

How to Adopt and Develop Anglo-American Concept of Fiduciary Law in a Civil Law System : A Korean Perspective

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Abstract

This article investigates the question whether and how to adopt and develop Anglo-American concept of fiduciary law in Korea. It is desirable and possible for Korean legislature and courts to implement Anglo-American concept of fiduciary principles in Korean private law in order to legally protect people's trust and confidence in others, particularly in a conflict of interest situation. The question is how to adopt and develop the concept in Korean private law. After reviewing previous piecemeal implementation efforts of Korean legislature, I argued here that systemic adoption of fiduciary principle is preferable, and three legislative steps for the systemic adoption are proposed : (1) Adoption of the principles in the Korean Trust Act as a source of developing fiduciary law, (2) Adoption in the Korean mandate law as a springboard to apply the concept to 'standard' relationship of trust and confidence, and (3) Adoption in the Korean law of management without obligation as means to cover 'residual' 'fact-based' relationships of trust and confidence. It is also proposed that although alien to civil law system, Anglo-American fiduciary principles can be interpreted and positioned as an applied sub-set of the supreme principle of good faith and sincerity when they are accommodated in the Korean mandate law or in the law of management without obligation. The supreme positioning of the fiduciary principles in the Korean private law system will more encourage willing Korean judges to exercise judicial discretion with flexibility.

I. Introduction

How can the courts legally protect entrustor's trust or confidence in, or dependency upon, others, particularly in a conflict of interest situation? While Anglo-American courts have responded to this problem by developing a separate area of law called *fiduciary law*,¹ Korean courts have not fully

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answered the question yet: the result is that there will be less or least legal protection for entrusting trust or confidence in, or dependency upon, others. Perhaps, the same is true to other courts in civil law countries. This article explores the hypothesis that it is desirable and possible for Korean courts to protect people's trust or confidence in others through the adoption of Anglo-American concept of fiduciary law and exercising judicial discretion in the name of fiduciary duties. In particular, I will investigate the question whether and how to adopt and develop the fiduciary principles in Korean private legal system. In the coming sections, I will deal with following issues in detail.

- (i) Whether to adopt, and how to formulate the substance
- (ii) Definition and scope of fiduciary law in this article
- (iii) Previous efforts to implement fiduciary law in Korea
- (iv) New Korean moves to develop fiduciary law
- (v) Proposal to structure systemic adoption in Korea
- (vi) How to adopt fiduciary duty in 'Mandate Law'
- (vii) How to adopt fiduciary duty in 'Law of Management Without Obligation'
- (viii) Positioning of Fiduciary law in Korean Legal system : Fiduciary Law as Concrete Subset of Supreme Principle of Good Faith and sincerity

II. Fiduciary Law : Whether to adopt in Korea? How to formulate its substance?

1. Judicial Discretion v. Statutory Interpretation

Why are introducing and developing Anglo-American concept of fiduciary duties and granting judges flexible discretion so important in Korea? Because Anglo-American fiduciary law gives judges judicial discretion, and judicial flexibility could lower overall agency costs by filling the gap.² In common law countries, the principle of fiduciary law has been developed separately by the chancery court as opposed to the common law court and plays a pivotal role in regulating with flexibility situations involving conflicts of interests or discretionary powers. On the other hand, in civil law countries, there is no equivalent *principle* of fiduciary law. Instead, there are isolated *specific provisions* dealing with conflicts of interests such as prohibition of self-dealing and

¹ For the definition of "fiduciary law", "fiduciary duty" or "fiduciary remedy", see III. 1. and 2.

² For judge's gap-filling role through fiduciary law, see III. 1. (3)

prohibition of competition with the principal, etc.

Although these scattered provisions may play a similar role in regulating conflict of interests or discretionary powers, I argue that there exists a significant difference between the two regimes, and that powerful judges armed with flexible fiduciary law would do a better monitoring or guarding job by undertaking “gap-filling” mechanism in private law which could lower overall agency costs: while the chancery court has inherent and unlimited discretion in recognizing the fiduciary status of a person in a conflicting position and in granting flexible fiduciary remedies, the civil law courts have to resort to relevant statutory provisions and are inevitably subject to the limitation resulting from the statutory interpretation of those provisions, and the available remedies are normally limited to damages only.

The deficiency of the *principle* of fiduciary law in civil law system may be overcome in part by well-prepared statutory provisions that give same effect as fiduciary law under common law, including codified no-conflict rule, and no-profit rule. In particular, in respect of *status-based fiduciaries* (ie. those who are designated as fiduciary on the basis of a particular position of trust and confidence they hold, for example, a director, a lawyer or a fund manager),³ it is possible for civil law countries to overcome the deficiency by a similar fiduciary-finding through well-prepared statutory provisions regarding that position, and civil law courts’ active role in interpreting those statutes. But, in respect of *fact-based fiduciaries* who are designated as a fiduciary on the basis of a particular circumstance in which relationship of trust and confidence develops, it seems nearly impossible for civil law courts to give similar effect to the relationship as a fiduciary relationship. I wish to explore the hypothesis that unless the fiduciary and equitable principles are introduced systemically as a whole, and accompanying equitable remedies are recognized as a general remedy,⁴ there is an inherent limitation for civil law countries to solve problems involving conflict of interests or discretionary powers.

2. Necessity of Fiduciary Law in the context of controlling *chaebol* conglomerates

In particular, the principle-based regulation in the name of fiduciary law is urgently necessary in Korean corporate law context. Unlike US corporations where managers dominate, and ownership is

³ For the categories of fiduciaries, see III. 2. (3)

⁴ For Korean way of systemic adoption of fiduciary law, see VI. and VII.

separable from control, Korean corporations are dominated by shareholders and there are always ‘owner-managers’ even if the corporations are diffusely-held. They are called *chaebols*: Although dubbed ‘owners’ of Korean conglomerates, their average shareholding in the entire group is merely 5%, but they control the whole group through complex ‘circular shareholding’ mechanism and ‘majority rule’ in shareholder resolutions: Korean courts have not successfully applied a version of *Speiser v Baker*.⁵ Not surprising, the board of directors who are appointed by the ‘owners’ tend to act on behalf of their ‘owners’ rather than the collective shareholders. To overcome this unequal situation, the Korean judiciary should be equipped more powerful means to control these overwhelming ‘owners’. The adoption of broad loyalty concept and granting Korean judges flexible discretion in applying the fiduciary duties can help them guard minority shareholders from the *chaebols*.

3. How to Formulate Fiduciary Concept: *Principle*-Based formulation v *Rule*-Based formulation

Assuming that the adoption of Anglo-American fiduciary concept is the correct answer to overcome the limitation of statutory interpretation and, in particular, to control powerful *chaebols*, the next question is how to formulate the fiduciary concept in Korean law. This question can be again raised from two different angles : One is “Whether legal commands should be promulgated as *rules* or *standards*”. The other is “In which law legal commands as either rules or standards should be placed”. Before dealing with the latter question that is the main focus of this article, I will investigate the former question first. The question as to “the extent to which legal commands should be promulgated as rules or standards” can be answered on the economic analysis of “statutes or rules that are *ex ante* designed” and “principles or standards that will be filled with *ex post* adjudicator’s determination”.⁶ Although, it is clear that rule-based regulation is more costly, and standard or principle-based regulation can lower overall transaction costs by judges’ *ex post* gap-filling role, there is one obvious defect in the standard-based approach: lack of predictability. But as Caplow observed, this less predictability and related cost of *ex post* determination can be justified by the less frequency of the application of principle or standard: The cost of infrequent *ex post* inquiry will be cheaper than the cost of wholesale *ex ante* rule-designing.⁷ The wider scope of the

⁵ Delaware Chancery Court 525 A.2d 1001 (1987).

⁶ Kaplow, Rules v Standards : An Economic Analysis, 42 Duke L.J. 557 (1992-1993) 557.

⁷ Kaplow 621.

coverage of the broad principle or standard also makes cost of *ex ante* rule-designing more expensive. Therefore, the adoption of fiduciary concept as a typified example of the broad principle or standard can be justified by the fact that recognition of loyalty duty by the courts are relatively rare and the concept covers very diverse areas of laws.

Another important thing to notice is that application of standards may over time produce more precise rules. It is particularly true to the fiduciary law: in respect of a directorship or trusteeship, many fiduciary standards are now well-established as more precise rule forms. Therefore, the necessity of applying broad fiduciary concept varies whether a fiduciary is *status*-based or *fact*-based. The conduct of a *status*-based fiduciary that can trigger loyalty adjudication arises less frequently because the repeatedly applied standards regarding the *status* are already transformed into more precise rules through precedent or codification, and the loyalty adjudication may only arise in respect of residual areas. Here, to make legislature or a regulatory agency to design wholesale rules *ex ante* in all relevant parts is less costly than to make judges or adjudicators to repeatedly determine the law's content *ex post*. On the other hand, the conduct of a *fact*-based fiduciary that can trigger loyalty adjudication is too diverse to cover in advance, and the contingencies may arise unexpectedly on the basis of particular circumstance (and thus the standard applied to a new untypical issue is not transformable into rules through precedents). In this case, to make judges to determine the law's content *ex post* is less costly than to make legislature to design wholesale rules *ex ante* in unknown areas. But, in any case, whether *status*-based or *fact*-based, they are all fiduciary in nature, and the very fact always necessitates judge's *ex post* application of fiduciary principles although varying in degree.

4. How to Formulate Fiduciary Concept in Korean Mandate law, Corporate Law etc

As we will see, I am proposing three legislative steps to *structure* Anglo-American fiduciary concept in Korean legal system:⁸ the adoption of the concept in the Korean Trust Act,⁹ in the mandate law¹⁰ and in the law of management without obligation.¹¹ The main method of formulating Anglo-

⁸ VI. 1. 2. 3. and 4.

⁹ VI. 2.

¹⁰ VI. 3. and VII.

¹¹ VI. 4. and VIII.

American fiduciary concept in the mandate law or the law of management should be principle or standard-based rather than rule-based, because these laws deal with basic conceptual relationships rather than a certain status, and the coverage of the laws is very wide.¹² On the other hand, the main method of formulating the concept in Korean trust law or corporate law should be more precise rule-based, because in respect of a *status*-based fiduciary relationship, the fiduciary law has already transformed the repeatedly applied standards into a more precise rule form or well-known fiduciary principles. This is particularly true to the position of trusteeship or directorship. Therefore, I argue that when importing US fiduciary doctrines regarding trustees or directors (such as corporate opportunity doctrine), these well-known doctrines should be embodied in the form of fine-tuned rules, because “the additional costs of designing rules-which are borne once-are likely to be exceeded by the savings realized each time the rule is applied.”¹³ The same is true to adopting the key US cases like Weinberger, CNX, Kahn v Lynch¹⁴ on how to handle controlling shareholders as well as Blasius¹⁵ for special rules governing interference with voting. For example, when the key US cases are imported in Korean corporate law as means to control *chaebols*, the formula of adoption should be rule-based through codification: to make legislature or a regulatory agency to design wholesale rules *ex ante* is less costly than to make judges or adjudicators to determine the law's content each time *ex post*. The rule-based formulation is also applicable to importing the US securities fraud cases that can play a role in regulating *chaebols* (the case laws give minority shareholders the right to sue to block a transaction if they are misled).

But, although the frequency is low, new and unknown loyalty adjudication issues may arise again even in respect of this well-known status of directorship or trusteeship. Therefore, it will also be necessary to take principle-based approach regarding this *status*-based fiduciary in order to cover ‘residual’ unknown future conflict of interest situation. From this, I propose the hypothesis that, not only in the mandate or the management law but in the trust or corporate law, the ways of formulating the fiduciary law should always be accomplished not only principle or standard-based but rule-based as well.

¹² II. 3.

¹³ Caplow, 621

¹⁴ Supreme Court of Delaware 638 A.2d 1110 (1994).

¹⁵ Delaware Chancery Court 564 A.2d 651 (1988).

III. The Definition and Scope of Fiduciary Law in this article

Before moving on to the question how to adopt and develop fiduciary law in Korea, I will briefly look at the emergence of the term “fiduciary” in English law in order to understand better the usage of the term and the function of fiduciary law. I also explain the definition of ‘fiduciary duty’ and ‘fiduciary remedy’ for the purpose of this article, and briefly look at certain aspects of the fiduciary law, on which this article is more focusing: (i) function rather than standard, and (ii) categories of fiduciaries.

1. Emergence of the term “fiduciary” and Function of Fiduciary law

(1) Recognition of “fiduciary” as a legal term

After reviewing two centuries of English case law on fiduciary relationship, Cambridge Law Professor LS Sealy drew following conclusions: that the word “trust” or “confidence” had been used in general meaning until early 19th century, but the term “trust” could not be used as a general word any more when “the word “trust” came to be recognised as a formal term with its modern technical meaning”.¹⁶ With the recognition of the law of trusts as a separate branch of the law, the term “trust” began to be used only in a technical sense dealing with a relationship of trust property, and the question was raised: How to describe “the other situations formerly described vaguely as “trusts” [that] were now left without a name”?¹⁷ According to Sealy, “the word fiduciary (which earlier had received very little judicial support) was adopted to describe these situations which fell short of the now strictly defined trust”.¹⁸ From that time on, over 200 years English chancery court have used the term “fiduciary” to describe these relationships of trust and confidence, as the previous Chancery Court before 19th century had used the term “trust” or “confidence” to describe same situations. As a result, trustees, agents, guardians, attorneys, or advisers are now all called ‘fiduciary’, and the term “fiduciary” is now used by the Chancery court as a catch-all ‘veil’ to cover all relationships of trust or confidence including the trust itself.

(2) Fiduciary law as supplementary rules : Maitland’s explanation

¹⁶ Sealy, *Fiduciary Relationships*, 1962 Cambridge L.J. 69, 71

¹⁷ Sealy, 71

¹⁸ Sealy, 71-72

From the usage of the word “fiduciary”, we can infer the role of fiduciary law: Behind the fiduciary ‘veil’ they have thrown over certain people, the Chancery court exercising judicial discretion has been able to impose a different degree and kind of flexible duties under the title of ‘fiduciary duties’ that could reflect exact nature of a particular relationship in issue.¹⁹ Cambridge legal historian Maitland rightly explained how the fiduciary law works. Although put to describe the role of equity, his explanation aptly applies to the fiduciary law as a typified example of equity: He described the role of equity as “supplementary” to common law. According to him, common law has been developed by common law courts as a self-sufficient legal system, in which every legal relationship can be autonomously created by contracts, tort etc. On the other hand, equity has never been developed by the Chancery as a self-sufficient system but as supplementary legal rules to intervene in or qualify pre-existing or basic legal relationships that were formed through common law rules : “Equity was not a self-sufficient system, at every point it presupposed the existence of common law”.²⁰

(3) Gap-filling role : American explanation

This supplementary role of fiduciary law appears in American legal literature as a “gap-filling role”. But fiduciary law’s gap-filling role has had separate development in the US, and there are conflicting views on the role of fiduciary law. While the traditional legal theory regards the gap-filling role of fiduciary law as an exercise of ‘judicial discretion’ for the purpose of regulating fiduciaries or ‘protecting beneficiaries’,²¹ some contractarians regard the gap-filling role as judicial declaration of a ‘presumed contract’ between the parties for the purpose of enhancing their ‘common interests’, lowering overall transaction costs.²² The viewpoint or attitude looking at the fiduciary law is strikingly different in two camps. The traditionalists start their arguments by putting the interest of vulnerable entrustor above that of his fiduciary with discretionary powers. Therefore, the gap-filling role of the courts should be of a public guardian, protecting the vulnerable entrustor from the fiduciary with selfish human nature. As a logical conclusion, judicial discretion

¹⁹ Sealy, 73-74

²⁰ Maitland, *Equity* (2nd ed., Brunyate, 1932), 19.

²¹ Brudney, Contract and Fiduciary Duty in Corporate Law, 38 B.C.L. Rev. 595 (1996-1997) 624-629

²² Easterbrook & Fischel, Contract and Fiduciary Duty, 36 J.L. & Econ. 425 (1993) 426-427.

cannot be contracted out, and the fiduciary principles should be of a mandatory nature. On the other hand, the contractarians do not regard the parties of presumed contract (ie. an entrustor and its fiduciary) in a conflicting position but regard sharing common interest in their joint venture, and thus the courts don't have to act as a guardian for the entrustor. Therefore, the role of the courts is not to guard the entrustor from his business partner but to maximize the value of their joint venture by filling presumed intents of the joint-venturers as a default contract. Similarly, as they regard fiduciary duties as a default contract, the duties are always to be excluded by negotiations, depriving the mandatory nature of fiduciary duties.²³ (as will be seen below, this contractarian view of fiduciary law (ie. default contract theory) shares much common aspects with mandate law in civil law system in that it allows a fiduciary to take profit from his fiduciary status).²⁴

The contractarian view can explain persuasively some *status*-based fiduciary relationships such as a director-company relationship, because this standard status has long been recognized and can be easily explained through contract-making mechanism. Even trustee-beneficiary relationship can be explained by the default contract theory²⁵: As long as the court can infer presumed intents of the parties and their common interest, it is possible to frame imposition of fiduciary duties as presumed contracts of the parties. There also exist some elements justifying possibility of contracting-out : To the extent that fiduciary principles are transformed into more fined-tuned rule forms, and the content of the legal command is clearer and more predictable to contracting parties,²⁶ the judge may allow contracting out of more-precise fiduciary rules on the basis of increased predictability of the rules.

But, even if it is possible for judges to find their presumed intent and frame it as contracts, the goal of value maximization of common venture is one thing, and equitable distribution of the maximized value between the participants is another.²⁷ For the latter purpose of securing equitable distribution, the traditional theory of the gap-filling role of fiduciary law sounds more persuasive, particularly

²³ Brudney 623.

²⁴ For details, see VII. 5.

²⁵ Langbein, *The Contractarian Basis of the Law of Trusts*, 105 *Yale L.J.* 625 (1995).

²⁶ For details, see II. 3.

²⁷ Brudney 622 and footnote 111 at 634.

where there exist conflict of interest between the parties. In particular, where the case is too complex, and it is difficult for the courts to find the presumed intents of the parties, it is too fictional to frame fiduciary duties as their presumed intents or contracts. In this case, it is straightforward and more persuasive to explain the imposition of fiduciary duties as a simple exercise of judicial discretion for the purpose of guarding the vulnerable. Where there is ‘common but unequal’ interest, the gap-filling role should be focused on equal distribution rather than value maximization. Furthermore, in respect of a *fact*-based fiduciary relationship, the process of fiduciary designation is performed on the basis of particular *facts* in a certain circumstance, and the imposition of fiduciary duties can be better explained as a judicial exercise rather than as a presumed contract.

2. Definition and Meaning of Fiduciary Law in this articles

(1) Scope of Fiduciary Duty and Fiduciary Remedy

As far as the duty side of the fiduciary law is concerned, the US fiduciary law embraces not only duty of loyalty but duty of care. On the other hand, English fiduciary lawyers confine their talks to the duty of loyalty. As the concept of duty of care is already well established in Korean private law, and what Korean law needs urgently is the concept of duty of loyalty, it is more convenient and conceptually neat to limit the research focus to the duty of loyalty. Therefore, when the word “fiduciary duty” is used in this article, it normally refers to a duty of loyalty that connotes the obligation to put the interests of the entrustor above those of the fiduciary. Of course, a fiduciary’s duty of loyalty can be expressed in different names according to the particular nature of a given fiduciary relationship such as a duty of confidence, a duty to avoid self-dealing or conflicting transactions etc.

In the same vein, in respect of the remedy side of the fiduciary law, it is useful to confine the research focus to the account of profit remedy, although there are other available fiduciary remedies such as injunctive relief. The main reason is that in Korean private law the profit-based remedies are not yet available while damages are well established as a standard restorative remedy, and injunctive relief is also already available as a preventative remedy. What Korean law needs now is the account of profit remedy as a main means of ‘optimal preventive mechanism’ to deter a

fiduciary from profit taking.²⁸ Therefore, the words “fiduciary remedy” in this article means the disgorgement of profit remedy in many cases.

(2) Function rather than Standard of Duty

My research regarding the fiduciary law is focused on the functional aspect of fiduciary law: the gap-filling role of the fiduciary law through the exercise of judicial discretion by judges. Although the standard of duty of loyalty can be higher than that of duty of care, fiduciary designation does not necessarily require or result in higher standard of duty: the essence of the fiduciary designation is not to impose high standard of duty but to prevent the fiduciary from putting their interest above those of his beneficiary in a conflict of interest situation. Therefore, this research will put much emphasis on the functional aspect of fiduciary law.

(3) Categories of Fiduciary : *Status*-based fiduciary v *Fact*-base fiduciary

There are many ways to categorize fiduciary relationships. Perhaps the most popular way is to categorize them into either *status*-based fiduciaries or *fact*-based fiduciaries.²⁹ The former category is designated as fiduciary on the basis of fiduciary elements that can be inferred from the well-known nature of a *status* such as a doctor, lawyer, director etc. Fiduciary elements leading to the fiduciary designation (such as trust or confidence, giving discretion, vulnerability, dependence etc) can be easily found in such a *status*. The latter category covers ‘residual’ fiduciary relationship, and in this category, the fiduciary designation is driven on the basis of *facts* having fiduciary elements that are found in a particular relationship.

This dichotomy is particularly attractive for Korean lawyers, because the concept of *status*-based fiduciary may well fit into *standardized* mandate relationships that are stipulated in the Korean Civil Code, Commercial Code etc. : As every *status*-based fiduciary can be interpreted as well-established *standardized* mandate relationship in Korean Codes (for example, a broker-client relationship or a director-company relationship etc), this conceptual similarity makes it easier for

²⁸ Cooter & Freedman, the Fiduciary Relationship: Its Economic Character and Legal Consequences, 66 N.Y.U.L. Rev 1045 (1991) 1051.

²⁹ Law Commission C.P. No.124, Fiduciary Duties and Regulatory Rules (1992); Paul Miller, A Theory of Fiduciary Liability, 56:2 McGill L J 235 (2011), 240.

Korean courts to adopt *status*-based fiduciary concept in Korean private law system.³⁰ Similarly, the concept of *fact*-based fiduciary may also match well with the management relationship recognized under the Korean law of ‘management without obligation’. This conceptual similarity may also make it easier for the Korean courts to adopt *fact*-based fiduciary concept.³¹

IV. Previous Implementation of Fiduciary Law in Korea

1. Introducing and Developing Fiduciary Principles in Korean Corporate law

There have been Korean and Japanese legislative attempts to introduce Anglo-American concept of fiduciary law in respect of corporate directors: section 382-3 of the Korean Commercial Code expressly uses the term “fiduciary duties of directors”. But this attempts seem to have failed, and there is a split in legal opinion on this section: Although some scholars argue that the use of the term imposes on directors the same fiduciary duties as the Anglo-American equivalent, according to the prevailing view, Anglo-American style fiduciary duties cannot be accommodated into the concept of civil law duty of care merely because of the expression of the term “fiduciary duties of directors”. They believe that this simply declares the different aspects of duty of care already recognized in civil law system. In Japan, this view was confirmed by Japanese Supreme Court in 1970. But, it is arguable that with the surprising recognition of fiduciary duties in respect of trustees,³² Korean Supreme Court in 2012 will think differently from Japanese Court in 1970: it is hoped that Korean Supreme Court give recognition to the natural meanings of the expression “fiduciary duties of directors” in the Korean Commercial Code. In any event, in order to introduce and develop corporate fiduciary law in Korea universally, it is necessary to draw out and establish uniform fiduciary principles and to codify them into the Korean Commercial Code.

This urgent necessity to establish corporate fiduciary law into Korea is closely related to the growing tendency of granting more discretionary powers to directors. This is also happening in other civil law countries. For example, there has been a big debate in European Union over the rigidity of principles of maintenance of capital and the liberalizing the regime for distributing to

³⁰ For details, see VII. 3.

³¹ For details, see VIII. 3.

³² For details, see V. 1.

shareholders by granting directors more discretion. The same debate is likely to occur in Korea: the legal capital doctrine is enshrined in the Korean Commercial Code. The fundamental question in this debate is - once the directors are given more discretion in respect of distributing to shareholders - how to secure the necessary degree of regulatory control over the directors' exercising increased discretions. The English chancery court armed with their inherent flexible equitable jurisdiction may cope well with the directors' misuse of discretion, but it seems less certain for the German or French courts to cope well with the situation unless the legislature provides them with well-codified statutes or enough discretion.

Apart from the distribution regime, there are many corporate law areas in which directors' discretion is more desirable than rigid statutorily-set regime that currently exist in Korea: for example, the kinds of preferred shares or hybrid bonds for a company to issue are now statutorily listed and defined, and I argue that there should be more room for directors to maneuver. Similarly, in the context of merger and acquisition or acquisition of own shares, directors should have some discretion to exercise their judgment. But, as the giving of financial assistance by corporations in share acquisition is generally prohibited in Korea, there has been a big row over the validity of leveraged buy-outs. The Korean Supreme Court has declared in 2006 that directors who gave company assets as collateral in a leveraged buyout are in breach of their duties to shareholders and creditors, resulting in the transacting being null and void. But in a separate decision in 2010, the Court qualified the earlier judgment holding that in so far as there is a mechanism for protecting shareholders and creditors the directors are not regarded as breaching their duties (in this case the acquiring company had merged the acquired first and then used the assets of the acquired to pay back). According to the Court, in the latter case, the shareholders and creditors could be protected through the statutory merger procedures that gave them a chance to oppose the merger proposal.

It follows that as Korean directors' discretion increases, the question of whether and how to control the increased discretion will become a more pressing issue in Korea. It is arguable that as more powers are vested in the directors in the form of discretion in operating their corporations, greater judicial discretion needs to be vested in the courts allowing them to grant a wide range of fiduciary remedies because it is nearly impossible for the legislature to stipulate all the possible corporate situations in which conflicts of interests may arise. In other words, an increased flexibility in management power should be reflected in an increased judicial discretion in regulating the misuse of management discretion to the same degree in order to control management with utmost flexibility.

Therefore, for the purpose of regulating increasing management discretion in corporate decisions, it

is arguable that the main and perhaps the only feasible way to control will be receiving and developing the principles of fiduciary law through the systemic introduction of fiduciary concepts in many legislations including corporation law³³ and, then allowing Korean judges commensurate discretion both in applying the established fiduciary principles (ie. no-conflict rule, no-profit rule, prohibition of self-dealing etc) and in granting equitable remedies with utmost flexibility as in the USA and UK.

2. Introducing and Developing Fiduciary Principles in Korean Financial Law

Similar legislative attempt has been made in order to adopt Anglo-American concept of fiduciary law in respect of financial institutions: there are some isolated statutory provisions in Korean financial law that expressly refers “fund managers’ fiduciary duties”, “investment advisers’ fiduciary duties”, “trust banks’ fiduciary duties” etc. Here again there will be a split in opinion about whether this statutory provisions impose Anglo-American concept of fiduciary law upon Korean financial institutions or they simply declare different aspects of duty of care already recognized under the existing Korean private law.

Given the format of the statutory provisions expressing fiduciary duties on these financial institutions is not much different from the format introducing directors’ fiduciary duties in corporate law, the latter view seems to prevail in financial law as well: Anglo-American concept of fiduciary duties cannot be accommodated into the concept of civil law duty of care merely because of the express use of the term “fiduciary duties of financial institutions.” But, given the surprising decision of the Korean Supreme Court recognizing trustees’ duty of loyalty in 2005,³⁴ it is also possible for the Korean Courts to take a different stance from the prevailing view as to the question of financial institutions’ fiduciary duties.

But in any event, considering the limited number of provisions dealing with conflict of interest situations and deficiency of provisions granting equitable remedies, there is an urgent necessity to introduce and develop fiduciary principles systemically into Korean financial law,³⁵ and to allow Korean Courts equivalent discretion in granting fiduciary remedies. This requirement is also

³³ For details of Korean way of systemic introduction, see VI. 1.

³⁴ V. 1.

³⁵ For details of Korean way of systemic introduction, see VI. 1.

accelerated due to the increasing complexity of financial products, and their diversified sales channels, and the tendency of granting more discretion to financial services providers: Korean clients are giving them more and more discretion as to investment decisions and are heavily dependent upon their investment advice as their financial products become increasingly more complex. For example, banks or insurance companies had been traditionally regarded as providing safe products and thus did not normally attract fiduciary issues. But, they are now more likely to trigger fiduciary issues due to their risky products such as equity-linked deposits or variable insurance and their assuming investment adviser roles.

Here again, the fundamental question is once the Korean financial service providers are given more discretion in respect of investment decision or advice and clients increasingly rely on their advice, how to secure the necessary degree of regulatory control over the financial institutions exercising increased discretions. As outlined earlier, an increased discretion in investment decision or advice should be controlled by an increased judicial discretion in regulating the misuse of such discretion to the same degree in order to curb misuse of the discretion with utmost flexibility.

V. New Korean Moves to Develop Fiduciary Law

1. Recognition of Loyalty Obligation in Korean Trust Law

The first visible breakthrough in introducing fiduciary principles in Korean law has been made in respect of Korean trust law and by the Korean Supreme Court. Like other major Korean legislations, the Korean *Trust Act* does not expressly use the term “fiduciary duties” or “fiduciary remedies” although the Trust Act incorporates many Anglo-American principles of trust law. While the role and powers of the trustee are similar to those in the USA or UK, their duties are framed in the name of civil law duty of care and some specific provisions dealing with conflict of interests: although there are isolated provisions prohibiting self-dealing and profit-making from trust property, there was no general “fiduciary duty”. In the same line, according to the prevailing views, the status of beneficiaries and the nature of their beneficial interests are differently framed: beneficiaries are regarded as holding contractual status and their interest are contractual rather than proprietary. Beneficiaries’ right to trace is also differently framed as a right to avoid fraudulent transactions while the remedial tool of constructive trust has never been recognized under Korean trust law.

In spite of these different legal frameworks in trust law, the Korean Supreme Court declared in 2005 that “trustees’ fiduciary duties are the duties under which trustees have to administer trust properties according to trust purpose and to maximize interests of the trust. Although there is no express

provision regarding trustee's fiduciary duties, the duties can be drawn from the section 31 of the *Trust Act* prohibiting trustee's self-dealing".³⁶ This recent Korean trust law decision is in stark contrast to the 1970 Japanese Supreme Court decision referred to above, which held that the Anglo-American concept of fiduciary duties cannot be accommodated into the concept of civil law duty of care merely because of the expression of "fiduciary duties of directors." This difference can be explained from two angles. First, there is the time gap between the two decisions: the Japanese decision was made in 1970, and over time the Korean courts have become more educated about the Anglo-American concept of fiduciary law. Secondly, it may be easier for a Korean court to recognize fiduciary duties in respect of trustees than for a Japanese court to recognize fiduciary duties in respect of directors.

But, despite this welcoming decision of the Korean Supreme Court, there was still a long way to go in order to adopt and develop *general* fiduciary law into Korea. First, while the Court recognized trustees' fiduciary duties, it did not refer to any available fiduciary remedies. Given the essence of fiduciary law lies in the flexible fiduciary designation and granting flexible fiduciary remedies, there should be a discussion regarding the availability of equitable 'remedies' along with fiduciary 'duties'. In particular, a disgorgement of profit against a fiduciary in breach of trust should be adopted. The introduction of the concept of constructive trusts is another issue. It is arguable that, where trust property is transferred in breach of trust to knowing recipient or assistant, the designation of constructive trustee is preferable measure as a restorative remedy to civil law right to damages.

2. Passage of Completely Revised Korean Trusts Act

Realizing the importance of the *Trust Act*, Korean Ministry of Justice has formed a Committee for Revising the Trust Act in Jan 2009 in order to carry out comprehensive revision of the Act. A Trust Bill has been prepared by the Committee and tabled to the Korean National Assembly by the Korean Ministry of Justice in Feb 2010. The Bill, being review by the Judicial Committee, was passed in the Assembly in June 2011. In the Revised Trust Act, there are many new provisions dealing with conflict of interest issues, and the remedy of disgorgement of profit and injunctive relief are also expressly stipulated. Some of the relevant sections are as follows:

³⁶ Korean Supreme Court 2005.12.22 Decision 2003 Da 55059.

Section 33 (fiduciary duty)

Section 34 (prohibition against activities of conflict of interests)

Section 35 (duty of fairness)

Section 36 (prohibition of trustee's profit taking)

Section 37 (trustee's duty to segregate trust property)

Section 43 (breaching trustee's liability to restore trust property, to pay damages and to account of profits etc)

Section 77 (injunction to enjoin trustees)

It is arguable that, these statutory provisions dealing with conflict of interest issues and statutory remedy of account of profit will be a genuine starting point to introduce *general* fiduciary principles into Korean legal system that will in turn be used as a springboard for extending fiduciary principles to other areas of law. It is expected that those statutory provisions as a whole may function as the equivalent of Anglo-American fiduciary law.

3. Adoption of Corporate Opportunity Doctrine

There is also an important development in Korean corporate law. The corporate opportunity doctrine developed in American chancery courts was adopted in the Bill to Revise Korean Commercial Code (Company Law) in 2008 and the Bill finally passed through the Korean National Assembly in March 2011. As this corporate opportunity doctrine secures a firm statutory footing in the Korean corporate law,³⁷ a more friendly environment has been created for Korean legal scholars or courts to argue or recognize *general* corporate fiduciary principles through the combined interpretation of the scattered provisions having fiduciary concepts, such as prohibition of self-dealing or dual-agency etc. One defect is that the Revision did not directly introduce account of profit remedy: it rather regards the 'profit' obtained through appropriating corporate opportunity as 'loss' to the company, and the disgorgement of 'profit' should be claimed as damages for the 'loss'. The implication is that in corporate law the account of profit remedy still won't be available in principle, although in corporate opportunity cases shareholders are practically equipped with account of profit remedy. Even in a self-dealing case, the available remedy is still limited to damages and injunctive relief only. This corporate law approach shows quite different stance from that taken in the Korean Trust Act: In the Trust Act, disgorgement of profit remedy is expressly

³⁷ Section 397-2, Korean Commercial Code.

stipulated as a *general* remedy in respect of any breach of trust.

VI. Proposal to Structure Systemic Adoption in Korea

1. Systematic Adoption rather than Piecemeal Amendment

Introduction of fiduciary law only in respect of a *particular* status-based fiduciary or introduction of limited sections in a *single* legislation would not be sufficient. The Korean and Japanese experience illustrates this: Although section 382-3 of the Korean Commercial Code expressly uses the term “fiduciary duties of directors”, there is a split in legal opinion: some scholars argue that the use of the term imposes on directors the same fiduciary duties as the Anglo-American equivalent while other scholars – the majority – believe that this simply declares the different aspects of duty of care already recognized in civil law system. According to the latter view, Anglo-American concept of fiduciary duties cannot be imported into the concept of civil law duty of care merely because of the use of the expression of “fiduciary duties of directors.”

Therefore, in order to deal with trust or confidence, conflict of interest, or discretionary powers efficiently and universally, it is arguable that the introduction of Anglo-American fiduciary law into Korean law should be accomplished systematically as a whole rather than through piecemeal amendments of a single legislation. The systematic adoption should be executed in two stages: (i) legislation stage by policy-makers and (ii) interpretation stage by scholars and judges.

As for the legislation stage, there should be step-by-step legislative measures to introduce enabling provisions of fiduciary concept into as many legislations as possible: among the legislative measures, first, there should be introductory steps to adopt the enabling provisions in trust law as a ‘source of developing fiduciary principles’ (Step I), and then in mandate law as a ‘springboard for applying any developed fiduciary principles to *standard* relationships’ as widely as possible’(Step II), and finally in law of management without obligation to fill the gap, ie. *residual* relationship of fiduciary elements (Step III). With these basic enabling provisions in trust law, and mandate and management laws, structural framework of fiduciary principles in Korean law can be set up together with those scattered provisions in corporate and financial law.

As for the interpretation stage, there should be guiding scholarly efforts as well as efforts by the judiciary to draw out and establish uniform fiduciary principles across different areas of laws facing possible conflict of interest situations (ie. *uniform* fiduciary law supported by the no-conflict rule and no-profit rule, duty of loyalty, duty of disclosure etc). In particular, the Korean Courts should be

empowered to be active and willing to interpret and enforce those statutory provisions broadly, so as to allow the provisions to operate in a similar manner as Anglo-American fiduciary law.

2. Step I : Developing Korean Trust Act As Source of Fiduciary Law

My first proposition as to the legislative step is that for the systematic adoption of fiduciary law in Korea the first legislative step should be taken in respect of the Korean Trust Act as a general source of fiduciary law development. As we have seen above, the emergence and development of English fiduciary law is closely related to the establishment of trust principles by the English Chancery.³⁸ It is arguable that there is a strong ‘historic path dependency’ in adopting fiduciary law in any country, and Korea is not free from this path dependency: As fiduciary principles are not only developed from the standard relationship of trust and confidence having trust property but also the very reflection of trust law principles, the Korean Trust Act is the most ideal place for Korean fiduciary principles to settle down first. In the same line, as the trust relationship is the strictest relationship of trust and confidence and reflect the ‘default’ fiduciary standard of duty, the Korean Trust Act should be the source of fiduciary law, from which both *general* fiduciary principles are recognized and developed as a default rule and *specific* equitable doctrines can evolve. It is not surprising that the most detailed conflict of interest provisions are found in the Trust Act.

As we have seen above, by passing the wholly revised Trust Act, Korea has accomplished the first mission in the first stage. The Korean Trust Act expressly confirms, among other thing, the concept of duty of loyalty and account of profit remedy. It is expected that from these sources of Korean trust law general and specific fiduciary principles can develop and expand.

3. Step II : Adopting and Developing fiduciary law in Mandate law as a Springboard

My next proposition is that for the systematic adoption of fiduciary law in Korea the second legislative step should be taken in respect of the mandate law in the Korean Civil Code. Korean mandate law not only governs a mandator - mandatee relationship but also by the operation of law generally applies to other *standard* management relationships whether those relationships are formed by contracts of other nature or triggered by court appointment:³⁹ As a director, broker, adviser , attorney, guardian etc – typical mandatees - are governed by the mandate law, so are a

³⁸ III. 1. (1).

³⁹ Kwak, Law of Personal Obligations: Particular Subjects (6th ed, 2003) 274.

statutory guardian and bankruptcy administrator regarded as mandatee-equivalents by statutory provisions, and the mandate law in the Code applies to them as a default rule. Therefore, if fiduciary principles are embedded in the Korean mandate law, the fiduciary principles working as basic mandate law rules can apply to every *standard* relationship of managing others' affairs. In other words, in order to apply fiduciary principles as widely as possible across different areas of Korean laws, we have to use the mandate law as a springboard. We will investigate the difficult issues facing Korean lawyers in adopting fiduciary principles in Korean mandate law in VII.

4. Step III : Adopting fiduciary law in Law of Management without Obligation As *Fact-Based* Fiduciary Law

My final proposition is that for the systematic adoption of fiduciary law in Korea the third legislative step should be taken in respect of the 'law of management without obligation' in the Korean Civil Code. While management relationships that arise out of any contract or statutory provision are governed by the mandate law, management relationships that arise without any contractual or statutory basis will be covered by the law of management without obligation in the Civil Code. In other words, among management relationships, *typical* management relationships with contractual or statutory basis will be governed by the mandate law, but the 'residual' management relationships lacking contractual or statutory basis have to be dealt with under the law of management without obligation. Therefore, if fiduciary principles are embedded in this law of management without obligation, the fiduciary principles working as basic default management law rules can apply to any 'residual' management relationships of diverse nature scattered in different area. In other words, while fiduciary principles adopted in the mandate law will only make it possible to apply fiduciary duties to *standard* management relationships across different areas of laws, fiduciary principles adopted in the law of management will let fiduciary duties apply to 'untypical' residual management relationships, filling the remaining gap. We will investigate the difficult issues facing Korean lawyers in adopting fiduciary principles in the law of management without obligation in VIII.

VII. Remaining Work I : How to adopt fiduciary duty in Korean Mandate Law

As observed earlier, once fiduciary principles are rooted in Korean mandate law, the fiduciary principles can through the springboard of the mandate law reach as widely as possible to every *standard* relationship of management whether they are formed by contract or incurred by statutory provisions. Then, why not adopt fiduciary principles in the mandate law?

1. Why not adopt fiduciary duty in Korean Mandate Law ?

As we have seen, there have been some successful Korean moves to adopt fiduciary concept in Korean trust and corporate law. But there has never been an effort to explain other relationship of trust or confidence from the perspectives of fiduciary duty in Korea. For example, although a mandate or guardian relationship is a similar trust and confidence relationship, Korean scholars have never talked about a mandatee's or guardian's duty of loyalty: scholarly talks are confined to their duty of care. Here, arises a fundamental question: If fiduciary concept can be adopted in a director-company or trustee-beneficiary relationships in Korea, why not introduce the concept in other relationship of trust and confidence such as mandator-mandatee or guardian-minor relationship? To answer this question, we have to first investigate whether there is any benefit or advantage from adopting fiduciary duty in Korean mandate or guardian law: If current mandate law mechanism can already impose the same kind or degree of fiduciary duty and grant similar fiduciary remedy to the protection of entrustors or beneficiaries, we need not adopt a duty of loyalty concept in Korean mandate law. But, if the Anglo-American fiduciary law could provide any benefit different from what the current mandate law does, there is a compelling reason to adopt the fiduciary concept in Korean mandate law.

2. Can the concept of Reasonable Manager's duty of care provide same degree of fiduciary duty?

To answer the question whether the mandate law could provide the same degree of protection as the fiduciary law does, we have to look at and compare the working mechanisms of both the mandate law and the fiduciary law.

(1) Reasonable Manager's Duty of Care v Duty of Loyalty

First, we'll look at how the Korean mandate law and its main duty, ie 'reasonable manager's duty of care' work in Korean private law system. A mandate relationship arises when one party (the mandator) entrusts management of a task to the other party (the mandatee) and the latter accept that entrustment (Section 680 of the Korean Civil Code). In entrusting a task to the other, the mandator normally expects and relies on the mandatee's special knowledge, expertise, skill, experience etc in performing the mandated task. Therefore, it is generally accepted that a mandate relationship is a relationship of 'trust and confidence'. Here, one question arises : "Is the nature of 'trust and confidence' discussed in a mandate relationship is the same as or different from that discussed in a fiduciary relationship ?"

The answer is “It is different”: the trust and confidence that a mandator reposes upon his mandatee are directed to the latter’s ‘office’ or ‘capacity’ of managing the task in the expectation that the latter perform the job better with his special expertise than he does. As a result, the purpose of the duty-imposition in the mandate law is to secure the necessary *quality* of performance by the ‘office-holder’ (ie. the quality of the management should be *reasonable* from the fellow office-holders’ point of view). The logical conclusion is that the mandatee should be under a ‘*reasonable manager’s duty of care*’ in managing the entrusted task, and the standard of the duty is to be objectively determined according to the nature of the ‘office’ the mandatee assumes. The quality aspect of the duty become most conspicuous, when it comes to a mandate relationship *without consideration* : Even when a mandatee is paid no consideration, the mandatee is put under the same ‘reasonable manager’s duty of care’ in performing his ‘office’, because the duty is imposed to secure reasonable quality of performance by the office-holders regardless of whether consideration is paid or not.

On the other hand, in the fiduciary law, according to the traditional legal theory, the trust or confidence that is reposed on a fiduciary is directed to ‘integrity’ of the fiduciary. In the process of fiduciary designation, therefore, the finding of trust or confidence is intended to make the fiduciary loyal to his beneficiary, and thus sacrifice his interest, to the advancement of beneficiary’s interest, particularly in a conflict of interest situation. In fiduciary relationships, therefore, the purpose of duty-imposition on a fiduciary is to secure fiduciary’s integrity in a conflict of interest situation rather than to secure necessary quality of performance. The logical conclusion is that a fiduciary should be under no-profit rule or no conflict rule etc. To the extent that the trust or confidence element in the mandate law is not intended to secure a mandatee’s sacrifice for the best interest of the mandator, the trust or confidence element in the mandate law functions differently from those intended in the fiduciary law.

(2) Mandatee’s Profit-Taking, Allowed v Fiduciary’s Profit Taking, Prohibited

Thus, the ‘reasonable manager’s duty of care’ recognized in the mandate law is far from, and can be contrasted to, a duty to sacrifice his interest intended in the fiduciary law. For example, a mandatee-broker can act for both entrustors and obtain dual commissions from both parties. As long as he arranges their deals through the exercise of a *reasonable manager’s care and skill*, neither he need sacrifice his commissions nor act for the best interest of either entrustor.⁴⁰ When it comes to a

⁴⁰ Commentar to Korean Civil Code [XV] (1997), 533.

mandate relationship ‘without consideration’, the profit-taking aspect of the ‘reasonable manager’s duty of care’ appears most strikingly: since the mandatee has to perform his office with ‘reasonable manager’s duty of care and skill’ even if not paid consideration, there should be some reward. The mandate law does not prohibit the mandatee’s exploiting the business opportunity that he is commissioned on a pro bono basis. In this situation, the ‘contractarian’ view of fiduciary law overlaps with what the mandate law says: Both the mandator as a provider of business opportunity and the mandatee as a manager of their joint business are all participants in their joint venture, and sharing their common interest in the venture. According to their views, the default duty of the mandatee should be to maximize the value of their common interest rather than to control selfish human nature of the mandatee, and thus the mandatee will be allowed to take advantage of the business opportunity as long as he maximizes the value of the joint ventures. From this observation, it is arguable that there will be some convergence between the mandate law in civil law countries and the contractarian view of the fiduciary law.⁴¹

(3) Trust in ‘Office’ may turn into trust in ‘Fiduciary’s Sacrifice’: Concept of *Status-Based* fiduciary

Although, the function of ‘reasonable manager’s duty of care’ can be conceptually differentiated from that of ‘duty of loyalty’, a duty of loyalty can be inferred in many mandate relationships. In particular, the nature of ‘office’ in a mandate relationship such as a doctor-client relationship can connote fiduciary elements of discretion, dependency, vulnerability etc, and an entrustor’s trust or confidence in the ‘office’ may lead to the expectation of mandatee’s acting for the best interest of the beneficiary due to the fiduciary elements associated with the office. In this situation, loyalty-imposition can be justified due to the particular nature of the ‘office’ with such fiduciary elements. Therefore, in many cases, to the extent that an ‘office’ itself connotes fiduciary nature, trust or confidence in the ‘office’ may automatically turn into the trust or confidence in ‘mandatee’s integrity’, triggering the imposition of loyalty obligation. This observation that trust or confidence in ‘office’ may turn into trust or confidence in ‘mandatee’s sacrifice or integrity’ is arguably a very linking pin to the establishment of the concept of ‘office-based mandatee’s duty of loyalty’.

3. How to Adopt and develop fiduciary concept in Mandate Law: Through Adoption of concept of *Status-based* fiduciary

⁴¹ See below 5.

A good starting point to answer the question how to adopt fiduciary law in Korean mandate law is the fact that a duty of loyalty can be inferred from the nature of 'office' in a mandate relationship itself. If a loyalty obligation is justified in a certain mandate relationship on the basis of the fiduciary nature of its 'office' itself, we can establish a category of mandate relationship on the analogy of the well established concept of '*status*'-based fiduciary, and that category can be termed '*office*-based fiduciary-mandatee'. In other words, Korean law can impose a duty of loyalty in certain mandate relationships through the adoption of the '*office*-based fiduciary-mandatee' concept. Of course, there is other category of mandate relationships in which a mandatee's office is not associated with fiduciary elements. In respect of this category of mandate relationships, a duty of loyalty cannot be inferred or justified. This category of mandate relationship can be termed as '*office*-based non-fiduciary mandate' relationship.

It is arguable that in the first category of relationship, ie an '*office*-based fiduciary relationship', a fiduciary-mandatee will be put under not only a reasonable manager's duty of care that is required in managing the *office* but a duty of loyalty to act to the best interest of beneficiary that is required to secure his *integrity*. On the other hand, in the latter category of relationship, ie a '*office*-based non-fiduciary relationship', a non-fiduciary mandatee will only be obliged to exercise a reasonable manager's duty of care that is required to secure the quality of the office, but be allowed to take profits in his performing the office .

4. Conflict Solving : 'Supplementary role' of Fiduciary duty to Mandate relationship

One remaining question is how the adopted loyalty duty can operate in the current framework of Korean mandate law? In other words, in what ways the dual duties of loyalty and reasonable manager's care can work together? As we have observed earlier, English fiduciary law has been developed by the chancery court as a supplementary rule, and thus performs supplemental role of qualifying the pre-existing basic relationship formed by contract or other common law rules,⁴² and the law does supplement if and only if there exist fiduciary elements in the relationship. This supplementary role of fiduciary law should continue when the law is adopted in Korean legal system. The 'reasonable manager's duty of care' will, therefore, continue to dominate as a basic legal standard in a given mandate relationship, but a loyalty duty may perform a supplementary qualifying role in a certain circumstances if there found fiduciary elements: Korean courts will designate a mandatee as fiduciary by throwing 'fiduciary veil' if and only if there exist fiduciary

⁴² III. 1. (2).

elements in a given mandate relationship (such as conflict of interest etc). And then the courts will impose necessary degree and kinds of specific fiduciary duties according to the particular nature of the relationship. The imposition of specific fiduciary duty will vary according to the nature of the relationship, and may be expressed as a duty of confidence or prohibition of certain act etc.

5. Convergence of Mandate law and Fiduciary law in Law of Corporate Directors

Once fiduciary law is adopted in Korean mandate law, and a loyalty duty can be imposed upon mandatees of fiduciary nature, the picture of Korean corporate law regarding directors becomes similar to that of American corporate law. If the rise of *chaebol* conglomerates over the last decades can be seen as a good example of value-maximization of corporate entity, according to the contractarian view, Korean mandate law has done well in maximizing the value of joint-venturers' common interests by allowing or incentivizing mandatee-directors or *chaebol* families to take profits in relation to their manager-capacity and being lenient to their unofficial perks: Due to the absence of traditional fiduciary loyalty obligation,⁴³ it is not uncommon for Korean directors or controlling shareholders to misappropriate corporate opportunity or information to their personal advantage. The isolated provisions of prohibition of self-dealing or dual-agency in Korean Commercial Code have not worked properly to prevent their indirect profit-taking. But, once the mandate law is equipped with traditional fiduciary loyalty obligation, Korean judges can more easily find fiduciary nature of directors' position in their corporation, and more willingly control the process of distributing the maximized corporate value among corporate participants with fairness. This picture of strengthened mandate law seems similar to that of American corporate law in the sense that powerful judges can wield judicial discretion to the protection of vulnerable shareholders.

It is arguable that although American corporate law has taken a different route from Korean law, both corporate laws regarding directors run to the same direction and meet in the middle. On the one hand, US corporate principles have been developed by chancery courts through the application of equitable doctrines, and in order to protect shareholders the most stringent aspect of traditional fiduciary obligations have been applied and done well in solving conflict of interest problems. But the stricture of fiduciary law has now been lessened in the area of management decisions: in corporate world, value-maximization is one of the ultimate goals, and there is an element of risk-taking to that goal, and thus in order to give corporate managers discretion to make risk-taking business judgment, the traditional duty of loyalty has been qualified in certain circumstances. This

⁴³ For the harsh aspect of English no-profit rule, see *Boardman v Phipps* [1976] 2 AC 46.

end result is similar to what the mandate law equipped with loyalty imposition stands for. It is arguable that there is an interesting convergence happening between mandate law in civil law countries and Anglo-American fiduciary law in the area of corporate directors.

VIII. Remaining Work II : How to adopt fiduciary duty in Law of management without Obligation

As I proposed earlier, once Anglo-American fiduciary principles are adopted in the Korean ‘law of management without obligation’, the fiduciary principles can through the springboard of the management law reach any ‘residual’ relationships of management lacking any contractual or statutory basis. Then, why not adopt the fiduciary principles in the law of management in Korea?

1. Duty of Manager without obligation : Reasonable Manager’s Duty of Care

As we have seen above, while any management relationship with a contractual or statutory basis is governed by the mandate law in Korea, other management relationships lacking any contractual basis is dealt with by the ‘law of management without obligation’. Although in principle people will never be under any obligation to take care of other’s matters, once anybody starts to take care of others’ task without any obligation, by the operation of the law of management, the person (ie. non-contractual ‘*task-holder*’ or ‘*task-manager*’ without obligation) will be generally attached with the same duty as is attached to any mandatee under a similar mandate role.⁴⁴ Accordingly, a manager without any mandate or any contractual obligation is also supposed to “take care of his principal’s task to his best interest according to the nature of the undertaken task” (Section 734(1) of the Korean Civil Code). Here, the phrase “the best interest of the principal” is qualified by the words “according to the nature of the undertaken task”, and it is generally accepted that the purpose of the duty-imposition is to secure the necessary ‘quality of performance’ by the manager without obligation rather than the manager’s integrity or loyalty. The logical conclusion is that the manager without obligation is supposed to exercise a *reasonable* manager’s duty of care and skill, and the standard of the duty is to be determined objectively according to the ‘nature’ of the ‘undertaken task or *role*’⁴⁵ (Suppose an old lady is living alone and the door of her house is broken when she is away. Nobody is obliged to repair the door, but if someone decides to repair the door, he should exercise a *reasonable* manager’s duty of care in fixing it).

⁴⁴ Kwak, Law of Personal Obligations: Particular Subjects (6th ed, 2003) 339.

⁴⁵ Kwak, Law of Personal Obligations: Particular Subjects (6th ed, 2003) 340.

2. Manager's Profit-taking v Loyalty Duty

In principle, the task-manager without obligation is not prohibited from taking profits in managing his principal's task to the extent that the manager is successfully taking care of the principal's affairs by exercising a reasonable manager's duty of care.⁴⁶ But, is the manager always allowed to take profits out of managing other's affairs? It is arguable that as trust or confidence in an 'office' of a typical mandate relationship may lead to the expectation of the mandatee's integrity or sacrifice (ie. acting for the best interest of the beneficiary),⁴⁷ so may the presumed trust or confidence in an 'undertaken task or role' lead to the expectation of the manager's integrity or sacrifice where some fiduciary elements are associated with the 'nature' of the undertaken task or role. In this situation, to the extent that 'undertaken role' itself connote fiduciary nature, judges' fiduciary designation and loyalty-imposition can be justified on the basis of the particular nature of the undertaken role itself. This proposition that trust and confidence in 'undertaken role' may infer 'manager's integrity and sacrifice' and trigger a loyalty obligation is the very linking point to the establishment of the concept of 'fact-based fiduciary manager'.

3. How to Adopt and develop fiduciary concept in Law of Management without obligation : Through the concept of *Fact-based fiduciary*

How to apply fiduciary principles to any untypical or 'residual' relationships of management lacking any contractual or statutory basis? In other words, how to adopt Anglo-American concept of fiduciary principles in the Korean law of management without obligation? A good starting point to answer this question is to notice that a fiduciary designation and its resulting imposition of loyalty obligation can be justified from the particular nature of 'undertaken task or role'. If a loyalty obligation can be drawn and justified in a certain management relationship on the basis of its fiduciary nature of any 'particular task or role' itself, Korean lawyers may establish a category of fiduciary management relationships on the analogy of the well established Anglo-American concept of 'fact-based fiduciary'. This category can be termed in Korean management law as 'fact-based fiduciary-manager' or 'role-based fiduciary-manager'.

Of course, not all the role- or fact-based managers will be designated as fiduciary from its nature:

⁴⁶ Commentar to Korean Civil Code [XV] (1997), 533.

⁴⁷ VII. 2. (3).

there will be non-fiduciary category of management relationships in which a manager's undertaken *role* is not associated with any fiduciary elements. In this category of '*role or fact-based non-fiduciary*' management relationship, the imposition of loyalty obligation will not be justified. For example, suppose A found his neighbor B's handbag with money and identity card inside, and A know B is away for a while. A can choose to open a bank account in B's name and deposit the money into the account. In doing this, A cannot be designated as a fiduciary manager: as long as B's presumed intention is safe management of the money, exercise of reasonable care is enough and loyalty expectation is not justified. Thus a loyalty obligation should not be imposed in respect of this category of role- or fact-based non-fiduciary relationships.

IX. Positioning of Fiduciary law in Korean Legal system : Fiduciary Law as Concrete Sub-set of Principle of Good Faith and Sincerity

1. Principle of Good faith and Sincerity : Supreme Position and Supplementary Role

Like in most civil law countries, Korean legal scholars tend to categorize the law into public and private law. As far as the private law system is concerned, 'default' private law principles are well codified in the Korean Civil Code, and it is said that the spirit penetrating the Code and the private law generally is declared as the 'principle of good faith and sincerity' in the article 2 (1) of the Code: "The exercise of rights and the performance of obligations should be done with sincerity according to good faith". In the hierarchy of private law principles, this principle takes the supreme position, and it is well established that under this principle the Korean judges may supplement or qualify transactions negotiated between parties.⁴⁸ But, the frequencies the Korean courts resort to this principles are very rare : since this principle is stipulated as one paragraph and does not provide any concrete rules under this heading, the judges always look at firstly other express statutory provisions and related case laws, and then rely on the principle as a last resort. Furthermore, Korean courts have not yet established any coherent doctrines under this principle: although there are some accumulated cases applying this principle, it seems there is no theoretical doctrine penetrating these cases.

2. Fiduciary law as a concrete sub-set of Principle of good faith and Sincerity

It is arguable that once Anglo-American fiduciary principles are accommodated in Korean mandate law or in the law of management without obligation, the fiduciary principles should be interpreted in

⁴⁸ Song, *General Principles of Civil Code* (2011) 99.

Korean private law system as an applied sub-set of the principle of good faith and sincerity. There are at least two reasons: Firstly, functionally speaking, both the Korean principle of good faith and the common law fiduciary principles presuppose a basic legal relationship either formed by contracts or facts-based, and perform supplemental or qualifying role to fill the gap in the relationship. Thus, the fiduciary principles once adopted in either the mandate law or the management law can get easily melted into the principle of good faith and be interpreted as specific examples of the supplemental or qualifying rules of the principle. Secondly, doctrinally and procedurally speaking, being developed over longer period of time and by the separate Chancery court, the fiduciary principles are well equipped with more coherent doctrines and more sophisticated procedural rules applying the doctrines than the Korean case laws developed by Korean courts under the principle of good faith: no-conflict rules, no-profit rules, duty of disclosure, duty of fairness etc has been developed to secure fiduciary's loyalty under the peculiar process of fiduciary designation and fiduciary presumptions. Although it is possible in the near future for the Korean courts to develop our own equivalent principles under the principle of good faith, it seems easier and saves time for Korean courts to borrow and to position the Anglo-American principles in Korean system as a 'ready-made' set of supplemental or qualifying rules.

3. The supremacy of Fiduciary principles makes Judge's job easier

Once the fiduciary principles are adopted in the Korean mandate law or the law of management, and interpreted as a concrete sub-set of the principle of good faith and sincerity, the logical conclusion is that the fiduciary principles will be placed at the highest position in the hierarchy of Korean private law system. The supremacy of fiduciary principles will definitely help the judges more willingly fill the gap through active exercise of judicial discretion. Therefore, it is expected that the Korean judges equipped with the supreme fiduciary principles may more actively intervene in any negotiated transactions between parties, wherever they feel obliged to supplement or qualify the basic relationship.

X. Conclusion

It is desirable and possible for Korean legislature and courts to adopt and develop Anglo-American concept of fiduciary principles in Korean private law in order to legally protect people's trust and confidence in others, particularly in a conflict of interest situation. The question is how to adopt and develop the concept in Korean private law. I have proposed three legislative steps : (1) to adopt and develop the principles in Korean Trust Act as a source of developing fiduciary law, (2) to adopt and

develop them in the Korean mandate law as a springboard to apply the concept widely to ‘standard’ management relationships of trust and confidence, and (3) to adopt and develop them in the Korean law of management to cover ‘residual’ ‘fact-based’ relationships of management. I also proposed that although alien to civil law system, Anglo-American fiduciary principles can be interpreted and positioned as an applied sub-set of the supreme principle of good faith and sincerity when they are accommodated in the mandate law or in the law of management without obligation. The supreme position of the fiduciary principles in the Korean private law system will encourage more willing Korean judges to exercise judicial discretion more actively.