

Research on the Identification Standards for Chinese Directors to Usurp Corporate Opportunity

Zhi Zhang^{1,*}

¹*Guanghua Law school, Zhejiang University, Hangzhou, 310058, China*

^{*}*Corresponding author's Email: 3180102054@zju.edu.cn*

ABSTRACT

After China Company Law introduced the doctrine of prohibiting usurpation of corporate opportunity, many problems appeared in the application of judicial judgments. In practice, the core of whether it constitutes the usurpation of corporate opportunity lies in the identification of the corporate opportunity. Focusing on the discussion subject of directors, combining academic viewpoints, case practices, and comparative law experience, the criteria for identifying corporate opportunity include "having interest or expectation interest", "taking advantage of authorities" and "closely related to company business activities". In the future, it is necessary to pass legislation to clarify the criteria for determining corporate opportunity and the reasons for defense, so as to promote the real landing of usurping corporate opportunity in judicial practice.

Keywords: *usurp corporate opportunity, the identification standards for determining corporate opportunity, the obligations of fidelity*

1. INTRODUCTION

The doctrine of prohibiting usurpation of corporate opportunity is a doctrine originated from the common law system. It refers to prohibiting the company's fiduciary from usurping business opportunities that the company has expected benefits, property benefits, or property rights, or those which should belong to the company from a fair point of view for their own use. [1] This doctrine was introduced when the "Company Law of the People's Republic of China" was revised in 2005. Article 148, paragraph 5 of the current Company Law stipulates: "No director or senior manager may commit any of the following acts: Without consent of the shareholders' meeting or shareholders' assembly, seeking business opportunities that belong to the company for himself or any other person by taking advantage of his powers, or operating similar business of the company for which he works for himself or for any other persons. "

Before the introduction to this doctrine in the company law, scholars had already started research on the identification standard of usurping corporate opportunity. [2] By drawing lessons from foreign experience, scholars have explored the nature of the corporate opportunity, specific identification standards,

reasons for practical defense and so on. [3] Some scholars have conducted research around the scope of the subject of the obligation, [4] this article does not take the subject scope of usurping corporate opportunity as the research focus for pertinent considerations. The subject of obligations specified in Article 148, paragraph 5 of the China Company Law includes directors and senior managers. Therefore, this research selects directors as the main subject of discussion, focusing on the research of identification standards rather than clarifying the scope of the subject. At present, scholars have not yet formed a unified view on the determination standard of usurping corporate opportunity and there are different opinions on whether the disclosure obligation falls within the scope of the determination standard. [5] [6] [7] In addition to theoretical research, since the doctrine does not have clear and specific standards for determination at the legal level, it has caused many problems in judicial practice, including "how to determine corporate opportunity" and "how to determine whether it is an act of usurping corporate opportunity". On the two core issues, the opinions of different judgments vary widely. If these two issues are not clarified, there will still be confusion in practice, so it is necessary to carry out in-depth exploration and analysis.

In view of these, this article will combine the experience of comparative law and judicial practice with a view to constructing the identification standards for Chinese directors to usurp corporate opportunity.

2. JUDGMENT STANDARD OF CORPORATE OPPORTUNITY

In order to construct the identification standards for Chinese directors to usurp corporate opportunity, we must first determine whether it is a corporate opportunity. When it talks about the judgment of company opportunity, we can discuss from three aspects: connotation definition, academic viewpoints and judicial practice.

2.1. Connotation Definition of Corporate Opportunity

2.1.1. The concept of corporate opportunity and property attributes

To discuss the identification standards for Chinese directors to usurp corporate opportunity, it is necessary to judge what is a corporate opportunity, and then first define the connotation of corporate opportunity.

The doctrine of prohibiting usurpation of corporate opportunity originated from common law and is an important theory in the corporate law of the United Kingdom and the United States. [8] Common law believes that there is a trust relationship between directors and the company, and as a trusted person, they have an obligation of fidelity to the company. Therefore, directors must not engage in behavior that harms the company's interests, such as taking the opportunities that belong to the company. [9] British law understands the nature of corporate opportunity as part of the company's property, where directors cannot usurp corporate opportunity, just as they cannot arbitrarily embezzle the company property. [10] With the rapid development of the modern economy and the improvement of corporate governance rules, the common law corporate opportunity rules have formed a relatively complete set of theories. There have been more in-depth discussions on the criteria for judging corporate opportunity and the scope of application of the rules. [11] The doctrine of prohibiting usurpation of corporate opportunity is gradually being accepted by civil law countries as well.

It is different from the broad definition of the concept of property in common law, which defines property as a right protected by a specific legal system and expressed in the form of property rights, covering all interests that can generate economic value and can be used for exchange. The civil law countries inherited the ancient Roman law of the division of tangible and intangible things, and defined property as a totality of

rights and obligations combined with economic value and a certain purpose, which requires that property must be controlled by manpower. [12] From this perspective, since not all company opportunities can be exploited and then dominated by manpower, it seems inappropriate to identify them as property. However, denying the property attributes of company opportunities cannot be included in the framework of rights. This is not only conducive to protecting company opportunities but also not conducive to the development of modern economy. Therefore, when the corporate opportunity is regarded as a right to value, it is included in the list of new types of property with great value, and when it is regarded as an abstract thing that can be transformed into an interest, the corporate opportunity is of course included in the category of intangible property. [6]

In terms of property attributes, corporate opportunity is clearly intangible property, so in terms of rights attributes, company opportunity can be attributed to things in a broad sense, and then become the object of civil rights. The company and directors have expectations for the benefits of the company's opportunity. The subject of the company's opportunity has been clearly defined as the company, and its content and scope can be basically determined. The company's opportunity is also protected by law. [13] Therefore, the company's opportunity fully meets the requirements of the right of expectation.

2.1.2. Discrimination of corporate opportunity and business opportunity

Commercial opportunity refers to the qualifications of commercial entities to engage in business and participate in competitive activities on an equal and fair basis. In legal nature, it is the right of commercial entities to participate in market competition and business activities. [14] In the definition of the concept of corporate opportunity, this article regards corporate opportunity as a special case of business opportunity. The determination of this viewpoint mainly considers two judgment factors, including the attribution boundary of the corporate opportunity and the right attribute of the corporate opportunity expectation right.

Regarding the ownership of company opportunity, the first thing to be clear is the generation of business opportunity, which may be inherent in advance, may be naturally formed, or created by others, but the company opportunity must be closely linked to the company. It is manifested in two aspects: (1) The company's opportunity stems from the company's creation, so it naturally belongs to the company. If the director represents the company to participate in project negotiations to create business opportunities, and the directors use the company's resource materials to discover business opportunities, they should all be

recognized as corporate opportunities in the end. (2) The formation of these business opportunities depends on the company's business activities. Only through the company's business activities can the value contained in abstract business opportunities be transformed into concrete company benefits. [3]

From point (2), the second factor for judging a corporate opportunity is extended, that is, the right attribute of the corporate opportunity expectation right, which is also the core difference between a corporate opportunity and business opportunity. A business opportunity is an opportunity that faces a wide range of objects in the market. The company has the possibility of taking advantage of the opportunity, but whether it is used or not has to be weighed. Besides, business opportunity may not necessarily bring benefits to the company. However, according to the normal logic of business operations, business opportunity that companies will use and can obtain certain benefits falls into the category of corporate opportunity.

2.2. Criteria For Identifying Corporate Opportunity

For the doctrine of prohibiting usurpation of corporate opportunity, the core is the identification of corporate opportunity. Around this issue, common law has established a number of criteria. For example, after a century of development in American law, it has ranged from interest and expectation criterion, business scope criterion, fairness criterion, power abuse criterion, and combined criterion to the most representative double criterion proposed by the American Law Institute. [15] Although China has introduced the company opportunity rule, the criteria for determining corporate opportunity are still in a blank form in legislation, that is, only the doctrine of prohibiting usurpation of corporate opportunity has been identified, and there is no clear definition of how to identify corporate opportunity. Discussions in the academic circles basically revolve around the traditional criteria proposed in the comparative case law, and on this basis, the discussion of localization and application is carried out. Summarizing the traditions of common law systems and the analysis of our academic circles, the most typical and universally recognized criteria for company opportunity judgment are mainly the following three:

2.2.1. Corporate opportunity is a business opportunity for which the company has interests or expected interests.

In American law, the earliest case on the corporate opportunity rule was the *Lagarde v. Anniston Lime & Stone Co.* case in 1900. From the judgment of this case, the widely applicable actual interest criterion and the expected interest criterion derived from the actual

interest were deduced. [11] In other words, the company may have begun to take advantage of the business opportunities and obtain certain practical benefits, or it may not know that the opportunity exists for the time being, but once it knows, it may use it and enjoy the expected benefits. Conversely, if there is no interest-related relationship with the company during the development of the business opportunity, it should not be regarded as a corporate opportunity, and the directors can use it freely. If a director participates in a charity party on behalf of the company, the fundraising activities in the party will not be publicly disclosed and there will be no rewards. Even if the director makes donations in his own name instead of the company's name, it will not constitute usurping corporate opportunities. [16]

In the application of this criterion, the biggest difficulty lies in the inability to judge whether interests or expectation interests really exist. This is because interests or expectation interests are often not only manifested as an easy-to-measure and relatively intuitive economic income growth, but also a relatively vague result such as a significant help to the company's business development. At this time, if the company wants to prove that the interests or the expectation interests do exist, it will encounter certain proof difficulties. If the proof cannot be provided, it means that although the company has hope, it does not actually constitute a specific opportunity, and it will not be recognized as a corporate opportunity in the end. In other words, there is greater uncertainty in the judgment of the criterion of interests or expectation interests, and the judgment in judicial practice will depend on the judge's understanding and discretion of the case. [17]

2.2.2. Corporate opportunity is a business opportunity obtained by directors taking advantage of authorities.

Based on the provisions of the company law, the establishment of this determination criteria is not controversial. Taking advantage of authorities emphasizes the process by which directors use the influence of the company to obtain business opportunities.

In the concept of time, taking advantage of authorities excludes the business opportunities obtained by directors before taking office and after leaving office. This is generally regarded as a business opportunity obtained by the director's personal ability and does not belong to the legal scope of corporate opportunities. However, if the third party clearly states that the opportunity is provided to the company, even if the director is not in the process of performing the duties of the company, it should still be recognized as a corporate opportunity. [5]

In the process of taking office as a director, the position of the company gives him business convenience, and he can be exposed to previously untouched business opportunities, and may be transformed into corporate opportunities. At this time, the business opportunity is a typical corporate opportunity. However, the third person's intention is also a breaking factor in terms of the criterion during the performance of their duties: if the third person clearly states that the business opportunity is not provided to the company, it should be recognized as a business opportunity available to the directors. However, in practice, it is necessary to consider whether the business opportunity is objectively unavailable by the company. If the business opportunity can actually be provided to the company and the directors pressure and a third party collude for profit, it should still be regarded as a corporate opportunity.

2.2.3. Corporate opportunity is a business opportunity closely related to the company's business activities.

A company opportunity must be a business opportunity closely related to the company's business activities, that is, the new business developed by the business opportunity competes with or overlaps with the company's existing business, and the company has an interest in taking advantage of the business opportunity. [18] This criterion limits the company's opportunities to the scope of the company's business activities that are functionally connected.

In the case law of the United States, this criterion is related to the "business scope" criterion established by the *Guth v. Loft, Inc.* case, which requires that the corporate opportunity must be closely related to the company's current or future business scope. Objectively speaking, the purpose of this criterion is to make the company adopt a definite and specific description of the

business scope clause. However, in practice, the company often applies general and vague sentences in the formulation of the company's articles of association, which not only undoubtedly increases the the difficulty of applying this standard, but also not conducive for directors to take advantage of business opportunities that have nothing to do with the company.

Therefore, in the localized application of this standard, in order to avoid similar problems, the scholars' view is: A corporate opportunity is a business opportunity that is closely related to the company's "business activities", not a business opportunity that is closely related to the company's "business scope". The reason for this change is that the extension of "business activities" is narrower than the extension of "business scope" in actual operations. However, "business activities" are often not as clear as "business scope". How to judge whether a business opportunity is related to the company's business activities mainly depends on the degree of closeness between the specific requirements of the project to which the business opportunity is directed and the professionalism of the company's business activities. Specifically, the court will use this method to evaluate the similar degree of distance between the company's business strategy, production technology, capital institutions, etc. and the business opportunity. If the distance is very close, then the business opportunity will be considered as belonging to a corporate opportunity. [7]

2.3. Application of Judicial Practice

Regarding the localization of corporate opportunity identification standards, this article selects some cases where directors (senior managers) usurped corporate business opportunities, and examines the status quo of judicial practice based on the circumstances of the case and the results of the judgment.

Table 1 List of judicial decisions for directors usurping corporate opportunities

Serial number	Case number	Reasons for the judgment (related to the company's opportunity determination standard)
1	(2006) Shen Zhong Min Si Chu	3.closely related to company business activities
2	(2007) Yong Yin Min Er Chu	1.having interest or expectation interest 2.taking advantage of authorities
3	(2009) Hai Min Chu	3.closely related to company business activities
4	(2009) Yi Zhong Min Zhong	2.taking advantage of authorities 4.having a disclosure obligation
5	(2012) Sui Zhong Fa Min Er Zhong	2.taking advantage of authorities 3.closely related to company business activities 4.having a disclosure obligation
6	(2012) Min Si Zhong	1.having interest or expectation interest

		4.having a disclosure obligation
7	(2015) Er Zhong Min Zhong	2.taking advantage of authorities
8	(2016) Jing 03 Min Zhong	3.closely related to company business activities
9	(2017) Hu 0115 Min Chu	1.having interest or expectation interest 2.taking advantage of authorities

It can be seen that in these selected cases, only three cases were found to usurp corporate opportunity, and the litigation request in one case was not supported. This means that in practice, the court's attitude towards usurping corporate opportunities is still more stringent. Regarding the three major identification standards generally recognized by the academic circles, that is, the company's opportunity must be business opportunity that the company has interest or expectation interest, and that directors take advantage of authorities to obtain, and that is closely related to the company's business activities. The application of judicial practice shows that all are applicable but not all applied. The most commonly used is "taking advantage of authorities" mentioned in the articles of the company law; the second is that "having interest or expectation interest", which is reflected in the determination that the business opportunity is not a corporate opportunity or that the company has lost the business opportunity. The close connection with the business scope is applicable in many cases separately, especially in the determination of the usurpation of corporate opportunity, while the closeness of the company's business activities to the business opportunity will be analyzed in detail.

In judicial judgments, in addition to these three standards, some discretion mentioned that corporate opportunity is the business opportunity that directors are obliged to disclose to the company. However, whether this point should be included in the criteria for determining the corporate opportunity has always been controversial in academic theory; in practice, it is also unrealistic to require directors to fully perform the obligation to disclose all information to the company; it is also difficult to establish an objective set of judicial decisions. The criterion measures whether directors have fulfilled their disclosure obligations. Therefore, the obligation of disclosure should not be used as a criterion for identifying corporate opportunity. [6] On the contrary, if a business opportunity is recognized as a corporate opportunity, the company has actual or expected interests, and the directors' disclosure obligation to the company will arise. In the case that the obligation of disclosure is mentioned, its essence does not play a role as the identification standard of the corporate opportunity, but appears as a defense of the directors (senior managers).

In summary, a corporate opportunity is a business opportunity that the company has interests or expectation interests and closely related to the

company's business activities. Under normal circumstances, it is obtained by the directors in the course of performing the company's duties; in the case of non-directors performing the company's duties, if the third party clearly stated that the opportunity is provided to the company, it should also be recognized as a corporate opportunity. In the application of judicial practice identification standards, the violation of any one of the standards will affect the identification of the corporate opportunity; conversely, as long as these three standards are met, whether the directors disclose to the company or not, it constitutes a corporate opportunity.

3. THE DEFENSE REASONS OF USURPING CORPORATE OPPORTUNITY

The doctrine of prohibiting usurpation of corporate opportunity prohibits directors from usurping corporate opportunity, rather than prohibiting directors from using corporate opportunities. Under special circumstances, even if there is a factual act of directors taking advantage of the corporate opportunities, it will not constitute the determination of usurpation. On what grounds the directors can engage in defense, this is also a problem that needs to be resolved in the judicial practice of usurping the corporate opportunity. In the determination of usurping the corporate opportunity, the most important thing is the determination of the corporate opportunity. On the basis of identifying as a corporate opportunity, as long as the perpetrator has the status of a director and realizes the transfer of the opportunity from the original company to the new company, it should be regarded as a usurpation of the corporate opportunity.

In judicial practice, the board of directors provides many defenses, some of which will indeed affect the determination of usurpation, while some reasons cannot exclude the establishment of usurping the corporate opportunity. In general, the untenable defenses include: (1) Advocating good faith. In fact, the act of usurping the corporate opportunities has nothing to do with whether the directors are subjectively goodwill or malicious. The duty of loyalty and diligence requires directors to absolutely safeguard the corporate opportunities. If the directors are allowed to evade the legal responsibility of usurping the corporate opportunities by claiming subjective goodwill, the requirement of loyalty and diligence is violated. (2) The new company that obtained the company's opportunities to transfer did not make actual profits. The act of

usurping the corporate opportunity has nothing to do with whether the result is profitable. No matter whether the directors and other companies make a profit after taking advantage of the original corporate opportunities, even if it is ultimately a loss, it will not affect the determination of usurpation. (3) The original company received compensation from other opportunities. The act of usurping the corporate opportunity has nothing to do with whether the original company is compensated for the lost corporate opportunities. In practice, the original company may use corporate opportunities together with other companies, or obtain new corporate opportunities as a substitute, but this makes the original corporate opportunities divert or even lost, so it should still be deemed to constitute usurpation of the corporate opportunity.

Generally speaking, the determination of usurpation of corporate opportunity in judicial practice only examines three objective factors: the identification of the corporate opportunity, the director's position in the company, and whether there is an exploit. As long as a director knows and uses a certain corporate opportunity through his position and identity, he will be deemed to usurp the corporate opportunity. Of course, the defense raised by the directors do include reasonable exceptions that will affect the judgment, which mainly includes the following two categories:

3.1. Company's Consent

The purpose of the doctrine of prohibiting usurpation of corporate opportunity is to prevent conflicts between the personal interests of the directors and the interests of the company, that is, the directors cannot take advantage of the company's opportunities without the consent of the company. [19] The introduction of this matter can refer to the relevant provisions of the British company law, from the original prohibition of directors from taking advantage of the corporate opportunities in any form, to the addition of exceptions unless the company agrees when the amendment is made, which shows that the British law has adopted the company's consent as a basis for defense. [20]

However, if the company agrees, the director's use of corporate opportunities does not constitute the usurpation of the corporate opportunity. There will be three major problems at this time: (1) The premise of the company's consent is that the company is aware of the existence of the corporate opportunity, which involves the discussion of directors' disclosure obligations; (2) Whether the company agrees that the directors use the corporate opportunities and whether the company gives up the corporate opportunities can be equated; (3) The company has been lagging behind, without expressing agreement or disagreement. Can the directors take advantage of the corporate opportunities?

On the first question, in the aforementioned discussion of the identification standards of corporate opportunities, this article believes that the disclosure obligation of directors arises after the company's opportunity is identified, not the identification standard of company opportunities, but the reason for the directors to usurp the corporate opportunities. In Case 4 in Table 1, the reason for the judgment given by the court mentioned that the appellee did not take advantage of authorities to obtain the corporate opportunity, and has also reported and disclosed business opportunities to the company, which ultimately did not constitute usurpation of the corporate opportunities. It should be noted that the disclosure of directors must occur before taking advantage of the corporate opportunity, in case that allowing subsequent disclosures would increase the possibility of directors' moving first and asking permission later. At the same time, the content disclosed by the directors should be facts that normal people will consider when deciding whether to use a business opportunity, such as the identity of the counterparty of the transaction, the content of the business opportunity and the method of use, the company needs to invest in preparations, etc., and meet true and accurate requirements. [21]

After the directors have fulfilled their disclosure obligations, what needs to be examined is the company's attitude towards the business opportunity. If the company accepts the business opportunity, the directors can no longer use the opportunity for profit, otherwise it will constitute usurpation; the company has given up the business opportunity. Can the director directly use the opportunity? In the extraterritorial practice of common law, this point is quite different: American law holds that as long as the company gives up the opportunity without the company's special consent, directors can use it for their own interests; [22] British law believes that directors can only use the opportunity when the company gives up the opportunity and clearly agrees with them to use. [23] This article tends to adopt a more stringent English law approach in order to better protect the interests of the company, that is, if the director wants to use the corporate opportunities abandoned by the company, the company's express consent must be obtained.

In real life, there may also be a relatively special situation. After a certain business opportunity is provided to the company, the company neither expresses taking advantage of the opportunity, nor expresses giving up the business opportunity. This article believes that the directors cannot directly use the corporate opportunities at this time. This is because if the directors are allowed to take advantage of pending circumstances, the directors will inevitably delay the company's decision on the opportunity for their own benefit and usurp the business opportunity in a fuzzy area, and all his company positions provide convenience

for this improper behavior, which is obviously not conducive to the protection of the company's interests.

3.2. Company's inability

In addition to the company's reluctance to take advantage of business opportunities, in practice there will be situations where the company cannot take advantage of it. Utilization cannot include two situations: legal inability and factual inability:

The legal inability means that, in law, the company is bound by legal restrictions and cannot take advantage of the corporate opportunities. In the discussion of this point, some scholars believe that the company's law inability means that the use of these opportunities constitutes an illegal act or ultra vires act. [6] However, since directors often have a great say in the company's operations, it is difficult to determine whether the use of ultra vires is in practice. Therefore, this article mainly discusses two situations: (1) The company has objective obstacles in qualification and approval. For example, in the construction qualifications of construction projects, there are multiple grades or even special qualifications. Only when the company's enterprise grade meets the standards can it undertake corresponding construction activities; another example is the negative list approval system, which stipulates the industries and areas in which enterprises are prohibited and restricted from investing and operating within the country. Limited by the barriers to entry, the company cannot take advantage of the business opportunities that appear within the scope of the corresponding business. (2) The company is temporarily in a penalty period, and related businesses are prohibited or restricted. For example, a futures company in the financial industry may be suspended by the Shanghai Stock Exchange for 3 months due to stock options business violations and restrict investment in the country industry field of operation.

The factual inability means that the company is limited to objective conditions, and the company does not have the conditions to take advantage of the opportunities. Common situations such as the company's insufficient financial resources and it's unable to take advantage of corporate opportunities. The difference between practical and legal inability is that the legal inability is an external restriction, where the company may actually be able to take advantage of the opportunities, but breaking the legal constraints will bring legal penalties; while the practical inability is internal deficiency and there are no legal problems.

It should be noted that the company's legal inability is likely to be temporary and can be overcome through measures to improve it. For example, the company can carry out relevant business after the penalty period has passed. Besides, in factual inability, a temporary financial crisis can also improve the company's

financial structure through financing or other means, thereby realizing the use of the corporate opportunities. At this point, it is necessary to judge whether the corporate opportunity can be waited. If it can be waited and be used, it is not a real company's inability. The company's inability refers to the situation where the current company cannot meet the conditions of use and will permanently miss business opportunities.

To sum up, in consideration of the defense of usurping the corporate opportunities, for the corporate opportunities that the company is not willing to use, unless the company explicitly waives and agrees with the director to use, it will constitute the director's usurpation; directors can also use corporate opportunities that the company cannot take advantage of, including two situations where the company cannot use legally and factually. Of course, due to the vague judgment of the inability to use the company in practice, the court often regards the directors to fully disclose the company's information before taking advantage of the corporate opportunities as one of the defenses for usurpation.

4. CONCLUSION

The doctrine of prohibiting usurpation of corporate opportunity originated in European and American legal systems, and its legitimacy stems from the director's duty of loyalty. It is precisely the requirement of loyalty and diligence that directors must strictly safeguard the company's opportunities and must not arbitrarily usurp them. After the introduction to this doctrine in China Company Law, the lack of clear provisions on the identification standards and defenses has led to unclear legislation, which in turn led to problems of the application of judicial judgments. There are constant disputes in the academic circles about the criteria for usurping corporate opportunity, and the standards adopted by local courts are also very different, causing the problem of different judgments in similar cases. In judicial practice, there are many defenses raised by the parties, but the court also lacks a unified standard for judging whether to adopt it or not. All of these have led to confusion in practice.

With directors as the main body of discussion, in order to build a standard system for usurping corporate opportunity in China, the most important thing is to first build the criteria for judging corporate opportunity. Looking back to the relevant legal systems and case judgments in European and American legal systems, and based on the results of discussions in our academic circles as well as existing judicial experience, this article believes that there are three criteria for determining corporate opportunity: 1. The company has interest or expectation interest. 2. The directors obtain the opportunity by taking advantage of authorities. 3. It is closely related to company business activities. In

addition, judicial judgments also include disclosure as one of the criteria for judging, but this judgment should be determined as a defense after the company's opportunity has been usurped, and should not be included in the criteria for determining the corporate opportunity.

After identifying a business opportunity as a corporate opportunity, as long as the director knows about the opportunity through his position and identity and uses it, regardless of whether the director is subjectively in good faith, whether the director and other companies are profitable, or whether the original company is compensated, it should be deemed to usurp the corporate opportunity. However, there are exceptions to this determination procedure, and possible reasonable defenses include the company's consent and its inability to use it. It should be noted that the company's consent must be explicit express, and director's use without special consent or his company has not decided whether to use is not allowed. What's more, company's inability covers both legal and factual circumstances, and the result must be that the company cannot use the corporate opportunities at that moment, and it will permanently lose it. If the company can re-use the business opportunities by means, it does not constitute a real inability.

Returning to Chinese legal system, the introduction to the doctrine of prohibiting usurpation of company opportunity requires directors to be the trustees of the company or shareholders and have the obligation not to compete with the company for benefits, otherwise they will bear legal responsibility. This is undoubtedly the specific improvement and development of the duty of loyalty to directors, which is because the doctrine of prohibiting usurpation of company opportunity is not only a requirement for a good manager of their business capabilities, but also the same as the duty of loyalty, which belongs to the category of moral obligation. Out of the company's high level of trust in the directors, it has separated from the ordinary civil appointment relationship and became a director's legal obligation through legislative procedures. [5]

Of course, from the perspective of the legislative system, the existing regulations are obviously difficult to meet the complex needs of judicial practice, which requires legislative and judicial organs to make changes. In terms of legislation, the existing company law can be revised to specifically clarify which criteria are included in the determination of corporate opportunities; for the explanation of reasonable defenses, judicial interpretations can be issued to list them, and they can be continuously supplemented with the development and changes of the social economy. Judicially, the Supreme People's Court may issue a series of guiding cases, clarifying that subjective goodwill and other reasons should not be a defense. Only in this way can

the loopholes in the existing legislation be bridged, and the legal basis and guidance for case judgments can be provided, thereby strengthening the protection of the interests of the company and shareholders.

REFERENCES

- [1] West Publishing Co., See Black Law Dictionary(6th edition) , 1990, p. 340.
- [2] Before the revision of the Company Law in 2005, the academic circle discussed the criteria for usurping corporate opportunity, such as S.M.Cao, H.Gao, Study on corporate opportunity doctrine, Tribune of Political Science and Law 02(2004) 58-68.
- [3] G.M.Shen, Judicial identification of corporate opportunity, Law Science 06(2019) 180-192.
- [4] L.C.Li, On doctrine of corporate opportunity in the juridical thinking pattern—focusing on article 149 of the corporate law of PRC, Northern Legal Science 03(06) (2009) 93-99.
- [5] J.J.Chen, On the director's Obligation to Usurp corporate opportunity—also on the improvement of relevant systems in China Company Law, Academic Exchange 03(2000) 87-90.
- [6] G.Feng, An research on the doctrine of prohibiting usurpation of corporate opportunity, China Legal Science 01(2010) 96-110.
- [7] H.X.Hou, A study on the judicial application of the doctrine of prohibiting usurpation of corporate opportunity, Studies in Law and Business, 29(04), 149-155.
- [8] Article 175 of British company law in 2006, Duty to avoid conflicts of interest: "(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity). ".All principles of corporate governance (1994), §§ 5.05, 5.12.
- [9] K.P.Zhang, Research on the Legal System of Directors in British and American Companies, Law Press China, 1998, p.266.
- [10] For example, in *Regal (Hastings) Ltd v. Gulliver*, the U.S. court interprets corporate opportunities as part of the company's property, and clarifies the

scope of application of the doctrine of prohibiting usurpation of corporate opportunity, what it prohibits is that the director obtains a certain commercial opportunity through his position and identity, but uses it for his own profit without the consent of the company. *Regal (Hastings) Ltd v. Gulliver*[1967]2 AC 134.

- [11] For example, in the *Lagarde v. Anniston Lime & Limestone Co.* case in the court of Alaska in 1900, the court pointed out the scope of application of legal restrictions on personal acquisitions by company managers and deduced three important criteria, including "actual interest criterion", "expected interest criterion derived from the actual interest" and "criterion that hinder the realization of the company's goals". *Lagarde v. Anniston Lime & Limestone Co.*126 Ala.496, 28 So.199 (1900) .
- [12] H.X.Liang, *General Civil Law (Third Edition)*, Law Press China, 2007, p.156.
- [13] W.X.Shen, *Research on the Basic Theory of the Right of Expectation*, China Renmin University Press, 2006, pp.32-41.
- [14] L.M.Lv, *On the legal protection of commercial opportunities*, *China Legal Science* 05(2006) 107-114.
- [15] The American Law Institute believes that a company's opportunity is: "(1) Any opportunity to engage in a business activity known to a senior executive or director of the company, and the senior executive or director learns of such an opportunity or (A) because of the performance of senior executives the duties of the director, or under the circumstances, the senior executive or director has reason to believe that the person who provided the opportunity intends to provide the opportunity to the company; or (B) by using the company's information or property, if there is reason to believe the senior executive or the director can foresee that the obtained opportunity is in the company's interest; or (2) Any opportunity to engage in a business activity known to the company's senior executives or directors, and the senior executives or directors are engaged in or will engage in business with the company activities are closely related." *American Law Institute, Corporate Governance Principles: Analysis and Recommendations, Vol. 1*, translated by J.B.Lou et al., Law Press, 2006, p.329.
- [16] S.M.Cao, H.Gao, *Study on corporate opportunity doctrine*, *Tribune of Political Science and Law* 02(2004) 58-68.
- [17] S.S.Bo, *On the Director's Obligation to Usurp corporate Opportunity—Also on the improvement of relevant systems in Chinas Company Law*, *Academic Exchange* 03(2000) 87-90.
- [18] Y.M.Zhang, *On the code of corporate opportunity*, *Journal of Social Sciences* 09(2006) 111-117.
- [19] David Kershaw, *Does it matter how the law thinks about corporate opportunities?*, *Legal Studies* 25(4) 2005 533-558.
- [20] Article 175 of the British Companies Act revised in 2006: "(4) This duty is not infringed—(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or (b) if the matter has been authorised by the directors."
- [21] C.B.Che, *The judicial adjudication of corporate opportunities doctrine:based on the inspiration of recent reformation of American Corporate Law*, *Science of Law(Journal of Northwest University of Political Science and Law)* 28(05) 2010 67-72.
- [22] Article 5.05 stipulates that directors or important senior employees shall not use company opportunities for themselves or related persons, unless: (1) The opportunity is first provided to the company and all important facts about the company's opportunities and conflicts of interest are disclosed to the company's decision-makers; and (2) The company rejects the company's opportunity in one of the following ways: (A) When the disinterested director approves the rejection of the company opportunity after all important facts have been disclosed, the behavior of the director who approves the rejection must comply with Article 4.1. Article (d) of the business judgment standards; (B) when all important facts are approved or ratified by disinterested shareholders, such rejection does not constitute a waste of company assets; (C) if a rejection is not in accordance with the previous two If the standards stipulated in this clause or other effective terms are not met by the company, it is unfair for the company to take advantage of this opportunity by directors or important senior staff. *American Law Institute, Corporate Governance Principles: Analysis and Recommendations, Vol. 1*, translated by J.B.Lou et al., Law Press, 2006, pp.328-329.
- [23] L.C .B .Gower, D .D .Prentice, B .G.Pettet .Gower' s *Principles of Modern Company Law(5th) , Sweet&Maxwell, 1992, p.570.*