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The legislative perfection and practical dilemma of Fiduciary Duty: Based on the multi-dimensional examination of the New Company Law of People's Republic of China

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ABSTRACT
The newly revised"Company Law of the People's Republic of China" has been officially implemented on July 1, 2024. The new revised Company Law provides better provisions on the duties of loyalty and diligence of company directors, supervisors and senior executives than the previous Company Law (2018): it clarifies the specific content of the relevant obligations, it also provides for stronger penalties for directors and supervisors who break the law. This article will combine the New Company Law in the fiduciary duty adjustment content and the fiduciary duty itself concept and the content start, will give the future prospect on the New Company Law fiduciary duty perfect path.

KEYWORDS
fiduciary duty; duty of loyalty; duty of diligence

1 Localization of Fiduciary Duty

When discussing the concept of fiduciary duty in the Company Law of the People's Republic of China (hereinafter referred to as "Company law") , we should first clarify its theoretical basis and core meaning. Fiduciary duty, as one of the core principles of the Company Law, aims at regulating the behavior of directors and other executives, preventing the abuse of power, and protecting the legitimate rights and interests of the company and its shareholders.[1] In particular, fiduciary duties ensure that directors put the company's interests first in the performance of their duties by establishing their duty of loyalty and diligence, and adopt good faith and reasonable care as their code of conduct.

In our company law system, the concept of fiduciary duty is mainly borrowed from anglo-n law system. However, due to the differences of culture, language and law system, it has some deviation in the process of localization. Article 147 of the Company Law (2018) stipulates the fiduciary duty of directors, supervisors and senior exeutives, but does not clearly explain the specific meaning of fiduciary duty. [2] As two core elements of fiduciary duty, duty of loyalty and duty of care are only embodied in part of judicial interpretation.

This legislative fuzziness not only hinders the judicial application of fiduciary duty, but also limits its effective application in the practice of corporate governance. In addition, our Company Law on the fiduciary duty of the scope of application and legal liability mechanism also exist deficiencies, the current breach of the fiduciary duty of the legal means of relief is relatively limited, and shareholders bear a higher burden of proof when they file related lawsuits.

These problems lead to the fiduciary duty in the actual legal function of the difficulties encountered.

2 Comparison of Fiduciary Duty between the New and Old Company Law

At this point, the concept of fiduciary duty, its position in the relevant legal norms and detailed provisions have been discussed, but this New Company Law for directors and supervisors fiduciary duty of the new provisions need to be compared with the Company Law (2018) provisions in order to understand the progress and shortcomings.

2.1 Fiduciary Duty under the Company Law (2018)

Before the legislation of Company Law of our country, the fiduciary duty of directors, supervisors and senior executives has not been clearly stipulated in the law. [3] With the deepening development of market economy, the problem of power and responsibility imbalance in enterprise governance is becoming more and more prominent, especially the problem of abuse of power or neglect of duty in the management of directors, supervisors and senior executives of listed companies because of their special position and power, this poses a potential threat to the interests of the company and its shareholders. [4]

In order to deal with this problem, the concept of fiduciary duty was first introduced into the Company Law (2005), and the fiduciary duty was divided into two types: fiduciary duty and diligent duty. This division provides a code of conduct for the directors to perform their duties and becomes an important step for the legalization of corporate governance in our country.

Article 147 of the Company Law (2018) stipulates that directors, supervisors and senior executives of listed companies shall abide by the laws, administrative regulations and articles of association of the company, and shall have the duties of loyalty and diligence to the company. [5] This article establishes the legal status of the duty of loyalty as the core content of fiduciary duty. Article 148 lists seven types of conduct that violate the duty of loyalty, including misappropriating company funds; storing company funds in the name of an individual or another person; and violating the provisions of the articles of association, borrowing or guaranteeing company funds without the consent of the shareholders' meeting or the board of directors; dealing with the company without approval; using one's position to facilitate self-employment or the operation of a business similar to the company for others; taking commissions on transactions and disclosing company secrets.

In addition, the article has a backstop clause, which stipulates that other violations of the duty of loyalty should also be held legally liable.[6] These provisions show that the core of the duty of loyalty is to require the directors to protect the interests of the company strictly, to avoid self-interest or conflict of interest damage to the legitimate rights and interests of the company.

2.2 Fiduciary Duty in the New Company Law

The newly revised Company Law provides more detailed provisions on directors, supervisors and senior executives of listed companies' fiduciary duty and the punishment mechanism after their violation, compared with the Company Law (2018), it has achieved important breakthroughs in the design of provisions and the definition of obligations. The previous provisions of the Company Law were criticized by the academic community for being too general and broad. The connotation and scope of fiduciary duty have not been effectively refined, which has affected the application effect of judicial practice. [7] This revision emphasizes the importance of directors, supervisors and senior executives of listed companies' fiduciary duty in corporate governance and strengthens the binding force and practicability of the fiduciary duty, it provides a more perfect legal framework for our corporate governance.

2.2.1 Strengthen and Refine the Duty of Loyalty

According to Article 180 of the revised Company Law, directors, supervisors and senior executives of a company have the duty of loyalty to the company. This provision goes into great depth to the core of the duty of loyalty, which is to prevent conflicts of interest between individual and corporate interests, and to prohibit the use of position for improper gain. This provision for the first time in the legal text of the duty of loyalty to the core content of a clear definition, the establishment of the duty of loyalty norms, aimed at protecting the interests of the company at the same time, to ensure that the legitimate rights and interests of shareholders and other stakeholders are not infringed. [8] The clear definition of the duty provides specific code of conduct for the performance of the duties of the director, and promotes the certainty of judicial application. In line with the definition of the duty of loyalty, article 181 of the New Company Law enumerates in detail the concrete actions of directors, supervisors and senior executives of listed companies' violation of the duty of loyalty, including embezzlement of company property and misappropriation of company funds; opening an account in the name of an individual or another person to store company funds; using one's position to receive bribes or illegal income; accepting commissions related to company transactions as one's own; and disclosing company secrets without authorization; other violations of the duty of loyalty. [9] Although the new provisions are fewer in number than in the Company Law (2018), they are more general and cover a wider range. In the case of misappropriation of corporate funds, the new provisions cover not only the nominal storage of funds, but also the use of authority to obtain illegal proceeds, thus it embodies the dual function of the duty of loyalty to protect the company's property and trade secrets. The significant improvement in the duty of loyalty in the new company law is reflected in the clarity of its value orientation. While the Company Law (2018) also enumerates a wide range of violations of the duty of loyalty, it focuses more on the consequences of the act than on whether the act itself constitutes a conflict of interest. [10] By emphasizing the avoidance of conflict of interest and the prohibition of abuse of authority, this revision constructs a complete framework of the duty of loyalty from the two dimensions of the course of conduct and the result of conduct. This adjustment strengthens the pre-restraint on the behavior of the director and supervisor, and helps to prevent the occurrence of the problem, instead of relying only on the accountability mechanism after the fact.

2.2.2 The Breakthrough and Development of the Duty of Diligence

As a key component of fiduciary duty, the duty of diligence is more clearly defined in the newly revised Company Law. The act stipulates that directors, supervisors and senior executives must act in the best interests of the company in the performance of their duties and abide by the due diligence duty of managers. [11] This provision highlights the core of the duty of diligence, which requires the above-mentioned persons to follow professional and normative standards in their management activities and to ensure that their conduct is consistent with the best interests of the company.

In contrast to the broad provisions on the duty of diligence in the Company Law (2018), the new provisions of the law specify the specific requirements of this duty, thus enhancing its operability. The concept of "Reasonable attention" has been further refined in theoretical research and judicial practice, which shows that directors, supervisors and senior executives need to make reasonable judgments based on sufficient information when performing their duties, and adopt decision-making processes that are consistent with business practices. [12] This requirement not only provides a clear criterion for judicial application of the duty of diligence, but also makes it play a full role in preventing risks and ensuring the stable operation of the company. The improvement of the duty of diligence in the New Company Law is also reflected in the expansion of the types of conduct.

Although the Company Law (2018) provides for the duty of diligence of directors, supervisors and senior executives, the consequences of their violation are not described in detail, resulting in a low application rate in judicial practice. [13] By linking up with the duty of loyalty clause, this revision clarifies the scope of the breach of duty of diligence and its legal liability, thus making up for the deficiencies in the previous system design.

3 The Future Prospect of the Fiduciary Duty of Company Law

In view of the limited depth of the study of the Company Law, the author has not fully understood the fiduciary duty in the company law of our country, aiming at the problems and challenges after the implementation of the New Company Law, put forward the corresponding prospect. It is expected to promote the overall improvement of the Company Law through the in-depth discussion of fiduciary duty, so that the New Company Law can guide the practice more effectively and meet the needs of the market.[13]

3.1 Clarifying General Provisions of Fiduciary Duty: Addressing Core Issues in Company Law

The lack of unified provisions for fiduciary duty in Company Law leads to unclear classifications and ambiguous standards for breaches. While the revised Company Law has expanded the scope of loyalty and diligence duties, it fails to address the fundamental issue of a cohesive concept of fiduciary duty, hampering both judicial application and theoretical development.

Fiduciary duty, as a cornerstone of corporate governance, should encompass broader functions beyond loyalty and diligence. A general provision would help streamline specific obligations, mitigate uncertainty, and balance restrictions on directors' conduct with the protection of their legitimate rights. Given China's unique legal framework, fiduciary duty must be tailored to domestic needs rather than replicating foreign models. [14] This includes integrating fiduciary duty for controlling shareholders and actual controllers, who now fall within its scope under the revised Company Law. However, without a general framework, overlaps with directors' obligations may arise. A unified framework combining Articles 21 and 179 of the Company Law could address these issues, providing clearer guidance and enhancing fairness and rationality in judicial application.

3.2 Refining Obligation Classification: Broadening the Scope of Fiduciary Duty

The revised Company Law imposes stricter standards for loyalty and diligence duty but lacks clarity in distinguishing violations, leading to their frequent conflation in judicial decisions. To address this, diligence duty should be further detailed, with explicit examples of breaches, such as failure to investigate or mitigate losses. [15] Typical cases could also provide clearer standards, enhancing judicial consistency and fairness.

The scope of fiduciary duty should extend to include information disclosure and special obligations. Information disclosure is a critical element of corporate governance, yet existing regulations are scattered and lack enforcement strength. Special obligations during company acquisitions, such as avoiding harm to shareholder interests, also require codification.[16]Additionally, prohibitions on rights abuse by controlling shareholders and internal compliance obligations (e.g., ensuring accurate financial reporting) should be incorporated.A refined framework, with loyalty and diligence at its core and auxiliary obligations supporting it, would strengthen governance, clarify judicial decisions, and align corporate interests with accountability and fairness in complex scenarios.

4 Conclusion

The newly revised Company Law of the People's Republic of China marks significant progress in the refinement of fiduciary duties, establishing clearer definitions for the duties of loyalty and diligence and introducing stricter accountability mechanisms. These advancements aim to enhance corporate governance and address some of the longstanding challenges associated with fiduciary duty. However, the absence of a cohesive general framework for fiduciary duty and the lack of detailed classifications for specific obligations continue to present practical and theoretical challenges.

Moving forward, the legislative framework must focus on integrating a unified general provision of fiduciary duty that reflects the unique characteristics of China's legal system. This framework should clarify the boundaries of loyalty and diligence duties while accommodating broader obligations, such as disclosure and compliance. Furthermore, it is essential to refine judicial standards through detailed legislative provisions and exemplary cases, ensuring consistency, fairness, and predictability in application.

By addressing these issues, the Company Law can better support the evolving needs of corporate governance, striking a balance between managerial accountability and the protection of legitimate rights. These reforms will lay a robust foundation for the future development of fiduciary duty in China's corporate legal system, fostering a more transparent, equitable, and efficient business environment.

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