, the first steps have already been made. The second step, however, needs to be made by the higher Dutch courts, as these courts need to ensure whether the corporate opportunity doctrine actually is applicable in the Netherlands. In case the higher courts decide that the doctrine is applicable in the Netherlands, this research states two complementary ways in order to further develop the Dutch corporate opportunity doctrine. The first way is discussion of the doctrine in legal literature on an in-depth and regular basis. Legal authors preferably should look at the German corporate opportunity doctrine as an example for the Dutch doctrine, since these two corporate law jurisdictions are similar. In certain cases and circumstances it would also be good to look into the corporate opportunity doctrines of the United States and the United Kingdom. The second way is lawyers claiming before courts that the corporate opportunity doctrine is applicable in their case. Since the courts are then obliged to determine if the doctrine is applicable or not, it will deliver a contribution to the development of the corporate opportunity doctrine and it will reduce legal uncertainty. The discussion in literature could provide judges tools to guide them in their corporate opportunity cases.

As any research, this one has its shortcomings. In this research, not all aspects of the corporate opportunity doctrine are addressed. For instance, the research only focused on the appropriation of corporate opportunities by directors and not on the appropriation by (majority) shareholders. Moreover, it is not discussed which kind of corporate opportunity doctrine works best, for instance the strict approach of the United Kingdom compared to the flexible approach of the United States. Also, it is not described how the German and Dutch doctrines relate to the strict or flexible corporate opportunity approaches. Furthermore, this research has not questioned whether the corporate opportunity doctrine in general is an efficient way to deal with loyalty problems of directors, and if not, what could be done to improve the doctrine or if there are other, more sufficient, ways to deal with loyalty problems.

Further research in this topic could attempt to mitigate these shortcomings by addressing the aforementioned issues. In further research specifically relating to the Dutch corporate opportunity doctrine, it is recommended to define the specific circumstances that are relevant or irrelevant for the application of the doctrine, for instance if it is relevant whether the third party wants to contract with the company and if it is relevant whether the board member has

learned of the opportunity in the capacity as a board member or a private person. Other unclear aspects of the Dutch corporate opportunity doctrine should be addressed in further research in order to provide courts tools to guide them in the application of the corporate opportunity doctrine in their cases.

Bibliography

Cases

United States

Lagarde v. Aniston, 126 Ala. 496, 28 So. 199 (Ala. 1900).

Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

Guth v. Loft, 5 A.2d 503 (Del. 1939).

Durfee v. Durfee Canning, 323 Mass. 187 (Mass. 1948).

Johnston v. Greene, 121 A.2d 919 (Del. 1956).

Kaplan v. Fenton, 278 A.2d 834 (Del. 1971).

Aronson v. Lewis, 473 A.2d 805 (Del. 1984).

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

Siegman v. Tri-Star Pictures, 15 Del. J. Corp. L. 218 (Del. Ch. 1989).

Northesast Harbor Golf Club, Inc. V. Harris, 661 A.2d 1146 (1995).

Broz v. CIS, 673 A.2d 148 (Del. 1996).

Thorpe v. CERBCO, 676 A.2d 436 (Del. 1996).

Demoulas, 677 N.E.2d 159 (1997).

In re Cumberland Farms, Inc., 249 B.R. 341 (Bankr. D. Mass. 2000).

In Re Digex, 789 A.2d 1176 (Del. Ch. 2000).

Beam Ex Rel. MSO v. Stewart, 833 A.2d 961 (Del. Ch. 2003).

Wayne County Employees' Ret. Sys. v. Corti, No. CIV.A. 3534-CC, 2009 WL 2219260, 1 (Del. Ch. July 24, 2009).

United Kingdom

Keech v. Sandford 25 E.R. 223; (1726) Select Cases Temp. King 61.

Aberdeen Rail Co. v. Blaikie Brothers (1854) 1 Macq. 461; [1843-60] AII E.R. Rep. 249.

Aas v. Benham [1891] 2 Ch. 244.

Bray v. Ford [1895-99] AII ER Rep 1011, [1896] AC 44.

Boardman v. Phipps [1966] 3 AII ER 721, [1967] 2 AC 46.

Regal Hastings Ltd v. Gulliver [1967] A.C. 134n.

IDC v. Cooley [1972] 2 AII ER 162.

Framlington Group plc v. Anderson [1995] B.C.C. 611.

Bhullar v. Bhullar [2003] EWCA Civ 424; [2003] B.C.C. 711.

O'Donnell v. Shanahan [2009] EWCA Civ 751; [2009] B.C.C. 822.

Germany

German Supreme Court (Bundesgerichtshof) 8 May 1967 – II ZR 126/65, Wertpapier-Mitteilungen 1967, 679.

German Federal Labour Court (Bundesarbeitsgericht) 11 December 1967 – 3 AZR 22/67, Betriebs-Berater 1968, 504.

German Supreme Court (Bundesgerichtshof) 24 November 1975 – II ZR 104/73, Wertpapier-Mitteilungen 1976, 77.

German Supreme Court (Bundesgerichtshof) 11 October 1976 – II ZR 104/75, Wertpapier-Mitteilungen 1977, 194.

German Supreme Court (Bundesgerichtshof) 10 February 1977 – II ZR 79/75, GmbH-Rundschau 1977, 129.

German Supreme Court (Bundesgerichtshof) 23 September 1985 – II ZR 257/84, Neue Juristische Wochenschrift 1986, 584.

German Supreme Court (Bundesgerichtshof) 23 September 1985 – II ZR 246/84, Neue Juristische Wochenschrift 1986, 585.

German Supreme Court (Bundesgerichtshof) 8 May 1989 – II ZR 229/88, Neue Juristische Wochenschrift 1989, 2687.

German Supreme Court (Bundesgerichtshof) 3 November 1997 – II ZR 353/96, Neue Juristische Wochenschrift 1998, 1225.

German Supreme Court (Bundesgerichtshof) 4 December 2012 – II ZR 159/10, Das deutsche Steuerrecht 2013, 600.

The Netherlands

Court of appeal (gerechtshof) Amsterdam (Enterprise Division, *Ondernemingskamer*) 31 August 2001, JOR 2001, 208.

Court of appeal (gerechtshof) Amsterdam (Enterprise Division, *Ondernemingskamer*) 28 December 2006, *ARO* 2007/6.

District court (rechtbank) Zwolle-Lelystad 30 January 2008, ECLI:NL:RBZLY:2008:BG0842.

District court (rechtbank) Leeuwarden 16 June 2010, ECLI:NL:RBLEE:2010:BY1308.

Court of appeal (gerechtshof) Arnhem 29 March 2011, LJN BQ0581.

Court of appeal (gerechtshof) Amsterdam (Enterprise Division, *Ondernemingskamer*) 21 December 2012, ECLI:NL:GHAMS:2-12:BY9760.

District court (rechtbank) Noord-Nederland 13 March 2013, ECLI:NL:RBNNE:2013:BZ6236.

District court (rechtbank) Midden-Nederland 19 February 2014, ECLI:NL:RBMNE:2014:457.

Books

United States

Allem, W.T., & R. Kraakman, *Commentaries and Cases on the Law of Business Organization* 229, 246 (5th ed. 2016).

Black, L.S., Jr. & F.H. Alexander, *Analysis of the 2000 Amendments to the Delaware General Corporation Law* (Aspen 2000).

Clark, R.C., *Corporate Law* (A.A. Balkema 1986).

Cox, J.D., et al., *Corporations* (Aspen Law & Business 1997).

Martin, M.W., *Twelve Full Ounces* (Holt, Rinehard and Winston 1962).

Stoddard, B., *Pepsi: 100 Years* (General Publishing Group 1997).

United Kingdom

Boyle, A.J., et al., eds, *Gore Browne on Companies* (44th ed., Jordans, Bristol, 1986).

Davies, P.L., *Gower's Principles of Modern Company Law* (6th ed., Sweet & Maxwell, London, 1997).

Morse, G., ed., *Palmer's Company Law* (25th ed., Sweet & Maxwell London, 1992).

Germany

Fleischer, *Handbuch des Vorstandsrecht*, (2006).

Häublein / Hoffmann-Theinert, *BeckOK HGB* (2017).

Hauschka, Moosmayer, Lösler, *Corporate Compliance* (2016).

Immenga, *Die personalistisch Kapitalgesellschaft* (1970).

Merkt, *ZHR 195* (1995).

Mestmäcker, *Verwaltung, Konzerngewalt und Rechte der Aktionäre* (1958).

Michalski, *GmbHG* (2010).

Schiessl, *GmbHR* (1988).

Windbichler, *Gesellschaftsrecht* (2009).

Winter, *Mitgliedschaftliche Treuebinduningen im GmbHR* (1988).

The Netherlands

Verdam, A.F., *Corporate opportunities: Over de toeëigening door functionarissen van aan de venootschap toebehorende business opportunities* (Schoordijk Instituut 1995).

Miscellaneous

Berle, A., & G. Means, *The Modern Corporation & Private Property,* (New York, Macmillan 1932).

Besanko, D., et al., *Economics of Strategy,* (John Wiley & Sons 2010).

Douma, S., & Hein Schreuder, *Economic approaches to organizations* (Pearson 2013).

McCahery, J.A., & Erik M. Vermeulen, *Corporate governance of non-listed companies* (OUP 2010).

Journal articles

United States

American Bar Association Corporate Laws Committee, 'Amendments to Sections 2.02 and 8.70 (and Related Changes to Sections 1.43, 8.31 and 8.60) Permitting Advance Action to Limit or Eliminate Duties Regarding Business Opportunity' (2014) 69 Business Lawyer 717. Available at https://apps.americanbar.org/dch/committee.cfm?com=cl270000.

Bebchuk, L.A., & A. Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering Competition Over Corporate Charters' (2002) 112 Yale L. J. 533.

Black, L.S., 'Why Corporations Choose Delaware' (2007) Delaware Department of State Division of Corporations.

Brudney, V., & R. Clark, 'A New Look at Corporate Opportunities' (1988) 94 Harvard Law Review 998.

Coffee, J.C., Jr., 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role' (1989) 89 Columbia Law Review 1618.

Gordon, J.N., 'The Mandatory Structure of Corporate Law' (1989) 89 Columbia Law Review 1549.

Lamoreaux, N.R., & C. Glaisek, 'Vehicles of Privilege or Mobility? Banks in Providence, Rhose Island, During the Age of Jackson' (1991) 65 Business History Review 502.

Macneil, I.R., 'Contracts: Adjustment of Long-Term Economic Relations Under the Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854.

Maynard, T.H., 'Spinning in a Hot IPO: A Matter of Business Ethics' (October 2002, *Loyola-LA Public Law Research Paper No. 22*). Available at https://ssrn.com/abstract=337300.

Rauterberg, G.V., & E.L. Talley, 'Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers (2017) *Forthcoming Columbia Law Review.*

Riley, K.V., 'Corporation's Right to Profits Made by Directors' (1916) 4 Minnesota Law Review 513.

Salzwedel, M.R., 'A Contractual Theory of Corporate Opportunity and a Proposed Statute' (2002) 23 Pace Law Review 83.

Savitt, W., 'A New New Look at Corporate Opportunities' *Columbia Law School Center for Law & Economic Studies Working Paper No. 235* 10. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=446960.

Steele, M.T., 'Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies' (2007) 32 Delaware Journal of Corporate Law 1.

Talley, E., 'Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunity Doctrine' (1998) 108 Yale Law Journal 227.

Ying, J., '*Guth v. Loft: The Story of Pepsi-Cola and the Corporate Opportunity Doctrine'* (May 8, 2009) 19. Available at https://ssrn.com/abstract=1414478.

United Kingdom

Clark, B., 'UK company law reform and directors' exploitation of "corporate opportunities" (2006) 17(8) International Company and Commercial Law Review (I.C.C.L.R.) 231.

Edmunds, R., & J. Lowry, 'The no conflict-no profit rules and the corporate fiduciary: challenging the orthodoxy of absolutism' (2002) Journal of Business Law 122.

Gelter, M., & Geneviève Helleringer, 'Corporate Opportunities in the US and in the UK' (2017) ECGI Working Paper Series in Law – Working Paper No. 346/2017. Available at SSRN: https://ssrn.com/abstract=2877205.

Hadjinestoros, M., ‘Exploitation of business opportunities: how the UK courts ensure that directors remain loyal to their companies’ (2008) 19(2) International Company and Commercial Law Review 70.

Hearnden, B., & Simon Howley, ‘Directors’ conflicts under the Companies Act 2006 considered’ (2008) 239 Co. L.N. 1.

Hirt, H.C., ‘The law on corporate opportunities in the Court of Appeal: Re Bhullar Bros Ltd’ (2005) Journal of Business Law 669.

Jones, G., ‘Injust enrichment and the fiduciary’s duty of loyalty’ (1968) 84 Law Quarterly Review 472.

Li, J., ‘The Peso Silver case: an opportunity to soften the rigid approach of the English courts on the problem of corporate opportunity’ (2011) 32(3) Company Lawyer 68.

Lim, E., ‘Directors’ fiduciary duties: a new analytical framework’ (2013) 129 Law Quarterly Review 242.

Prentice, D.D., & J. Payne, ‘The corporate opportunity doctrine’ (2004) 120 Law Quarterly Review 198.

Witney, S., ‘Corporate Opportunity Law and the Non-Executive Director’ (2016) 16 Journal of Corporate Law Studies 145.

Germany

Kaya, Z., ‘Die Anwendung der Geschäftschancenlehre auf die Gesellschaft bürgerlichen Rechts: Zugleich eine Besprechung des BGH-Urteils vom 4. 12. 2012, II ZR 159/10’ (2013) Das deutsche Steuerrecht 1088.

Lawall, L., ‘Verdeckte Gewinnausschüttungen unde Geschäftschancenlehre im GmbH-Recht’ (1997) Neue Juristische Wochenschrift 1742.

The Netherlands

Evers, M.W.E., ‘Aandeelhouders en ongeschreven non-concurrentienormen’ (2011) 5 Tijdschrift voor de Ondernemingsrechtpraktijk 200.

Goedel, C.S., ‘De positie van de minderheidsaandeelhouder in geval van belangenverstrengeling tussen de vennootschap en de meerderheidsaandeelhouder’ (2002) 4 Vennootschap & Onderneming 65.

Koelemeijer, M., ‘Redelijkheid en billijkheid in het vennootschapsrecht’ (1994) 6154 Weekblad voor Privaatrecht, Notariaat en Registratie 714.
Soerjating, M., ‘Begemann: tegenstrijdig belang en corporate opportunity’ (2007) 2 Tijdschrift voor de Ondernemingsrechtprakijk 79.