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Fiduciary Duty in a Guanxi Society

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Abstract

China has imported the Anglo-American law of fiduciary duty into its corporate statute. I argue that fiduciary duty confronts a problem. Its transplantation is into the rich cultural soil of guanxi, a soil that is incompatible with the equally richly developed culture of fiduciary duty.

This is the first paper to examine the relationship between fiduciary duty and guanxi. I conclude that, while fiduciary duty may take root in the limited (but important) context of self-dealing transactions, it is likely to fail in its essential function of guiding fiduciary behavior in the presence of a guanxi relationship.

Keywords

fiduciary duty, China, corporate law, guanxi

1. Introduction

A general statement of fiduciary duty was included as part of sweeping amendments to China's company law in 2005. Detailed statutory provisions prohibiting much conduct that comes within the rubric of fiduciary duty have been in place since 1993, but the 2005 amendment was the first inclusion of the broad common law principle into Chinese law. "The directors, supervisors and senior executives of a company shall comply with the laws, regulations and the articles of association of the company, and bear the duties of loyalty and due diligence towards the company" (Note 1). The topic is one of contemporary controversy and debate (Note 2). Significant attention is currently being paid to the question of whether fiduciary duty appropriately fits Chinese legal culture and, if so, the forms it should take (Note 3). This paper is the first to examine the relationship between fiduciary duty and the deeply embedded social and business practice of *guanxi,* and the prospects for the former in a culture of the latter. My focus is on the duty of loyalty, which is the issue presented in the vast majority of cases (Note 4).

Fiduciary duty is as much a cultural concept as a legal one, and has a long and rich history in common law countries. China lacks this history and culture (Note 5). More significantly, China has transplanted

fiduciary duty into a culture in which the practice of *guanxi* is deeply embedded (Note 6). Fiduciary duty and *guanxi* serve the same goals, but in conflicting manners (Note 7). I conclude that fiduciary duty appears to work reasonably well in the context of self-dealing, but it is likely to fail in the presence of *guanxi* relationships (Note 8).

It is unlikely that fiduciary duty will soon disappear from Chinese law and extremely unlikely that the practice of *guanxi* will end in the foreseeable future (Note 9). So one important question is whether the two practices can be reconciled. I provide a few brief suggestions for reconciliation but am skeptical of success. I conclude that perhaps the better course of action is for Chinese law to drop the rhetoric of fiduciary duty and permit the growth of indigenous Chinese practices to regulate the behavior of disloyal corporate actors (Note 10).

This leads me to conclude with an important observation. In many respects, Chinese corporate law has adopted the trappings of western corporate law, primarily to reassure foreign investors and attract foreign capital. But these transplantations have not worked terribly well. They may, in fact, interfere with the efficient functioning of Chinese enterprises and hinder the development of a corporate regime that is tailored to the specific requirements of Chinese law, politics, and culture. The transplantation of fiduciary duty, as indeed the transplantation of the board of directors, is a good example of this problem (Note 11). This suggests that lawmakers and scholars should pay attention to the development of business forms appropriate to Chinese culture and practice in order to ensure its continued economic growth and prosperity.

2. A Matter of Culture

The study of legal transplants has matured to a point where it is almost a given that the adoption of the law of one country by another does not ensure that the transplanted law will be understood or applied in the adopting country in the same manner as it is in the country of origin. This is especially true of statutory transplants from common law countries to civil law countries in which the strong common law tradition of judicial interpretation is less present (Note 12). And as true as this is of statutory law, it is even more so of common law, which is entirely judicially developed. Differences between source country and host country are amplified when a further step is taken and the transplanted common law is codified by the adopting country. Such is the case with fiduciary duty.

Legal and cultural traditions certainly affect these transplantations in practice. More often than not, transplanted laws have been statutory (Note 13), maintaining at least some legal cultural continuity in civil law jurisdictions accustomed to statute. Studies have been done of the transplantation of various business and finance laws from western countries to Asian countries, but they have typically focused on the institutional aspects of law, like entity and ownership structure, market regulation, and the creation and composition of corporate boards (Note 14). China’s adoption of fiduciary duty, historically a uniquely common law doctrine (Note 15), provides an interesting opportunity to study transplantation of a vastly more indeterminate body of law in a different legal and cultural context.

Fiduciary duty and, particularly, the duty of loyalty, presents a special case in the study of legal transplants. Grounded as it deeply is in Anglo-American norms and culture, it carries with it notions of dispassionate power and responsibility, and unilateral, disinterested, other-regarding conduct. *Guanxi*, grounded as it deeply is in Chinese norms and culture, locates itself within the individual in her search for survival, is bilateral, instrumental, and emotional. Responsibility looks upward, and other-regarding conduct is motivated by self-interest (Note 16).

Consistent with fiduciary duty's obligations to others, the American character, despite its emphasis on individualism, is significantly other-regarding (Note 17). The Chinese character, despite its reputation for community over self, is egotistic, with the individual at the center and survival networks emanating therefrom (Note 18). This characteristic has led some to describe Chinese culture as more radically individualistic than is Western culture. Herrmann-Pillath uses the term "relational individualism," producing a "more radical individualism than the Western one…" (Note 19) Research has shown that, when conflicts of interest arise, members of *guanxi* networks will likely privilege close, and even middle-range, connections over the interests of others, including their business organizations (Note 20). It is, however, important to emphasize that *guanxi* exists and flourishes only within its own network. No matter how widespread the practice throughout China, it is confined within individual *guanxi* networks. This observation suggests that the likely space for fiduciary duty is between *guanxi* networks, not within them.

Fiduciary duty, with its general admonition to the fiduciary to behave in a manner consistent with the best interests of others, thus faces a challenge in China where even apparently other –directed behavior is, at its heart, a means of self-protection. Benjamin Cardozo's lyrical prose admonishing "self-abnegation" to the fiduciary (Note 21) seems a far cry from Fei Xiaotong's groundbreaking analysis of the Chinese character (Note 22).

It is important to note at the outset that the problematic interaction of fiduciary duty and *guanxi* is more than the result of tension between different cultures and attitudes. Difficulties also arise from the fact that fiduciary duty and *guanxi* are designed to serve the same purpose, but in conflicting ways. Simply put, both fiduciary duty and *guanxi* are proxies for trust under circumstances where trust in another's commitment to look after the trusting party's best interests is fragile. In American common law, the trust engendered by fiduciary duty is backed by a strong legal institutional infrastructure. Contemporary China has yet to achieve well-developed and stable legal infrastructures (Note 23). The trust supported by *guanxi* is thus personal. This personal character paradoxically makes *guanxi* trust both more fragile and more tenacious than fiduciary duty. The practical result is that fiduciary duty is unlikely to work well in China, in at least some contexts, and that conflicts between the underlying concepts of fiduciary obligation and *guanxi* are likely to result in the *guanxi* relationship being privileged over the fiduciary relationship when conflicts of interest arise.

The potential for the development of fiduciary duty in Chinese corporate law thus faces significant obstacles. Fiduciary duty and *guanxi* might work well together (perhaps redundantly) in contexts in

which the fiduciary and beneficiary have strong ties. But the ties of a fiduciary to beneficiary in corporate relationships, both to the corporation itself and to largely anonymous minority shareholders, are far more likely to be broken in favor of directing benefits to a member of the fiduciary's *guanxi* network. This is compounded by the underlying distinction between the supposed universalism of American values and the particularism of Chinese values (Note 24).

As I noted earlier, fiduciary duty might work in limited contexts, including situations in which the fiduciary's violation is entirely self-serving, as in the case of a personal misappropriation of corporate assets or a personal self-dealing transaction. That is to say, fiduciary duty might work well when a *guanxi* partner is not involved and a director or officer serves only herself (Note 25). Mergers, at least among public companies, present situations where the benefits of *guanxi* among shareholders probably are too tenuous to be practically realized and fiduciary duty might work in this context as well, although the case of directors and officers might be problematic. At this stage of China's development one might expect, in general, that cases in which the transaction involves parties with *guanxi* connections will result in a director or officer protecting the faithful friend over the faceless beneficiary.

Judges should be expected to enforce fiduciary rules despite the parties' *guanxi*. But this situation arises only in (relatively rare) litigated cases, and only in cases in which the judge and litigating counsel (or a litigating party) lack their own personal relationship (Note 26). Complicating fiduciary adjudication in China is that the goals of Chinese litigation are different from the goal of American litigation. American litigation is designed to resolve a dispute by concluding the process in favor of one side. American litigation results in winners and losers. Chinese litigation, while also aimed at the resolution of disputes, is also importantly directed toward the restoration of the parties' relationship, both acknowledging and reinforcing the importance of the personal in Chinese law and culture (Note 27). At the same time, some scholars have observed a trend in Chinese practice that places greater emphasis on contracts and suggest that the importance of *guanxi* may fade with China's continued economic and institutional development (Note 28).

Judicial opinions set both the outlines and texture of fiduciary obligation. American fiduciary duty opinions tend to be rich and contextual, with considered study leading to an almost intuitive understanding of appropriate behavior (Note 29). Chinese judicial opinions, in contrast, are both more rare and, when they appear, quite skeletal and rigid in a manner that significantly interferes with the development of fiduciary jurisprudence (Note 30). Chinese judicial practice also lacks a tradition of prescriptive pronouncements from appellate courts except when the Supreme People's Court issues Guiding Opinions, a very new practice (Note 31). These differences present a problem for fiduciary duty because fiduciary duty is, like law in general, designed to guide day-to-day behavior. The generality of the fiduciary mandate and the indeterminacy of its requirements often make the function of guiding individual conduct even more significant than in other areas of law, guidance which in American law is provided by a rich body of judicial opinions. In addition to the challenge to the

successful development of fiduciary law posed by Chinese judicial practices, most misbehavior is not litigated. Even if the Supreme People's Court issued a Guiding Opinion on fiduciary duty, it is likely that the daily practice of fiduciary duty will fall in the face of entrenched social norms and behavior.

A good example of the failure of Chinese judicial opinions to lay out the contours and guidance of fiduciary duty is presented by *Shanghai Yifeng Trading Company, Ltd.* v. *Storr-oeheld Trading Company, Ltd* (Note 32). The case involved the straight-forward diversion of corporate funds from Storr-oeheld, a wholly foreign owned enterprise, the general manager of which was Wang Xiang, into his own pocket and that of a corporation half-owned by him and another corporation owned by his mother (and dominated by Wang Xiang). Interestingly, Wang Xiang had succeeded in persuading customers to pay him directly, rather than the corporation, perhaps suggesting that the theft would not have been possible in the absence of some degree of *guanxi* between Wang and the company's customers (who, after all, were aiding and abetting Wang's theft). Shanghai Hongkou District People's Court held that Wang Xiang was a senior executive of Storr-oeheld and therefore liable for breach of his duty of loyalty under Section 148. There was no further explanation. While the violation was blatant, it is worth noting that the court did not engage in any evaluation of Wang's conduct. It engaged in no integrated discussion of the law and the facts. It simply stated the law and the judgment.

As a substantive matter, it is interesting to note that Wang appealed the lower court's decision, implying that perhaps there was a legal argument that could have supported his appeal, or perhaps that he counted on relationships with lawyers and judges to reverse the judgment. This latter observation is, of course, speculation, but the fact that Wang bothered to appeal in the face of such blatant misconduct combined with the bare exposure of the facts and the spare-ness of the opinion give support to this sort of speculation.

The transplantation of fiduciary duty is more than the transplantation of a law regulating institutional design or structure. It is the transplantation of legal and social culture.

3. A Matter of Trust

It is important first to understand the functions underlying fiduciary duty and *guanxi* in order properly to analyze their relationship. They serve the same critical purpose. Fiduciary duty and *guanxi* both are systems that serve as proxies for trust where trust is difficult to establish or circumstantially irrational (Note 33).

Trust is essential to any society (Note 34). At its most elemental, trust allows us to develop personal relationships. But it does so much more. In the absence of trust, we would be unwilling to buy our food in anonymous markets. Without trust we would keep our money under our beds. Without trust, we would insist upon daily pay for our work, keep our children home from school, refuse public transportation and even our own cars, reject help from others, and even hide from our own governments. Without trust, we simply would refuse to get out of bed in the morning (Note 35).

These simple observations illustrate a problem. While the trust of one person in another -- interpersonal

trust -- is grounded in intimate, or at least reasonably good, familiarity with the other person, facilitating judgments about her character and predictions of her behavior, the kind of trust issues noted above are almost entirely impersonal. I am sure there are places in the world where the non-farmer knows and trusts the person who sells her food. But most of us, especially those of us in cities, rely almost entirely on food produced far away by people unidentified to us. While we know something about our children's teachers, schools are larger institutions than a single classroom, with most actors unknown and potential dangers rampant. I've never met a driver of my subway. The challenge to trusting should be clear. And yet we do trust.

Why? The answer begins to appear once we distinguish two different types of trust. I have already mentioned interpersonal trust, which is the kind of trust most apparent in daily life, the kind of trust that develops between friends, between parents and children, between lovers. But the kind of trust illustrated above is quite different. This is institutional trust. With institutional trust, we don't repose our confidence in specific people. Indeed this would be impossible because we have no idea who they are. Rather, we repose our trust in a particular set of institutions, a particular system designed to mitigate if not eliminate the possibility that those who aid or perform important life functions for us, those to whom, in a very real sense, we entrust our lives, will not abuse that trust to our detriment. It is the interaction of these institutions, ultimately backed up by law, that makes institutional trust possible.

Trust is essential. There is even said to be honor among thieves. But different societies develop different levels of trust. The United States is considered to be a high trust society. China is said to be a low trust society, at least with respect to institutional trust (Note 36). High trust societies are characterized by predictable individual and institutional behavior grounded in a shared set of norms and significant institutional development, backstopped at the extreme by law. By contrast, low trust societies lack this kind of predictability, have relatively weak institutions, and suffer from an underdeveloped or poorly enforced set of laws and legal institutions (Note 37).

These facts are essential to understanding the interaction between fiduciary duty and *guanxi.* Institutional trust facilitates high levels of trust. Fiduciary duty can flourish. Weak and unreliable institutions exacerbate a low trusting society and drive its members to rely upon self-protecting interpersonal trust relationships. In China, *guanxi,* not institutions, serves as the backstop for trust (Note 38).

A high level of institutional trust creates a social environment in which individual autonomy can flourish. Autonomy is more difficult to achieve in low trust societies, where the necessary reliance upon other individuals for survival creates situations of indebtedness to others (Note 39). This indebtedness serves to help bind individuals in contexts where institutions and law are less reliable backstops. *Guanxi* is a system of indebtedness arising from another's provision of the means of survival or at least of improved existence. Autonomy can be, and often is, impersonal and detached. The culture that gives rise to *guanxi* is, at its core, intensely personal and connected (Note 40).

Underlying the differences between autonomy and reliance are significant (although often overstated)

cultural differences between common law (and especially American) culture and Chinese culture. While Fei's analysis of Chinese society is one of intense selfish individualism, it is precisely that selfish individualism that drives the Chinese to construct community (Note 41), although the word selfish, with its own normative implications, can be misleading. It is more accurate to say that Chinese behavior within community is highly other-directed, deriving from the Confucian privileging of family, status, and hierarchy, while outside the boundaries of a given community behavior is indifferent at best and, from an external point of view, appears to be both selfish and even rude. American culture is noted for its individualism deriving from its privileging of autonomy, but American culture since at least the time of Tocqueville is understood to have a significant communal component as well (Note 42).

In order to understand the relationship between fiduciary duty and *guanxi* and the viability of the former in a society of the latter, it is important to understand that American community is volitional. The society described by Tocqueville is a community of joiners, exercising autonomous choice over communal affiliation, the strength of which is always determined by that same autonomous choice that provides the option to leave. Chinese community is, as at some level as are many communities, grounded organically in family, but has remained so for considerably longer than most western societies, leading to a commitment so strong that the Chinese state has often relied upon the family metaphor to sustain its position in Chinese society. Like the family, *guanxi* relies upon position and status.

Fiduciary duty and *guanxi* both are institutions that facilitate trust. Other mechanisms also serve as proxies for trust and promote autonomy. In common law systems, contract is perhaps the preeminent institution that promotes reliance upon others in a manner that facilitates mutual advantage and economic growth. Contract allows individuals to optimize autonomous self-interest backed by a legal system that compels parties to fulfill their promises. The only trust needed to make this possible is institutional trust, trust in the legal system itself, although contract, even more than trust, is also grounded in an understanding of the incentives that individuals have to be known as people who keep their promises.

Guanxi can be seen in part as contractual, although at its core its binding nature is grounded in emotional personal relationships, making it essentially extra-contractual (Note 43). Indeed, in Chinese practice, relationships (although not necessarily *guanxi*) precede the conclusion of a contract, an instrument that is brought into play only when the parties have become sufficiently well acquainted that contract is almost an afterthought (Note 44). By contrast, in common law systems, contract itself *is* the relationship and, in American jurisprudence, classically defines the entire relationship (although over time American common law has developed to allow certain situations in which contract can be evaluated in the context of the underlying relationship as developed over the course of the contract.)

Process also serves as a proxy for trust although, like contract, its success is dependent upon institutional trust. When it functions properly, process is highly impersonal, relying upon a predetermined and invariable set of techniques to ensure the dispassionate (and therefore presumably

fair) (Note 45) allocation of benefits and detriments within a given institutional structure. The presumptive fairness (and therefore trustworthiness) of process is so strong in American law that it is inscribed within the Constitution of the United States, expanded judicially, and embodied in the laws governing the federal administrative structure of the United States (and its individual states as well). Process can be seen as the foundation upon which both contract and fiduciary duty are built, and thus as essential to institutional trust. Process is a key component of many of the world's legal systems.

But in order for process to fulfill this function, it must work as designed. The best-designed process can be rendered dysfunctional by factors including personal bias on the part of those conducting the process and corruption manifested by the granting of favors for benefits, and less obvious factors like lax or variant applications of the process due to simple incompetence or laziness.

Within a strong tradition of trust, aided by contract and process, fiduciary duty can be highly effective. When the absence of these factors has resulted in the creation of a system, like *guanxi*, that serves to compensate for these gaps in a highly individual and personal way, the successful development and application of fiduciary duty appears to be unlikely.

The functions of fiduciary duty and *guanxi* as proxies for trust should be clear. It seems likely that, until Chinese legal and economic institutions achieve a level of predictability and reliability sufficient to sustain institutional trust, *guanxi* will retain significant importance. I now turn to examine each institution in some detail, considering where co-existence is possible and where it is unlikely.

4. Fiduciary Duty in American Law

Fiduciary duty is a judge-made set of standards with a long history that traces back into English equity jurisprudence. While the relationship to which fiduciary duty attaches may (but need not) be formed by contract, the doctrine sounds in tort, with duty arising as a matter of law from the very nature of the relationship in question. Simply put, a fiduciary relationship is a relationship of power and dependency where one party, the beneficiary, entrusts some portion of his business or well-being to another person upon whom he relies to manage the entrusted affairs. From power assumed and trust reposed arises the judicial imposition of a duty on the fiduciary to selflessly and carefully manage the beneficiary's affairs, in short, to manage those affairs in the best interest of the beneficiary.

Classically, fiduciary duty provided no room for the fiduciary's exercise of self-interest. While a fiduciary might be (but need not be) compensated for his service, his interest in the beneficiary's affairs was limited to the agreed-upon compensation (if any) and nothing more. Fiduciary duty had no tolerance for conflicts of interest between the parties. Even a transaction between them that would be mutually beneficial was prohibited at common law, as were any attempts by the fiduciary to benefit from the property or interests of the beneficiary, primarily because of the absolute breach of trust created by the fiduciary's actions and, secondarily, because of the difficulty of proving advantage to the beneficiary.

4.1 Fiduciary Duty in Contemporary Application

While stricter forms of fiduciary duty continue to exist, matters have changed rather dramatically in the setting of American corporate law. The broad duty of the fiduciary to look to the best interest of the beneficiary remains, but other considerations, largely practical, have led to the development of more detailed standards (and sometimes rules) that provide the fiduciary with more leeway in his dealings with the beneficiary.

Corporate directors are a model of fiduciaries in American corporate law and their governing standards are well-developed and, typically, context specific. For example, self-dealing transactions between the director and his corporation are no longer, as they once were, absolutely prohibited. Instead, the director can do his own business with the corporation provided that he obtains the disinterested approval of the remaining directors or the stockholders (procedural fairness), or that the transaction itself is entirely fair to the corporation (procedural and substantive fairness). As another example, a director might take for himself a business opportunity that could be of significant interest to his corporation as long as he discloses the existence of the opportunity and his interest in it to the remaining directors and they either approve or don't disapprove of his taking the opportunity. Finally, the board of directors of a corporation subject to a hostile takeover attempt (and thus the imminent loss of their jobs if successful) may use the corporation's resources to fend off the offer (and thus deprive shareholders of the opportunity to take it) as long as they can demonstrate to a court that its actions truly were in the best interests of the corporation and it shareholders.

Of course the law is not so simple as I've made it appear, and each of these situations is governed by a complex and well-developed body of law. But all embrace a common pattern and theme. This can be seen in a more specific example, the rule governing the situation where a corporation's director or officer enters into a contract with the corporation. Originally flatly prohibited at common law, a specific set of rules developed, first articulated in corporate charters and then embodied in legislation. Section 144 of the Delaware Corporation Law reverses the common law rule of strict voidability of such contracts if full disclosure is made by the interested fiduciary and (i) the disinterested directors authorize the transaction, (ii) the shareholders (interpreted as disinterested shareholders) approve the transaction, or (iii) the transaction is fair to the corporation at the time of authorization, ratification, or approval, a concept of fairness that has been judicially interpreted as "entire fairness" and includes both the substance and the process of the transaction (Note 46). The common law rule remains if no authorization, approval, or ratification is obtained, again transformed into an entire fairness test.

The Delaware case of *Marciano v. Nakash* (1987) provides an example (Note 47). A closely held corporation was owned equally by two families, with two brothers from each family constituting the board of directors. The corporation was in financial distress, and the Nakashes made a loan to the corporation. The Nakashes bid on the company in bankruptcy and, if successful, would have acquired the assets of the corporation as holder of the loan in default. The Marcianos challenged the transaction because the Nakashes were an interested party and, because of board deadlock, there had been no

independent board authorization, stockholder approval, or ratification of the loan. Without such action, the statute mentioned above did not apply. Nonetheless, the court determined that, as a common law matter, the transaction was entirely fair and that the Nakashes could sustain their claim as creditor. The pattern here is classic.

The pattern of the rules is consistent. Disinterested approval absolves but, in its absence, entire fairness also absolves. Underlying all of this, the fiduciary principal is clear. Directors must act in the best interest of the corporation, even in contexts in which they themselves benefit. If they fail to do so, their transactions are illegal.

Despite these developments narrowing fiduciary duty, the broad principal of fiduciary duty remains deeply grounded in Anglo-American ideas of morality. The classic American statement of the duty illustrates this:

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions… Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd (Note 48).

This basic moral principle of loyalty to the beneficiary continues to underpin the doctrine and has been deeply acculturated in American business practices (Note 49).

4.2 The Precatory and Prophylactic Functions of Fiduciary Duty

As important as the contextually developed categories of fiduciary application are, and despite the diminution of the primacy of trust represented by the use of fairness analysis, perhaps the most significant function of the fiduciary principle in American law is to guide the behavior of fiduciaries on a day to day basis to help them fulfill their obligations and to prevent breach. Litigation is rare, but conflicts of interest are common. A fiduciary of any type must constantly test her motivations in such situations against a standard that helps resolve such conflicts. It is within the interstices of litigation that the culture of fiduciary duty helps to maintain the appropriate balance.

The classic expression of this is, once again, Judge Cardozo's opinion in *Meinhard v. Salmon* (Note 50). The case involved what Cardozo described as the misappropriation of a joint venture lease renewal by the managing joint co-venturer. While the case could have been resolved in fairly straightforward terms (as it was by the dissenting judge), the language of Cardozo's opinion seems to reach flights of fancy that have amused law professors ever since. The language quoted earlier is perhaps the prime example. Who knows what "a punctilio of an honor the most sensitive" is after all? Cardozo didn't say.

But this is the point. Cardozo's prose does not allow for the drawing of a clear line. The closest he comes is when he suggests that the managing joint co-adventurer would have been ashamed had his partner walked in on him in the act of signing the renewal. This is the essence of the precatory/prophylactic role of fiduciary duty. The principle of self-abnegation is clear. There is no line to be drawn. One must consult

one's own conscience.

But, as a practical matter, lines must often be drawn. Countless opinions following Cardozo's flesh out the circumstances in which self-interest can be gratified, as in the examples I gave above. But the function of the general principle in regulating day -to -day contact is clear. One must consult a conscience developed in the context of American society, culture, and values. If not (or if one's conscience is warped), legal consequences will ensue.

5. Fiduciary Duty in China

China, lacking a common law tradition and, indeed, until relatively recently lacking a tradition of law in the western sense, adopted a statutory form of fiduciary duty in its 2005 Company Law as part of its global economic expansion, which included reforming corporate law to more closely resemble the laws with which western investors were familiar (Note 51).

Fiduciary duty first came to China as part of the major revisions to the 1993 Company Law that became effective in 2005 and included duties for controlling shareholders as well as for directors, managers, and supervisors (Note 52). The broad statement of these duties appears in Article 148, which states in part:

Directors, supervisors and senior management executives shall abide by laws, administrative regulations and the corporate charter, and have a duty of loyalty and duty of care to the company (Note 53).

The Company Law also lists a number of specific prohibited behaviors, including misappropriating corporate funds, depositing corporate funds in officials' personal accounts, lending corporate funds without shareholder or board approval, entering contracts with the company without shareholder or board approval, and taking corporate opportunities (Note 54). These specific provisions largely parallel the contextual prohibitions covered by fiduciary duty in American law. Many of these provisions had existed in the 1993 Company Law (Note 55). The major changes in 2005 included the general statement of fiduciary duties in section 148, a provision prohibiting the appropriation of corporate opportunities, and a shift from the absolute prohibition of some activities to their conditional prohibition, among others.

Despite the use of the terms "duty of loyalty and duty of care," which are fiduciary terms used in American common law, the fact that fiduciary duty appears in China in statutory form is important, and so far has discouraged Chinese judges from the kinds of creative uses of fiduciary duty that have characterized its development in the United States. This is consistent with civil law style, and partly a result of the Chinese legislature's distrust of the judiciary, which precludes the latter from examining the substance of fiduciary transactions (Note 56).

Wang provides an interesting study of 137 fiduciary duty cases (96.4% involving the duty of loyalty) decided by Chinese courts between 2001 and 2010 (Note 57). Noting the rigidity of Chinese judges in applying the law as written to the facts they determine (an intellectual impossibility, as Wang notes, but close enough), he finds a little bit of evidence of judicial creative interpretation of fiduciary duty. A

large majority of the cases were decided using specific statutory prohibitions rather than the general fiduciary prohibition of Article 148, leading Wang to conclude that judges avoid the general principal in favor of specific prohibitions. Wang found a significant number of cases that, using the more general principle, focused on specific prohibitions against the violation of laws, regulations, or the articles of association which, in his view, permits judges to avoid relying upon the abstract loyalty principle and instead to use more precisely targeted legislation. To the extent that the general provision of the duty of loyalty is applied, Wang found it to be almost entirely procedural with almost no judicial examination of the substance of transactions (i.e., fairness) (Note 58). In the few cases in which substance was examined, it involved whether a particular corporate actor was, *de facto*, a director, supervisor, or senior officer, despite his official title, and whether the transaction had violated the company's articles of association. Neither of these represents the kind of substantive examination of a transaction that is a frequent component of common law fiduciary adjudication.

Cases also sometimes cite Section 148's fiduciary duties but decide the matter on non-fiduciary grounds. *Wu Linxiang and Chen Hua'nan* v. *Zhai Xiaoming* (Note 59) provides an example. There the court merely cited and summarized Article 148 in a dispute over whether the defendant or the corporation owned by plaintiffs and defendant had the right to apply for several patents. The opinion turned entirely on the timing of the inventions and patent application without any further mention of the duty of loyalty. The fiduciary question of whether the patents, even if owned by defendant, rightfully belonged to the corporation, was not even raised.

Contrast the similar Massachusetts case of *Energy Resources, Inc. v. Porter* (Note 60). Porter, employed by Energy Resources, was given an opportunity to develop a government-sponsored project with significant profit potential. Although he initially brought the proposal to corporate management he was persuaded by a friend to establish his own corporation to take advantage of the opportunity, a possibly that existed because the government only cared that Porter work on the project, regardless of the corporation. Porter lied to his employer, telling its president that the opportunity was no longer available to the corporation, and took it himself. While the opinion could have turned solely on timing (as in the case of *Zhai Xiaoming*), the court engaged in an extended discussion of Porter's fiduciary obligations and the appropriate standards of fiduciary behavior, leaving no question whatsoever as to the fiduciary's legal priorities.

Chinese adjudicative style also suggests that the strict enforcement of fiduciary principles is unlikely to occur. Chinese adjudication has been described as a continuum of court procedures from mediation to arbitration to adjudication with judges involved throughout the entire process (Note 61), reflecting the Chinese understanding of conflict as "a particular relation among the different individuals involved" rather than "a question of the violation of abstract rules," such that adjudication is, primarily, the search for compromise (Note 62). Huang has identified this adjudicative style as characterizing Chinese legal practice in Qing, Republican, and modern China, so it appears to be deeply embedded and therefore unlikely to change any time soon. The relational style of this process of adjudication parallels in some

ways the relational nature of *guanxi* itself and does not appear well-suited to the dispassionate adjudication of fiduciary duty, which is as abstract a principle as exists in the common law canon. It is also worth noting that Chinese judges themselves sometimes adjudicate on the basis of *guanxi* (Note 63), thus emphasizing the extent to which relational thinking is embedded in the Chinese legal system.

6. *Guanxi* and Fiduciary Duty

Having analyzed the cultural and functional underpinnings of *guanxi* and fiduciary duty, as well as the way fiduciary duty is used in Chinese and American corporate law, it becomes important to compare the two concepts directly in order to evaluate the likelihood of their comfortable co-existence in Chinese legal culture.

While, as I explained earlier, fiduciary duty and *guanxi* both function as proxies for trust, *guanxi* is grounded in entirely different considerations than those that underlie fiduciary duty. And it remains, for the moment, embedded in Chinese law. Indeed Schramm and Taube describe *guanxi* as shaping Chinese legal culture (Note 64).

Guanxi has not been precisely defined nor its parameters clearly circumscribed. But it is possible to understand *guanxi* from a description of the practice. Simply put, *guanxi* is a network of bilateral relationships emanating from individuals in which two parties, often but not always hierarchically distinct, mutually benefit from the exchange of gifts and favors over the typically long life of the relationship in which the ultimate goal is long-term survival. The relationship is one of exchange, and therefore business-oriented, although the obligation of reciprocation is rarely explicit and is not required to be immediate (and in fact one who immediately reciprocates demonstrates both bad taste and a misunderstanding of the long-term relational character of *guanxi*) (Note 65). In addition to this transactional dimension, *guanxi* also includes an undeniable affective component, although the necessary depth of emotional ties is debated (Note 66), and varies with the type of *guanxi*.

Many types of *guanxi* have been identified, varying with its purpose or its structure, but three general types, based upon strength of the relationship, are helpful in assessing the likely success or failure of fiduciary duty: (i) *guanxi* involving close relationships -- essentially family relationships; (ii) *guanxi* between people with frequent interaction; and (iii) *guanxi* with little interaction (Note 67). I find it difficult to conceptualize the third category as *guanxi* in any meaningful sense as distinguished from bribery or a one-off contract and it therefore should not complicate fiduciary enforcement.

Although *guanxi* clearly has a contractual dimension, it is not contractual in the western sense. As a general matter, western business relationships arise from contract, but Chinese contracts arise from relationships. While it is certainly true that American contracts often become relational (Note 68), the Chinese priority of relationship allows for the growth of affective ties before business is commenced. While the American notion of relational contracting describes a process of adjustments within the contractual relationship, *guanxi*, preceding as it does the contract, surrounds and extends around the contractual relationship. Thus the “relational” dimension of American relational contracting occurs

within the boundaries of contract (although it may lead to the informal modification of contractual terms), while Chinese contracts are engulfed within the *guanxi* network, which is temporally prior. Instead of the relationship serving as a subset of the contract, the contract serves as a subset of the relationship.

A fiduciary relationship also can be prior to contract. Indeed, the fiduciary "contract" is implied in law once the required relationship of power and dependency appears and thus need not be created intentionally. But that relationship can and, in the business context, typically does, form in an entirely bloodless manner. There is no affect in the relationship (or at least no necessary affect), and the fiduciary's sense of obligation arises from the demands of the law, not from the parties' agreement to such a relationship. Furthermore, unlike the process of Chinese contracting described above, the fiduciary contract is unilateral and rigid in its requirements. As has been seen, the *guanxi* relationship that engulfs the contract is bilateral and flexible.

Fiduciary duty and some types of *guanxi* are hierarchical. But the similarity ends there. As I noted above, fiduciary duty arises from a volitional relationship of power and dependency. *Guanxi* relationships often exist between pre-determined social superiors and social inferiors (Note 69). The fiduciary relationship is hierarchical in the sense that the fiduciary possesses sole legal power to conduct the relationship, tempered only by its equitable obligation to the beneficiary. *Guanxi*, on the other hand, is grounded in the understanding that the social inferior can (and must) provide benefits to his hierarchically superior *guanxi* partner, as well as the reverse. This is not just another way of saying, as I mentioned earlier, that fiduciary duty is unilateral and *guanxi* is bilateral. Rather it goes to the very heart of the social nature of the relationship.

While I have been arguing that *guanxi* can interfere with fiduciary compliance, this hierarchical dimension of *guanxi* underscores the difficult fit with fiduciary duty, especially in cases where, as is often the case, the direction of material giving is from inferior to superior. This may be exacerbated by the fact that high-level corporate fiduciaries of the type typically involved in significant breaches are unlikely to have, or to have many, hierarchical superiors within the organization with whose orders they must comply, leaving the fiduciary/*guanxi* partner more latitude in satisfying his *guanxi* obligations. Add to this the observation that has often been made, that *guanxi* is rooted in survival concerns, and its potential to override fiduciary duty becomes apparent.

None of this might matter terribly much if the corporation were the beneficiary of its fiduciaries' *guanxi*. Were this case, *guanxi* might balance with fiduciary obligation if it were deployed in a manner that benefitted the company as well as the individual (Note 70) and could be evaluated in a manner similar to the contemporary fairness metric of fiduciary duty. Thus the fiduciary could receive the benefits of *guanxi* within the corporate setting as long as the result was fair to the corporation, as might be the case in a self-dealing transaction (or, in the *guanxi* case, a corporate deal with the fiduciary's *guanxi* partner). Zhang and Zhan describe the various ways in which an organization might benefit from its employees' *guanxi* although, as they recognize, *guanxi* is and remains a personal asset (Note

71). Their argument is certainly plausible under normal conditions, and is consistent with the ordinary expectation that employees use their talents to the benefit of the organization (although ordinarily employees are not expected to devote their personal property to the organization). But they do not discuss the *guanxi* "owner's" expected behavior when her interests (or those of her *guanxi* partner) conflict with those of the organization. Under such circumstances, the organization (and thus fiduciary duty) will almost certainly lose.

Guanxi and fiduciary duty might also be reconciled if the fiduciary could, as some have suggested is possible, somehow transfer her *guanxi* to the corporation and were willing or obligated to do so (Note 72). This would, essentially, re-characterize the fiduciary's use of *guanxi* within the business context as something of a corporate opportunity. But, unlike a corporate opportunity, it appears to be clear that *guanxi* is owned (for want of a better term) by the individual (Note 73), and is an asset built by the individual over time (and for the long-term). Moreoever, *guanxi* transfer would only be possible with the *guanxi* counterparty's consent, and powerful incentives maybe necessary to break a trust relationship for one that is uncertain.

Lee and Dawes describe three cases in which individual managers built *guanxi* networks with their corporations' business partners and then left their corporations, taking these customers with them (Note 74). It is hard to imagine a person who has already built a beneficial *guanxi* relationship sacrificing that asset for the corporation, at least without very significant compensation (and again assuming that the *guanxi* partner would consent to the transfer, an unlikely proposition given the centrality both of trust and long term sunk capital to *guanxi*) (Note 75).

In light of the personal nature of *guanxi* and its affective components, it is difficult to imagine that such a transfer would even be possible. The concept of organizational *guanxi* seems to involve a fundamental conceptual shift because *guanxi* is characteristically defined in terms of the personal nature of the relationship. While it is of course true that, in practice, organizational *guanxi* would exist between individuals -- employees of each firm involved -- those individuals act within the context of their highly constructed roles as corporate representatives and thus are constrained from acting upon the full range of human motivations and emotions that exist outside that context.

Such a transfer, even if possible, would be highly unstable. In the first place, as I have noted, the role and legal constraints on corporate actors would necessarily diminish the deep trust that helps to sustain *guanxi* relationships since the fiduciary's *guanxi* partner will know that the fiduciary will sometimes be obligated to act inconsistently with the *guanxi* relationship if it serves the corporate interest for him to do so. Second, *guanxi* is a relationship that takes time to develop, involves significant sunk costs, and is expected to last over the long term (Note 76). Corporate employees often change jobs. Even if the affective component of *guanxi* were relatively low within the context of a given relationship, the trust between the parties developed in the course of the relationship could not readily be transferred to another person.

These problems are almost certain to exist in type one *guanxi* relationships that are personally close,

but the same problems should be expected in type two *guanxi* relationships, those involving frequent interaction. Frequency of interaction need not necessarily imply frequency of exchange, but it does imply greater familiarity and, likely, affect, than the occasional interactions in type three *guanxi* relationships.

Type three *guanxi* relationships, if they are indeed *guanxi* relationships, should present no problems for fiduciary enforcement at all. As Zhang and Zhan describe this type of *guanxi*, it is transactional, not relationship dependent (except for the transaction itself), can and often is one-off, and requires immediate compensation (in contrast to other *guanxi* relationships where payback occurs over time) (Note 77). It is difficult to see how this type of relationship even can be categorized as *guanxi* and neither Zhang and Zhan, nor others who have described this as a form of *guanxi* (Note 78) make any significant attempt to identify the commonalities between this type of relationship and the other characteristics of *guanxi*. Rather, this type of relationship looks like nothing more than an ordinary contract (or, in the worst case, bribe) without the accompanying long-term and affective characteristics of *guanxi* relationships and should present no more difficulties with fiduciary enforcement than does any other type of bilateral transaction.

The challenges to the effective deployment of fiduciary duty in Chinese law are clear, but it is possible to explore how fiduciary duty might operate in the context of a *guanxi* society (Note 79). To do so, I return for illustration to the types of corporate transactions to which fiduciary duty applies. Settings for fiduciary conflict include mergers and other control transactions, self-dealing, corporate opportunity, executive compensation, insider trading, and the special problems of closely held corporations.

Mergers and control transactions are quite rare in the life of a given corporation. For a number of additional reasons (including their size and the resources necessary to carry out such a transaction), the likelihood of *guanxi* interfering with fiduciary obligation at the shareholder level may be remote, especially in the case of large public corporations with dispersed shareholders. Matters may be different at the official–to-official level, where side deals might lead to the diminution of shareholder compensation or even a disadvantageous choice of merger partners. Chief among the *guanxi* risks in public corporation mergers is insider trading (which is conceptually grounded in fiduciary duty), where the corporate fiduciary tips off his *guanxi* partner to the pending transaction (Note 80). It is difficult to see how fiduciary duty would ameliorate this problem.

While interaction between *guanxi* parties does not necessarily occur within the boundaries of a single corporation (the relationship might run between a corporate insider to corporate outsider), *guanxi* relationships within the corporation can raise additional problems to those mentioned above (Note 81). Compensation and promotion are the most obvious of these. Chen and Chen (2009) suggest that changes in incentive structures, from *guanxi* based to purely merit-based, for example, could help to reduce the negative externalities created by intra-corporate *guanxi* (Note 82). This may well be true in the employment context as long as the metrics of merit are clear, transparent, and objective, but given the Chinese penchant for hierarchical control and limited disclosure of information, the cultural change

necessary to achieve this may be slow in coming. More important, while it may be helpful in the lower ranks of the executive hierarchy, establishing clear metrics to measure the success of individual top executives is difficult and the problem is even greater when it comes to compensating directors. In this context, *guanxi* and fiduciary duty run into similar types of problems, although *guanxi* implies favoring your friends (as does compensation of senior executives) but board compensation implies favoring yourself. In the latter case, a straightforward fiduciary application of the prohibition against self-dealing might suffice.

The type of corporation involved is important. *Guanxi* fulfillment in the context of the large public corporation might be more restrained than with respect to smaller and, especially, closely held, corporations because of greater market transparency, more attenuated relationships and, perhaps, more standardized monitoring structures. While Chinese corporate governance laws are not yet terribly effective at monitoring fiduciary behavior (Note 83), securities regulation provides a partial substitute as does the presence of a disciplining parallel-to-management Communist Party infrastructure within state-owned enterprises.

Generalizing from these contexts and returning to the cultural embeddedness of *guanxi* discussed above, fiduciary compliance in the public corporation may be threatened by a deeper cultural issue. It is well-established that Chinese interpersonal behavior is highly relationship-dependent. Other-regarding behavior in China principally is reserved for relatives, friends, and others with whom one is in a relationship. Acknowledging this, one can readily see why fiduciary duty may be difficult to establish in the public corporate setting. To the extent the duty is owed to the corporation, it is owed to an entity with which a human being has nothing resembling a personal relationship. Of course humans animate the corporation but, as I have earlier pointed out, the legal and practical role constraints on their behavior limit the full flowering of the kind of relationships that are likely to sustain *guanxi*. When acting within the corporation, these humans – should they comply -- are obligated to act for the corporation.

A different but perhaps even more insurmountable problem occurs to the extent that the duty is owed to shareholders. From a corporate fiduciary’s perspective, public shareholders are nameless and faceless. Performance of the duty owed to them depends upon the ability to universalize (at least within the universe of shareholders) one’s duty and behavior. It would require significant cultural and attitudinal changes that are unlikely to happen and may, in any event, be culturally undesirable, for Chinese fiduciaries to have the same perspective as their western counterparts.

The universal/particular distinction could well cause a different sort of fiduciary problem in listed state-owned enterprises. The public shareholders remain faceless and anonymous. But the corporation does have a controlling shareholder (although the controlling ownership structure of state-owned enterprises is often quite complex.) (Note 84) This presents a fiduciary problem that is similar to that presented in controlled corporations in common law countries, a problem that is handled by American law by the independent review/entire fairness structure described in Part III.

On a practical level, the problem is more complicated in China. Corporate fiduciaries in SOEs

(including listed SOEs) must satisfy the party-state and, indeed, there exists within the management structure of even listed SOEs a parallel management structure established and populated by the Chinese Communist Party. As a practical matter, it is necessary for the fiduciary to keep the party satisfied in order to keep her job, which may well require the fiduciary to act in a manner that disfavors public shareholders (but satisfies both political and *guanxi* relationships) and thus in breach of her fiduciary duty. In the American context, unless the controlling shareholder is an individual or itself an individually- controlled corporation, the controlling shareholder will be represented by the relatively more abstract corporate structure and bureaucracy. In contrast, the Chinese structure gives a face (faces) to the controlling shareholder, partly as a result of the embedded party structure, and thus facilitates the development of the affective component of *guanxi*.

Finally, a relationship with the state in Chinese thought goes well beyond the generalized and universal western notions of relationships with the state (at least the American notion in which one's attitude toward the state is universal within the American universe). The state has a familial role in Confucian thought, a role that the CCP has tried to capture for itself. Without putting too fine a point on it, the Chinese story is obligation to the state (in sharp contrast with American thinking in which the state is obligated to, and subjugated by, the people), creating at least the appearance of a relationship.

Privately-owned enterprises (whether publicly held or closely held) have their own survival concerns at stake, which require good relationships with state actors. Milhaupt and Zheng argue that the best predictor of government favor towards private corporations is the success of the latter (Note 85). That success itself might well be dependent upon access to state favors, with success as the *guanxi* payback. Of course success might obviate complaints about fiduciary issues (although it does not eliminate those issues) but there also could be significant fiduciary problems on the road to that success (and which might even impede ultimate success). In any event, there is no reason to expect *guanxi* to cause fewer fiduciary problems in privately owned enterprises and, indeed, research has shown that problems such as the tunneling of assets are considerably more significant in private enterprise than in SOEs.

Closely held corporations have long posed special fiduciary problems in the U.S., and the same is true in China. Indeed Wang found that the overwhelming number of cases brought under the generalized duty of loyalty involved closely held corporations (Note 86). These problems often arise within the corporation itself rather than between the corporation (or a corporate fiduciary) and a third *(guanxi)* party. By definition, the close corporation has few shareholders, most (if not all) of whom are involved in management, and expect to realize the principal returns on their investments in salary and benefits rather than in the eventual sale of their stock. Indeed that stock, at least from the perspective of an individual shareholder in contrast to the shareholders as a group, typically is unsalable unless the seller is a controlling shareholder (and the sale of close corporation control stock also presents its own special fiduciary problems). All of this creates a context in which the shareholders are highly dependent upon mutual good will in order to receive the benefits of ownership. American case law is rife with examples of several minority shareholders combining to control the corporation to the disadvantage of the

minority. One can imagine that these problems would be compounded in China to the extent that individual shareholders begin with (probably undisclosed) *guanxi* or develop *guanxi* in the course of building their businesses.

In addition to these special fiduciary problems existing in close corporations, *guanxi* relationships between some of the close corporation fiduciaries and not others could well lead to greater self-dealing and corporate opportunity problems (Note 87). And the tendency to identify close corporation assets with one's own (or at least to think of the corporation as to some degree having common identity with one's self) may lead the close corporation fiduciary to be more free with corporate assets in a *guanxi* relationship with an outside party than would be the case in a publicly held or state-owned corporation. For example, in the classic case of *Wilkes v. Springside Nursing Home* (Note 88), three of the four director/shareholders (with the hint of some pre-existing relationship between at least two of them) combined to oust the initial promoter from the board and from all corporate benefits because of common interests not shared with the promoter. Prior to the resignation of one director and the addition of another (the implicit relationship partner) the relationship among the director/shareholders seemed balanced and caused no fiduciary problems. If personal relationships can cause significant fiduciary problems in a system infused with fiduciary ethic, fiduciary duty seems to stand little chance for success in a society of *guanxi*.

It should be clear that the practice and enforcement of fiduciary obligation faces special challenges in China (as it would in other heavily Chinese ethnic populations in which the practice of *guanxi* is embedded.) While there appears to be no enforcement problem when the fiduciary merely favors himself over the beneficiary, the presence of *guanxi* partners whose interests must be satisfied leads to the conclusion that when fiduciary obligations and *guanxi* obligations conflict, fiduciary duty will lose out. So while there appears to be a role for fiduciary duty in China, that role is limited.

There is, however, a problem that must be solved, although the solution may require both greater development of fiduciary duty in Chinese courts (which may not occur given the adjudication system) and empirical research regarding the relationship of fiduciary duty and *guanxi* (which, as many of the sources cited here reveal, has been attempted but is difficult given the closed *guanxi* relationship). That problem is that fiduciary duty is increasing talked about in Chinese law and legal circles, giving it some sense of presence. But it is very unlikely that *guanxi* will disappear in the foreseeable future, it at all. If fiduciary duty is going to coexist with *guanxi* beyond the simple self-dealing context (which itself does not present a *guanxi* problem), accommodation must be made.

I have explored ways in which *guanxi* might be shared within corporate contexts but, after analysis, it does not seem within the nature of *guanxi* to permit such sharing. Outright prohibition of *guanxi* may be both undesirable and impossible. My tentative conclusion is that fiduciary duty should be removed from Chinese statutory law and indigenous concepts of responsibility should be permitted to flourish on their own terms (Note 89). The specific prohibitions in Article149 should be sufficient to eliminate major self-dealing problems (Note 90).

7. Conclusion

It remains to be seen, and is beyond the scope of this paper, whether recognizably western fiduciary duty will succeed in the face of Chinese cultural norms. Chinese radical individualism, as it has been described, might further complicate enforcement, but perhaps in no more significant a manner than ordinary rule of law concerns are raised in a nation whose history and culture have yet fully to embrace the concept of rule of law.

It also remains to be seen whether the problem of *guanxi*, if it is indeed a problem (apart from the fiduciary context and the limit case of bribery which typically occurs in type three *guanxi* relationships), fades as China develops economically. Some have suggested that this is a likely occurrence (Note 91), although the larger and, in my view, more convincing view, is that *guanxi* is so deeply embedded in Chinese culture that its disappearance will be a long time in coming, if at all.

All of this raises the fundamental question of why China should be keen to embrace western legal norms when such norms are so clearly inconsistent with its own. The standard argument, at least in corporate law, is that the adoption of western norms and practices will reassure foreign investors that investing in China presents legal risks that are no more serious than investing in western countries. But if transplantation doesn't work, proclaiming the existence of the law is not only misleading but also has the potential to hinder the evolution of effective business forms that are uniquely suited to Chinese culture and practice. Only recently have western scholars begun to recognize that western business forms are not necessarily universal and do not necessarily present the best institutional arrangements in other cultures (Note 92). Only when we understand the misfit of western legal norms in Chinese practice at a deep cultural level can we turn our attention to assisting with the task of building the kinds of institutions and creating the types of governing norms that will work effectively and efficiently in China.

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Notes

Note 1. Company Law of the People's Republic of China (公司法 Gongsi Fa) (promulgated by the Standing Comm. Nat'l People's Cong, October 27, 2005, effective January 1, 2006), P.R.C. LAWS148.

Note 2. Evidence is provided by the twenty-four papers on fiduciary duty presented on October 26 and 27, 2019, at the 21st Century Commercial Law Forum, 19th International Symposium, at Tsinghua University, Beijing, China. (Unpublished papers on file with the author.)

Note 3. *Ibid.*

Note 4. Wang (2015), p. 77.

Note 5. Xu et al. (2013), p. 57.

Note 6. Herrmann-Pillath (2010), p. 325.

Note 7. *See infra*, Part III.

Note 8. Indeed almost all of the cases I read involved self-dealing.

Note 9. Please note that I am making no normative judgment about *guanxi*. There are highly beneficial dimensions to it as well as negative dimensions, like almost any other social practice. Regardless of one's view of *guanxi*, it exists and must be understood.

Note 10. The Chinese Securities Regulatory Commission plays a significant role in regulating listed companies. Nicholas Calcina Howson, *Twenty-Five Years On – The Establishment and Application of Corporate Fiduciary Duties in PRC Law*, Tsinghua Papers, *supra* note ___. (unpublished manuscript on file with the author), September 2019.

Note 11. Howson argues that a form of fiduciary duty was practiced in China before the 2005 amendments and that the inclusion of fiduciary duty in the statute is therefore not really a transplant. Howson (2018), p.193. Wang argues that the inclusion of fiduciary duty in the statute permits courts to impose civil tort liability on officers and directors, which they previously were unable to do. Wang (2017), p.185. It is not my goal here to debate this question. Accepting that some form of fiduciary-like duty predated the 2005 statutory amendments in the courts, the tension between fiduciary duty and *guanxi* remains an issue.

Note 12. Pistor & Xu (2003)

Note 13. *Ibid.*

Note 14. Pistor et al. (2003), p. 791; Miller (2003), p. 839. Related to this literature is the legal convergence debate, which itself primarily is focused on economic and financial institutions. Leading examples include La Porta (1998), p. 1113; La Porta (1997), p. 1131; Gordon (2004), p. 382; Pistor (2002), p. 791; Teubner (2001), p. 417.

Note 15. There is an argument that some western European nations have developed a (weaker) analog to fiduciary duty. Geller & Helleringer (2019). Pistor et al., *supra* note ___, show actual transplantation of fiduciary duty in civil law countries.

Note 16. Fei (1947); Sun (2016), p. 72.

Note 17. Classic statements include Miller (1995), p. 435; Riesman (1967), p. 36.

Note 18. Fei, *supra* note __.

Note 19. Herrmann-Pillath, *supra* note ___ *at* 15 describes *guanxi* itself as "in fact an individualistic phenomenon. . . ."

Note 20. Chen & Chen (2009).

Note 21. Meinhard v. Salmon, 249 N.Y. 458.

Note 22. Fei, *supra* note __.

Note 23. Xu et. al. *supra* note ___.

Note 24. Zhao & Yang (2009), p. 116, provides an interesting critique both of this essentialization and the interactions of universalism and particularism between western and Chinese culture. My sparse description of character masks many subtleties and similarities and is the subject of significant debate. Jilin Xu, Universal Values or Chinese Values?: Historicist Thought in Contemporary China, 2011 Journal of the CIPH 0 provides an interesting historicist critique of the concept of universalism and

shows the complexity of the distinction in the context of modernization. It is not my goal, here, to engage in extended analysis of national characters, so I use this broad distinction for purposes of analysis.

Note 25. The case of Wu, Linxiang & Hua'an Chen v. Zhai, Xiaoming provides an example. Wu, Linxiang & Hua'an Chen v. Zhai, Xiaoming, SUP. PEOPLE'S CT. GAZ, 2008(1).

Note 26. Potter (2002), p. 179; Li (2018), p.634. Li describes two cases in which a lawyer and a auctioneer who sought commissions from a judge tried to develop (in one case successfully) *guanxi* relationships with the judges.

Note 27. Huang (2006), p. 135; Huang (2006), p. 275.

Note 28. Guthrie (1998), p. 254. Keay and Zhao argue that *guanxi* continues to play an important role in China's economic development. Keay & Zhao (2017), p. 376. *See also* Mayfair Yang (2002), p. 459 (challenging the notion that the practice of *guanxi* will decline with China's economic development); Su et al. (2007), p.304 (prediciting that *guanxi* will retain its legitimacy as an organizing principle of Chinese business because of its rootedness in Chinese collective society).

Note 29. Cardozo (1921) says that frequently a judge knows the proper resolution of a case simply after the presentation of facts.

Note 30. Xu et al., *supra* note ___; Han et al. (2018), p. 463-88.

Note 31. Note, *Chinese Common Law?: Guiding Cases and Judicial Reform*, 129 Harvard L. Rev 2213 (2016). There is no Guiding Opinion regarding fiduciary duty.

Note 32. Shanghai Yifeng Trading Co. v Storr-oelheld Trading Company ,9011 Shanghai Hongkou District People's court (China), (2016).

Note 33. Keay & Zhao, *supra* note ___, at 390, claim that *guanxi* can both promote and harm trust. They also argue that *guanxi* "assumes some of the functions of a legal system."

Note 34. Helpful and insightful discussions of trust in its various dimensions can be found in Baier (1986), p. 231; Barber (1983); Dasgupta (1988); Dunn (1980); Frank (1988); Diego Gambetta, *Mafia: The Price of Distrust*, in Gambetta, *op. cit.*; Luhmann (1979); Rotter (1980), p.1; Bernard Williams, *Formal Structures and Social Reality*, in Gambetta , *op. cit.*; Williamson (1993), p. 453.

Note 35. Luhmann, *supra* note ___.

Note 36. Hopkins (2012), p.120; Herrmann-Pillath (2010), p. 325 examines data from the World Value Survey that challenges the general conception that China is a low trust society, finding just the opposite. Drilling down a bit, he shows that the principal level of high trust is in acquaintances, whereas low trust manifests in relationships with strangers as well as foreigners. Herrmann-Pillath's distinction does not affect my analysis because the broader low-trust dimension of Chinese society is the relevant dimension. Ozer et al. (2014), p. 2435-47(attributes the finding that Chinese spontaneous trust is relatively low to its collective social nature creating in-group bias), 2453 (noting China's lesser institutional development in relation to trust). *See also* Yamagishi & Yamagishi (1994), p. 129 (Japanese trust through relationships whereas Americans trust in general).

Note 37. Fukuyama (1995).

Note 38. Fahr et al. (1998), p. 471 find that *guanxi* is "extremely important in establishing trust between executives of different companies.

Note 39. Herrmann-Pillath, *supra* note __ at 15-17, describes *guanxi* as an "individualistic category of moral behavior" and observes that its practice facilitates individualism.

Note 40. Herrmann-Pillath, *supra* note __ at 14 ("Thus, one core element of *guanxi* is the emotional basis, which is at the same time the foundation of trust, and needs confirmation by the fulfillment of the instrumental relation."); Keay & Zhao, *supra* note ___.

Note 41. Fei, *supra* note ___; Herrmann-Pillath, *supra* note ___.

Note 42. Tocqueville (2002), pp. 1835-40; Herrmann-Pillath, *supra* note __ at 16.

Note 43. Lee & Dawes (2005), p. 28; Herrmann-Pillath, *supra* note ___; Provis (2008), pp. 57-68.

Note 44. Szto (2013), p. 1 describes the circumstances under which Chinese contracts typically are formed.

Note 45. Rawls (1971).

Note 46. Delaware General Corporation Law, Section 144; *Weinberger v. UOP, Inc*. 457 A. 2d 701(1983).

Note 47. Marciano v. Nakash, 535 A.2d 400 (1987).

Note 48. *Meinhard v. Salmon*, 249 N.Y. 458. (1928).

Note 49. In a recent paper, Bratton argues that the erosion of fiduciary obligation in Delaware law makes no important practical difference because self-dealing is no longer a significant economic problem. William W. Bratton, *Reconsidering the Evolutionary Erosion Account of Corporate Fiduciary Law,* Tsinghua Papers, *supra* note ___ (unpublished paper on file with the author). I believe the underlying reason is that fiduciary standards have become so deeply ingrained in American business practice that strict standards may no longer be necessary.

Note 50. *Meinhard, supra* note ___.

Note 51. It has been suggested that common law-style legal development would work well in China, a topic I hope to explore in future work. At the moment, however, its legal system is civil.

Note 52. Sun, *supra* note x.

Note 53. Company Law of the PRC (Gongsi Fa), Article 148 (2005), *supra* note ___.

Note 54. Company Law, *supra* note 1, Article 149.

Note 55. Indeed Howson argues that a form of fiduciary duty existed in China prior to the 2005 amendments. Howson, *supra* note __.

Note 56. Wang, *supra* note x.

Note 57. Wang, *supra* note __. Xu, et. al., find that 88% of the duty of loyalty cases they examined involved straight-forward conflicts of interest. Xu, et al., *supra* note x.

Note 58. This approach is consistent with the cases I have read.

Note 59. Wu, Linxiang & Hua'an Chen v. Zhai, Xiaoming, *supra* note ___.

Note 60. Energy Resources, Inc. v. Porter, 461 N.E. 2d 1250 (1984).

Note 61. Huang (2006), p. 135; Herrmann-Pillath, *supra* note ___.

Note 62. Herrmann-Pillath, *supra* note ___.

Note 63. Li (2018), p. 634.

Note 64. Matthias Schramm & Mark Taube (2003).

Note 65. According to Kipnis, immediate repayment destroys *guanxi*. Andrew Kipnis, Practices of *Guanxi* Production and *Ganqing* Avoidance, in Gold et al. (2002).

Note 66. Lee & Dawes, *supra* note x; Herrmann-Pillath, *supra* note ___; Provis, *supra* note x.

Note 67. Dunfee & Warren (2001), pp. 191-204; Lin (2011), pp. 441-51; Zhang & Zhang (2006), pp. 375-92.

Note 68. Gordon (1985), p. 565.

Note 69. Lin, *supra* note ___.

Note 70. Dunfee & Warren, *supra* note ___.

Note 71. Zhang & Zhan, *supra* note ___.

Note 72. Chang & Lii (2005), pp. 215-22; Park & Luo (2001), pp. 455-77.

Note 73. Fan (2002), p. 371; Chen & Chen, *supra* note ___.

Note 74. Lee & Dawes, *supra* note ___.

Note 75. Chang & Lii, *supra* note ___.

Note 76. Lin, *supra* note ___.

Note 77. Zhang & Zhang, *supra* note ___. Indeed, Li makes the insightful point that *guanxi* is distinguished from other, often corrupt, exchange relationships because "*guanxi* facilitates and exchange where the *intention to exchange* is concealed by exchange parties from each other. Li, *supra* note ___ at 3.

Note 78. Dunfee & Warren, *supra* note ___.

Note 79. Lin (2013), p. 39, 64, 71, shows that a majority of independent directors in Taiwan had a *guanxi* relationship with the controlling shareholder or other corporate insiders and that such relationships were "commonplace" in Chinese corporations, thus raising another significant question about the efficacy of fiduciary duty in the face of *guanxi*.

Note 80. *But see* Xi (2008), p. 407(arguing that controlling shareholder fiduciary duty (adopted by the Chinese Securities Regulatory Commission but not the national legislature) has been an ineffective protection for minority shareholders of Chinese listed companies and also that a common method of obtaining disproportionate gains is insider trading).

Note 81. American intra-corporate fiduciary duties are complicated by the intrinsic issue of structural bias in boardrooms populated by acquaintances if not friends and directors from similar backgrounds Cox & Munsiger (1985), p. 83, a problem only slightly alleviated by the substantial presence of so-called independent directors.

Note 82. Chen & Chen, *supra* note ___.

Note 83. Xu et al., *supra* note ___.

Note 84. Milhaup & Lin (2013), p. 697.

Note 85. Milhaupt & Zheng (2015), p. 665.

Note 86. Wang, *supra* note x.

Note 87. Corporate opportunity doctrine appears much less strict in China than in the US. For example, in *Lin Cheng'en v. Li Jiangshan* (2014) the court ruled that a fiduciary could take an opportunity open to all other businesses (and not offered exclusively to the fiduciary's corporation) in the absence of fraud, deception, "or other devious measures." American law only requires that the opportunity fit the definition of corporate opportunity and be taken by the fiduciary without prior offer and rejection by the fiduciary's corporation.

Note 88. Wilkes v. Springside Nursing Home, Inc. 353 N.E. 2d 657 (1976).

Note 89. As I noted earlier, Howson provides strong evidence that something like fiduciary duty had been developing in Chinese law long before its statutory enactment. Howson, *supra* note __.

Note 90. Company Law, *supra* note 1 at 149.

Note 91. Guthrie, *supra* note ___.

Note 92. Pargendler (2020)