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Law-and-Economics of Business Judgment Rule in India

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I. Introduction

A company's decision-making process at the Director level has implications for both the shareholders and the stakeholders. Competing interests of accountability and authority are implicit in every such decision to which the judiciary responds in an abstentionist manner. 1 Therefore, the process is important for business efficiency and cost mitigation.[1]

In this paper, we argue that the contours of the 'business judgment rule' (hereinafter, 'the rule' or 'the doctrine') have not been properly delineated and add avoidable transaction costs in terms of business decision-making. On the premise of 'influence' existing between Board Directors and countervailing requirements of legal compliance, it becomes imperative to study both components. In the absence of any clear legalese on the latter component incentivizes Directors in two ways – by inhibiting judgment or by incentivizing abuse for a perceived higher probability of economic gain. *Firstly*, we will provide the modern origins of the rule and the changes it underwent in the United States and India through relevant case law. *Secondly*, we will analyse a hypothetical scenario using Bayesian probability and game theory to prove that the ambiguity about a desirable rule encourages inevitable director influence. Thus, judicial review on corporate merits must be used restrictedly with defined parameters for intervention.

[1] Stephen M. Bainbridge, 'The Business Judgment Rule as Abstention Doctrine' (2019) 57 Vanderbilt Law Review 83. The author contends that the Rule is a response to the dichotomy of the authority and accountability dilemma arising from the decision-making process. Further, the Rule itself is an abstention doctrine in its core essence as opposed to a standard of liability – the Court are guided to abstain from business decision-making outcomes and challenges. (The authors, in this article, argue against the Court's formulation in *Cede & Co. v Technicolor* and, in the Indian context, favour the more abstentionist stance of the Court in the case of *Shlensky v Wrigley*).

II. Invisible and Undefined: The Rule in Indian Jurisprudence

The 'business judgment rule' refers to shielding corporate decision-making from derivative litigation. The protection is used for increasing business efficiency by presuming that the Directors of a company would make a well-informed decision in line with the company's best interests.[2] 'Free' corporate decision-making in pursuit of shareholder wealth maximization is desirable for the owner-agent relationship between the shareholders and the Board directors[3] within the rules of the legal game. The agency conflict between the Board and the shareholders and the lesser valued conflict between the Board and the stakeholders hinges directly on the decisions taken by the Board of directors. The presumptive protection of the rule is a countermeasure to frictional tendencies of shareholder interference at the decision-making level.

The Delaware Supreme Court, in the case of *Aronson v Lewis,*[4] outlined the rule. The Court held that the Court of Chancery must decide based on particularized facts alleging, whether reasonable doubt has been created about the directors' independence and whether the outcome of the business judgment was, in general circumstances, a valid exercise of such judgment. The key determinants were held to be director disinterestedness and independence, propriety, information, care,[5] and a mandatory instance of 'demand futility'.[6] Mere allegations on the Board cannot be considered a valid plaint.

The rule has seen modifications in American jurisprudence. *Cede & Co. v Technicolor*[7] established that the operation of the rule is to "*preclude a court from imposing itself*

[2] R. Franklin Balotti & James J. Hanks Jr., 'Rejudging the Business Judgment Rule' (1992) 48 Bus Law 1337. The authors provide the background and origins of the Rule and its variants in practice. They provide reasoning behind the application of the Rule and hold that particularized pleading and a higher standard of evidence have become the basis for viewing it as an irrebuttable presumption. The authors denounce this and hold that pleading and evidentiary standards must be cleared up to remove the clunk surrounding the aspect of presumption in the Rule.

[3] Bernard S Sharfman, 'The Importance of the Business Judgment Rule' (29 December 2017) accessed 15 January 2023. Basically, the author views the Rule in terms of equity restraint and treatment by the Court. In essence, the author argues that shareholder wealth maximisation should be the legal end and obligation of a Board and the Rule must be understood in that respect.

[4] 1984 Del. LEXIS 305. The case refers to allegations of director dominance and demand futility against a Board of Directors comprised of directors appointed by the (allegedly) dominant director who also happened to be the owner of 47% of the outstanding stock of the same company. He had also appointed the rest of the Board directors and had been given interest-free loans from the company and a high salary.

[5] ibid [16], [24], [29], [17].

[6] 'Demand futility' refers to a situation wherein a derivative suit is imperative owing to the futility of demanding resolution from the corporate Board itself. Basically, the Board is interested in not pursuing litigation or resolution in a case where the persons in consideration are the directors.

[7] 1993 Del. LEXIS 398. The case refers to a Delaware Supreme Court ruling wherein a matter arose from a post-second merger dispute about director misconduct in going through with the sale despite opposition by the plaintiff Cinerama, Inc. It was found that two directors had an undisclosed interest in the sale. However, even

unreasonably on the business and affairs of a corporation."[8] The bench held that the best interests of the shareholders form the other arm of the twin requirements.[9] A director's self-interest could be understood as either in the form of extraneous benefit exclusive from the shareholders or appearance on both sides of a transaction.[10] 'Collective duty of loyalty' of the Board as a whole is considered over individual duty.[11] Proof of injury is not required to institute such a claim.[12] Duty of care and duty of loyalty are complementary and equal.[13] Further, 'materiality' between the director's interest and the board's deliberative process must be accounted for to exempt the rule's application.[14]

Another American formulation has been that of the American Law Institute's ('ALI') understanding of the rule.[15] The ALI's formulation is more standardized.[16] The standard components are good faith, duty of care, disinterestedness, well-informed deliberation, and a rational belief that the business judgment is in line with the company's best interests. Moreover, the term 'rational' gives wider discretion to the directors compared to the 'reasonable' standard.[17] Importantly, the Court in *Shlensky v Wrigley*[18] had repeatedly relied on earlier precedents to restrain itself from going into the corporate merits of the case and restrict itself to a *prima facie* evaluation of the plaint and any substantial particulars therein alleging negligence or other exemptional factors.

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such non-disclosure could only be relevant for exempting the Rule where the act itself is material to the final decision taken by the Board.

[8] ibid [44].

[9] ibid [43]. The twin requirements are the company's interests and the shareholders' interests.

[10] ibid [49].

[11] ibid [35][48][49]. The duty of loyalty is composed of twin requirements. Collective loyalty is said to be breached if either of the two conditions is not satisfied.

[12] ibid [83].

[13] ibid [71].

[14] ibid [56]. The bench rejected Cinerama's contention that individual benefit exclusive to the rest of the directors in itself removes the Rule's protection.

[15] Douglas M. Branson, 'The Rule That Isn't a Rule – The Business Judgment Rule' (2002) 36 Valparaiso University Law Review 631. The article goes into the formulations and components of the Rule and argues that the Rule is not a Rule in the common understanding of the word. The Rule acts as a dynamic tool resulting in a higher likelihood of a sound business decision being taken balanced by the Court's deference to business decision-making. Further, the author describes the variation in the Rule itself such as the ALI formulation and the Rule as it is in Indiana.

[16] ibid 634, 635.

[17] Franklin A. Gevurtz, 'The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?' 67 Southern California Law Review 287 Basically, the ALI's formulation has an explanation drawing a distinction between 'rational' and 'reasonable' – the former being wider in scope and thus, giving more force to the Rule as an abstention doctrine.

[18] 1968 Ill. App. LEXIS 107. The case concerns the non-installation of night lights in a baseball stadium causing considerable operational losses to the company owning the stadium. A minority shareholder had brought a derivative suit against the company. The bench ultimately sided with the company on the basis that the plaint did not have a cause of action and contained only conclusions.

The Indian scenario has seen limited explicit usage of the doctrine. In the case of *Miheer H. Mafatlal v Mafatlal Industries Ltd*,[19] the Supreme Court delineated a few parameters for director responsibility. These parameters were decisions taken in good faith as "*men of business would reasonably approve of*" and that the decision itself is beneficial to the "*class represented by them* (the decision-maker) *for whom the scheme is meant*".[20] However, there is no judicial precedent per se which has tried to define it. The Company Law Board ('CLB') in the case of *PPN Power Generating Company Ltd v PPN (Mauritius) Company*[21] had briefly mentioned that a previous Bench of the CLB had declined to "*interfere with the business judgment taken with collective wisdom of the majority directors.*"[22] Similarly, the Securities and Exchange Board of India ('SEBI') in the case of *Franklin Templeton Mutual Fund*[23] reproduced the rule as understood by the Delaware case law.[24] In the end, the SEBI adjudicator held that the rule was inapplicable as the decisions taken by the company were not in the interests of the investors. The National Company Law Tribunal had held in the case of *Fidalli Moiz Mithiborwala v Majolica Properties (P.) Ltd.*[25] that every judicial decision about a company had to be tested on the Rule and thus, had restricted its intervention.[26] However, none of these benches defined the Rule or referred to Section 463 of the Companies Act, 2013.

The rule remains ambiguously used with no substantial judicial evaluation. Apart from a few tribunal judgments, the rule can be traced to provisions in the Companies Act of 2013.[27]

[19] (1997) 1 SCC 579. The case is mostly irrelevant to the topic since the Supreme Court does not go into the question of business judgment rule itself but only touches its periphery through allusions to a reasonable businessman standard.
[20] ibid [29].
[21] 2004 SCC OnLine CLB 77. The case concerns an application filed by respondents to restrain the petitioners from proceeding with an arbitration suit in the ICC Arbitral Tribunal in Paris. The facts concerned a commercial dispute with a third party namely Tamil Nadu Electricity Board ('TNEB') which had defaulted on multiple payments of a huge outstanding loan. The petitioners had wanted to sue the TNEB to recover damages whereas the respondents wanted to continue their working relationship with the TNEB and not sue them owing to the risk of being left with no customer since TNEB was their sole energy-producing client.
[22] ibid [6]. There is an allusion to American jurisprudence through the phrase "collective wisdom of the majority directors". This could be compared to the 'collective duty of loyalty' principle enunciated in *Cede & Co. v Technicolor*.
[23] 2021 SCC OnLine SEBI 839. The case concerned the winding up of a few mutual fund schemes by the company Franklin Templeton Trustee Services Pvt Ltd. Multiple violations of SEBI (Mutual Funds) Regulations, 1996 were found by an audit by SEBI-appointed auditors. 'Business judgment Rule' was one of the arguments in the company's ~~defence~~defense.
[24] ibid [195]. A presumption in favour of the decision subject to it being taken in good faith, on an informed basis, and an honest belief that the action was taken in the company's best interests. The exception was understood to be only an abuse of discretion and absence of the above considerations.
[25] 2017 SCC OnLine NCLT 20894.
[26] ibid [31][32].
[27] The Companies Act, 2013 (Act No. 18 of 2013).

Sections 149, 164, 166, 184, and 463 are, in a way, piecewise components of the rule.[28] This piecewise treatment has resulted in confusion and a lack of extensive judicial interpretation of the rule in India.

In essence, the Indian jurisprudence is based on majority power – higher the number of amenable directors, higher the implicit weight attached to the presumption of the 'business judgment' rule. The 'materiality' parameter is in Indian practice. A Director under Indian law only needs a minimum number of yes-men to tilt the Court's favour in upholding the assumption of business judgment rule – thus, minimizing the possibility of sustaining a derivative suit in Court. The Indian premise does not look into the existence of a dominant director and his ability to centralize decision through individual 'material' connection to the decision of other directors.

III. Why Director Influence Precludes Dominance: A Hypothetical Case of Doogle Inc

We will proceed our analysis based on the following assumptions:

1. The decision structure is such that every decision-maker's vote is concurrent, prone to influence, and driven by economic considerations – pecuniary or not.
2. There is no information asymmetry. Every director reviews his decision with the same amount of information as his colleagues.
3. There is no differentiation in terms of positional and decisional hierarchy – all the directors are equally placed and hold equal voting shares.

The equilibria categories of pooling and separation could be said to exist in this scenario as well.[29] However, what distinguishes this case is based in the legal nature of corporate transactions. Here, the directors are not naturally inclined towards intra-board deviation due to them being equally placed in a regime which rewards collective wisdom of the Board – thus, business judgment rule. They know that a definite legal profit λ exists where there is a

[28] Section 149 talks about (a) mandatory independent director(s) on a Board. Section 166 talks about the duties of the directors wherein specifically the phrases 'act in good faith', 'best interests of the company', 'conflict with the interest of the company', 'due and reasonable care', and 'undue gain or advantage' have been used. This seems like a covert application of the Rule. Section 184 mandates disclosure of interest by a Director. Section 436 grants relief to Directors and officers of companies in general. This is in a non-criminal case wherein the officer has acted 'honestly and reasonably' in context of the circumstances of the matter available to the officer.

[29] Jeong-Yoo Kim and Keunkwan Ryu, 'Yes-Men and No-Men: Does Defiance Signal Talent?' (2003) 159 Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft 468.

high number of same decisions. Thus, we will consider this collective benefit to the firm and its Board while analyzing how the business judgment rule affects a director's decision.

Imagine a Board of a hypothetical company Doogle Inc. Doogle is a big tech company with a Board of Directors operating under laws *in pari materia* to Indian law. There are n directors in the company with majority decisions hinging on $n/2 + 1$ majority vote.[30] The voting pattern is sequential but can also be considered in a random sequence with different directors voting at different times.[31] The conditional probability of the $(n - 1)^{th}$ director's decision is denoted by event A and the n^{th} director's decision is denoted by event B. 2 scenarios can be considered:

Case 1: Complete independence from $(n - 1)^{th}$ director –

$$P(A \mid B) = \{P(B \mid A) \cdot P(A)\} \div P(B)$$

Joyce, James, "Bayes' Theorem" (*The Stanford Encyclopedia of Philosophy,* Fall 2021) < https://plato.stanford.edu/archives/fall2021/entries/bayes - theorem/ > accessed 9th January 2023. Here, the equation reduces to a simpler form of equal conditional probabilities since the probabilities of both completely independent directors will cancel each other out in the equation.

$$\therefore P(A \mid B) = P(B \mid A)$$

The Bayes' Theorem for two events applies in perfect independence of successive events. The probability of either decision[32] thus must be exactly 0.5 with 1 meaning absolute certainty of conforming to the previous vote. In such an ideal state, it is reasonable to deduce that there will be no dominating director – which is highly suspect in practical considerations. This brings us to the second more realistic scenario of influence.

Case 2: Influence from $(n - 1)^{th}$ director –

We will assume that the directors are economically rational businessmen whose decisions exist in a marketplace of competing decision factors. The same theorem is to be applied with a small change of a variable factor of influence of the decision of the previous director

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[30] This is an assumption of a simple majority vote as the sole parameter for decision-making. Real-life corporate scenarios can be more complex but will not change the underlying probabilistic logic.

[31] The directors must be considered as variable players executing a decision or perceived as executing a certain decision. Thus, the decision can exist in retrospect of the actual execution. In the case of an anonymous vote, the influence exerted by the previous variable can simply be understood as arising from what the next variable player would perceive that decision to be, irrespective of him having certain information.

[32] 'Yes' and 'no' both will follow the same result from the theorem's application.

denoted by x_i.[33] Now, for an influenced director, this variable must 'add' or 'subtract' to their decision. Thus, a continuous dynamic value function will result. Consider a renewed application for the n^{th} director resulting in the following equation. We will assume both x and dx to be only theoretically quantifiable:[34]

$$S = \sum_{i=1}^{n} f(x_i, dx_i) - S_{i-1}$$

Here, for coherence, $S_{i-1} = 0$ for $i = 1$.[35] dx is an inevitable variable[36] denoting small change as a fallout effect of the sum total of extraneous effects (perceived or real) of all x until the decision-making reaches the i^{th} director in the equation. dx refers to the overall effect of x up to the i^{th} director. The function S gives the value of the influenced decision of director i and its bearing on the next decision to be taken. S also provides a hypothetical quantification to how influenced a decision could be.

This influence tilts the probability towards either direction of the binary depending on the other directors' decisions. A Board with a high number of directors is susceptible to this combined effect with incrementally increasing values for both x and dx until the value for reaching a decision is reached. This is due to the sequential rise in overall influence affecting dx. However, even small Boards will face similar interests with concentrated power resulting in implicitly high x and dx.

There is inherent subjectivity in the case of director influence – a necessarily occurring dynamism in Board decision-making. The case that the rule attempts to fulfil is case 1. However, there is no clear doctrine in existence except by loose references here and there in the Indian jurisprudence and perhaps, by common law affiliation. Thus, there is no incentive for the hypothetical director to *not* exert influence (increasing x_i dramatically) and in turn, have a butterfly effect on the entire decision-making process (increasing dx_i).

[33] x can be understood as the change of an object from one point to another on a vector in one direction. Here, the vector is decision-making with 'yes' or 'no' being the direction – the magnitude being the degree of influence.

[34] This assumption will not hurt the analysis as will be seen in the next section.

[35] Considering the first director's decision ($i = 1$) as an independent and thus, the value of S will be 0.

[36] ~~dx refers to the overall effect of x up to the i^{th} director. Thus, c~~Consider director D2 ~~is~~as not influenced by D1 – this deadlock of votes will inherently affect D3's decision-making with competing D1 and D2 influence variables.

IV. Real Time Decision-Making: Directors and Noncooperative Games

The analysis in the previous section gives us a premise to build from in an actual game theory scenario.[37] We can consider hypothetical payoffs for all the 4 possibilities in a reduced form of a game set. Consider a director in a hypothetical decision-making event. D1 is assumed to be the influencing director and D2 is the influenced. The influence factor is assumed to adhere to completeness i.e., mutual influence must be understood as a net influence in one direction. For clarity, the net influence of perfectly independent directors will be 0 since their influence on each other will ultimately cancel out due to them being completely independent. Another way to understand this is to imagine both of them exerting 0 influence on each other and thus, the net result is 0. Following is our proposed payoff set~~-~~:

		D2 ('Influenced')[38]	
		Conforms	*Does Not Conform*
D1	*Yes*	$([x_i^+, dx_i^+], [x_i^+, dx_i^+])$	$([x_i^-, dx_i^\pm], [x_i^-, dx_i^\pm])$[39]
	No	$([x_i^+, dx_i^+], [x_i^+, dx_i^+])$	$([x_i^-, dx_i^\pm], [x_i^-, dx_i^\pm])$

[37] Ilhan Kubilay Geçkil and Patrick L Anderson, *Applied Game Theory and Strategic Behavior* (CRC Press 2010) 19. The book explores the applications of game theory through real-time payoff considerations in strategic decision-making in business decisions and other real-life events. The book follows the methodology of breaking any decision into a set of continuously flowing payoff sets with specific assumptions driving strategies.

[38] ~~D1 is assumed to be the influencing director and D2 is the influenced. The influence factor is assumed to adhere to completeness i.e., mutual influence must be understood as a net influence in one direction. For clarity, the net influence of perfectly independent directors will be 0 since their influence on each other will ultimately cancel out due to them being completely independent. Another way to understand this is to imagine both of them exerting 0 influence on each other and thus, the net result is 0.~~

[39] *dx* will either increase, decrease, or stay 0 depending on the degree of D2's influence.

An example of an ~~ordinal~~ cardinal payoff set approximating the above payoff model has been produced below. The payoffs rest on the assumption that a yes-man would profit from conformance. The following payoff values are merely illustrative:

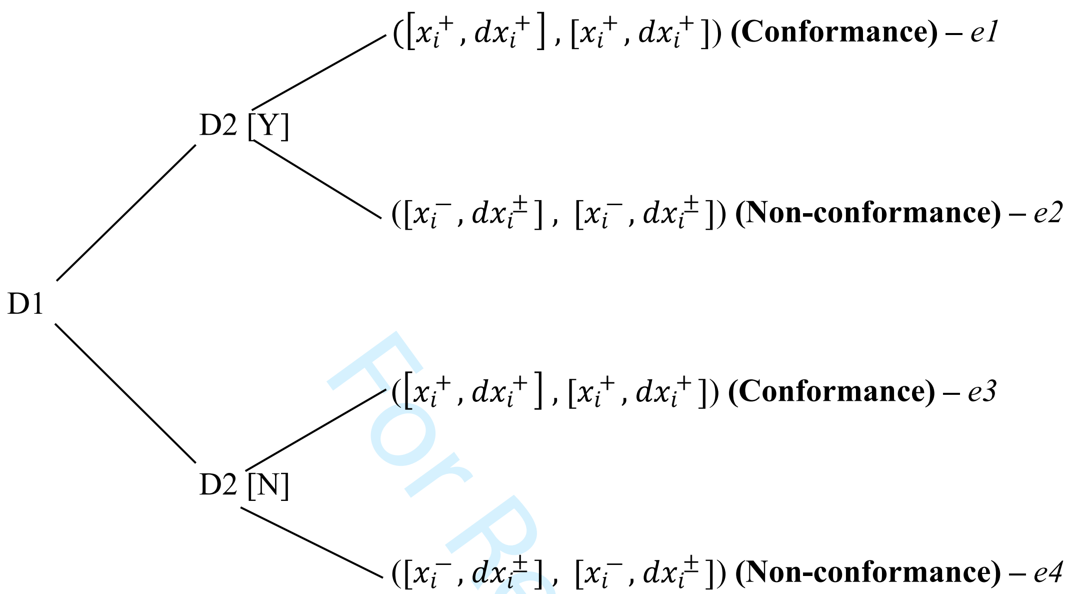
		D2 (‘~~Influenced’~~Next Decision-maker)	
		Conforms	*Does Not Conform*
D1	*Yes*	(2,2)(2,2)~~(3 , 1) (3 , 1)~~	$(1, \{-1,0,1\}), (1, \{-1,0,1\})$
	No	(2,2)(2,2)~~(3 , 1) (3 , 1)~~	$(1, \{-1,0,1\}), (1, \{-1,0,1\})$

The payoffs for events concerning D2’s conformance reflect an equal payoff to each decision-maker. In events of D2’s non-conformance, the payoff falls for D1 and adds uncertainty to D2’s payoff. -1 denotes loss; 0 denotes *status quo*; 1 denotes gain. Uncertainty here necessarily refers to a lower expected value by probability. This payoff set is indicative of the assumption inherent in the proposed thesis – conformance adds to the utility of the conforming actor. *Per contra*, if non-conformance rewards the dissenter, then a ‘no-man' would display economically rational behavior. We must reiterate that our proposal concerns with the Indian practice where brute majority of opinion tilts judicial presumption towards the rule as against putting ‘materiality’ as the parameter for ascertainment of the rule’s applicability or inapplicability.

Consider game theory in simultaneous decisions being taken by both. It is the dominant strategy for the ‘influenced’ director D2 to conform no matter what D1 chooses – not conforming merely goes against the previous director’s *x* while adding an uncertain direction to *dx*. In contrast, conformance adds positives for D2 in the form of allegiance, loyalty, and resolution[40] factors. The overall *dx* increases in D1 and D2’s direction for the rest of the

[40] R.H. Coase, ‘The Problem of Social Cost’ (1960) 3 The Journal of Law & Economics 1. Coase talks about the undesirability of, and the friction caused by transaction costs, especially in areas of undefined property rights. In the situation given in the paper, the resolution factor is understood to be an implicit economic tendency to save similarly defined transaction costs in a decision-making process by leaning towards one direction closest to reaching a decision.

directors who face an increased influence from these 2 decisions. We can look at a sequential version of the game:



In a sequential game, the ideal payoff sets for D2 would be reduced to *e3* and *e4*. This is a more precise representation of a 'domino' structure of decision-making. Further conformance in a sequence adds up to more and more directors following one set of decisions in absence of any countervailing considerations. Thus, there is a natural tendency to conform to a decision unless these prospects diverge from a director's self-interest. This is even more pertinent in related party transactions. The situation where a director's opportunity cost of conformance is higher than non-conformance becomes interesting in terms of factors for non-conformance. The overall outcome is dependent on both independent factors (denoted by *I*) and the variables of influence – *x* and *dx*. The important aspect is that unavoidable influence must be accepted as a factor in evaluating scenarios for the application of the rule or its exception. It precludes dominance and normalizes director influence as a factor while considering the need for judicial intervention. The conditional probability that we looked at in case 1 will be necessarily skewed in either direction in case 2 due to these extra factors. Further, Bayesian probability will keep shifting this skewed value to either direction or more realistically, in one direction.[41] Thus, whenever $I > (x + dx)$ in any decision made by a Board, there is no

[41] The former 'either direction' phrase is a reference to the theoretical but unrealistic outcome wherein the probability will keep oscillating between two outcomes owing to equal and opposite values for all x_i and dx_i.

need for any judicial intervention. This empirically explains the materiality condition in *Cede & Co v Technicolor*.[42] In case of the *I* factor being overrun by influence, the presumption must only be removed on particularized procedural grounds where such a decision is one of patent illegality, completely diverging from the duty of loyalty and care and thus, company interest – long-term or short-term, or so inimical to prudential business decision-making that it is completely unexplainable by any economic reasoning.[43]

There are 2 Nash equilibriums in such a scenario – conformance to either decision of the influential director. The materiality condition clarifies further outcome and assessment of the correct application of the presumption of 'business judgment' rule. Conformance provides stability to the rule's application where it is vaguely defined. Apart from the economic rationality argument and the cost-minimization argument, the conforming director secures employment profitability through long-term relationship building with other directors. Such individual-centric profit might come at the behest of the company's best interests. This highlights a lesser talked about agency problem – the friction between a director and the overall scheme and context of the Board of directors. In absence of a clear guideline juxtaposing the contours of director interest and the presumption of the rule, a director has no incentive to actively look for the company's best interests. The best interests must be concretized in law within the ambit of section 463 of the Companies Act of 2013. Shareholder wealth maximization ('SWM') is often purported as a workable solution to this issue.[44] Long-term SWM is seen as a reliable and assessable parameter to direct the behavior of the Board of Directors. A Board working for short-term SWM might also be considered as falling within the desired behavioral trajectory to ensure that considerable flexibility remains in corporate decision-making.

By defining and restricting the scope of the exception to the rule and the rule itself, costs will be mitigated in the form of a streamlined and clarified position of law. Exclusive legal positivism ('ELP') has properties of clarity, cohesion, and predictability.[45] This approach decreases transaction costs by assigning an economic utility value to the above

[42] *Cede & Co. v Technicolor* (n 6) [56].

[43] Assuming that the economic reasoning rests on neoclassical assumptions of profit-maximization for the firm.

[44] Judy Laux, 'Topics In Finance Part I-Introduction And Stockholder Wealth Maximization' (2010) 3 American Journal of Business Education 15.

[45] Rahul Singh, 'The Meld Model: The Holy Grail of Indian Corporate Jurisprudence' (2021) 7 (1) NLS BLR 132. The author's formulation of a synthesis of the schools of 'law and economics' and 'ELP' is economically rational for corporate jurisprudence. The cost-minimization and efficiency targets enunciated in both Coase theorem and Kaldor-Hicks efficiency align with business judgments which, ideally, should be in furtherance of the aforementioned two targets.

considerations.[46] The SWM directive is consistent with an exclusivist approach. A definite economic parameter increases the protection granted by the rule. It further increases incentives for competition among the directors to ensure that director decision is driven by SWM – whether short or long-term. Thus, the rule must be separately codified to ensure predictability and stability in business decisions free from an omnipresent unclear guillotine of judicial oversight.

V. CONCLUSION

Director influence is inevitable in any decision-making process. The Indian courts must clarify what constitutes the rule and must delineate specific parameters for initiating judicial intervention. A half-hearted legislative attempt at defining the doctrine in the Companies Act, 2013 further complicates the issue. Through clear definition, the judiciary will also be relieved of costs it would have accrued in the case of intervention. A coherent and progressive legal system must reduce its costs while favouring smooth business under its ambit. A separate, clear, and restricted statutory provision about the rule is needed for this end goal. Furthermore, for a director, a necessary adherence to SWM will force her to not engage in anti-competitive behaviour. Pro-competitive effects in the form of more refined decision-making guided by roughly measurable parameters will help in ensuring the best interests of the company. Thus, the rule is desirable but with clarity and predictability about the end goals underlying the protective presumption.

[46] Eric A Posner and Cass R Sunstein, 'Moral Commitments in Cost-Benefit Analysis' (2017) 103 Virginia Law Review 1809. The authors observe that moral considerations are generally susceptible to subjectivist valuation in a cost-benefit analysis. Despite this, one can still assign a statistically dependable valuation based on how much an individual or a society, in general, is willing to pay to retain that moral consideration.

Authors response to suggested revisions:

We have accepted and incorporated all suggestions in track changes mode.