

Transnational Fiduciary Law

Spaces and Elements

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2.1 INTRODUCTION

In recent years, fiduciary law has moved toward the center of scholarly attention in the common law world.¹ In spite of its “elusive” nature,² enough instances of fiduciary relationships occur across a wide variety of legal areas that many – with good cause – describe it as a distinctive field.³ Courts as well as scholars in common law jurisdictions deal concepts and ideas concerning fiduciary law back and forth.⁴ Although civil law countries have no tradition of the trust as a legal institution,⁵ courts and scholars alike term relationships based on some kind of personal or professional trust “fiduciary.”⁶ German law subjects guardians,⁷ trustees in

¹ The increasing number of volumes on fiduciary law bears testimony to this. See *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* (Andrew S. Gold & Paul B. Miller eds., 2014); *RESEARCH HANDBOOK ON FIDUCIARY LAW* (D. Gordon Smith & Andrew S. Gold eds., 2018); *THE OXFORD HANDBOOK OF FIDUCIARY LAW* (Evan J. Criddle et al. eds., 2019).

² Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 79 *DUKE L.J.* 879, 879 (1988).

³ See Tamar Frankel, *Fiduciary Law*, 71 *CALIF. L. REV.* 795 (1983); see also Gold & Miller, *supra* note 1, at 1. (“Whether it is viewed from the perspective of relationships, rights and duties, or wrongs and remedies, fiduciary law is a distinctive body of law.”)

⁴ See Section 2.4.2 (providing examples).

⁵ See, e.g., Richard Helmholz & Reinhard Zimmermann, *Views of Trust and Treuhand: An Introduction*, in *ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE* 27 (Richard Helmholz & Reinhard Zimmermann eds., 1998).

⁶ See Thilo Kuntz, *Das Recht der Interessenwahrungsverhältnisse und Perspektiven von Fiduciary Law in Deutschland*, in *I FESTSCHRIFT FÜR KARSTEN SCHMIDT ZUM 80. GEBURTSTAG* 761 (Katharina Boele-Woelki et al. eds., 2019).

⁷ See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 30, 1955, 17 *ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ]* 108 (116); Konrad Rusch, *GEWINNHAFTUNG BEI VERLETZUNG VON TREUEPFLICHTEN* 191 (2003); Walter Zimmermann, in *SOERGEL*, 20 *KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH* § 1833 margin no. 1, 3 (13th ed. 2000).

bankruptcy,⁸ attorneys,⁹ and others to a specific set of fiduciary duties, the most important of which is a duty of loyalty.¹⁰ France has introduced “*la fiducie*,” a substitute for the common law trust.¹¹ Indeed, civil law countries have long combined property and contract law in order to fashion substitutes for the common law trust. Contract-based *Treuhandverhältnisse* – that is, relationships of trust – have been a staple part of the German legal discourse for several decades, if not centuries.¹² And in recent years, the trust as a legal institution is gaining ground in civil law jurisdictions, following national recognition of the Hague Trust Convention by countries such as Italy and the Netherlands.¹³

⁸ 214 BGHZ 220 (margin no. 12); UDO BECKER, *INSOLVENZVERWALTERHAFTUNG BEI UNTERNEHMENSFORTFÜHRUNG* 40 (2017).

⁹ See, e.g., Oberlandesgericht [OLG] [Court of Appeal] Brandenburg, Mar. 5, 2012, *Neue Juristische Wochenschrift – Rechtsprechungsreport* [NJW-RR] 1191 (1193). The legal basis for fiduciary duties of a German attorney (*Rechtsanwalt*) is to be found in section 43a of the Federal Lawyer’s Act (*Bundesrechtsanwaltsordnung*):

The basic duties of a Rechtsanwalt: (1) A Rechtsanwalt may not enter into any ties that pose a threat to his/her professional independence. (2) A Rechtsanwalt has a duty to observe professional secrecy. This duty relates to everything that has become known to the Rechtsanwalt in professional practice. This does not apply to facts that are obvious or which do not need to be kept secret from the point of view of their significance. (3) A Rechtsanwalt must not behave with lack of objectivity in professional practice. Conduct which lacks objectivity is particularly understood as conduct which involves the conscious dissemination of untruths or making denigrating statements when other parties involved or the course of the proceedings have given no cause for such statements. (4) A Rechtsanwalt may not represent conflicting interests. (5) A Rechtsanwalt must exercise the requisite care in handling any assets entrusted to him/her. Monies belonging to third parties must be immediately forwarded to the entitled recipient or paid into a fiduciary account. (6) A Rechtsanwalt has a duty to engage in continuing professional development.

Translated in http://www.brak.de/w/files/02_fuer_anwaelte/brao_engl_090615.pdf (last accessed June 12, 2023).

¹⁰ See Kuntz, *supra* note 6, at 762 et seq.

¹¹ Loi 2007-211 du 19 février 2007 instituant la fiducie [Law 2007-211 of Feb. 19, 2007 on Instituting the Trust], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE] Feb. 21, 2007, 3052. On open questions concerning concept and doctrine, e.g., Yaëll Emerich, *Les fondements conceptuels de la fiducie française face au trust de la common law: entre droit des contrats et droit des biens*, 61 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 49 (2009) (comparing the French *fiducie* with the common law trust); see also the short overview in Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems*, in Criddle et al., *supra* note 1, at 583, 594.

¹² See Stefan Grundmann, *The Evolution of Trust and Treuhand in the Twentieth Century*, in Helmholz & Zimmermann, *supra* note 5, at 469.

¹³ Hague Conf. on Priv. Int’l L. [HCCH], *Convention on the Law Applicable to Trusts and on Their Recognition* (July 1, 1985), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=59> (last accessed June 12, 2023); for a list of signatories and the status of ratification: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59> (last accessed June 12, 2023). See also *COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW: THE INTEREST AND SCOPE OF THE ENQUIRY* (Michele Graziadei et al. eds., 2005); *RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW* (Lionel Smith ed., 2012).

Some scholars even argue for progressing toward a hybrid system of fiduciary law, built on unified principles applicable both in common law and civil law jurisdictions.¹⁴ There is some precedent for this hybrid approach. For instance, East Asian countries with a strong civil law background such as Japan have adopted (and adapted) the trust as a legal institution.¹⁵ Mixed legal systems in the United States (Louisiana) and Canada (Quebec) have done the same.¹⁶ Nor is this hybridity limited to domestic law. International institutions such as the Organization for Economic Co-operation and Development (OECD), the United Nations Environment Programme (UNEP) Finance Initiative¹⁷ (e.g., the OECD Principles of Corporate Governance,¹⁸ and the UN report on “Fiduciary Duty for the Twenty-first Century”¹⁹) are shaping fiduciary norms across national borders, even though these initiatives do not have the force of law themselves – at least when viewed from traditional Hartian or Kelsenian accounts of law.

In short, even a cursory review shows ample evidence of the importance of fiduciary-related norms not only in common law and civil law jurisdictions, but also beyond the nation-state. Additionally, many norms are created through national or quasi-national legislation on a supranational level as, for example, in the European Union, while others are developed by nongovernmental actors.

In other areas of the law with regulations and rules spreading beyond the nation-state, scholars have been trying to spell out a concept of transnational law, determined to map the reality of “something being there” that does not quite fit the bill of either national law or international law.²⁰ In the well-known words of Philip Jessup:

[T]he term “international” is misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states). . . . Part of the difficulty in analyzing the problem of the world community and the law regulating them is the lack of an appropriate word or term for the rules we are discussing. Just as the word “international” is inadequate to describe the problem, so the term “international law” will not do. . . . I shall use, instead of “international law,” the

¹⁴ Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 *QUEEN’S L.J.* 391 (2014).

¹⁵ See Section 2.3.1.2 for more on this.

¹⁶ On Louisiana, see Michael McAuley, *Truth and Reconciliation: Notions of Property in Louisiana’s Civil and Trust Codes*, in Smith, *supra* note 13, at 119. On Quebec, see JOHN B. CLAXTON, *STUDIES ON THE QUEBEC LAW OF TRUST* (2005).

¹⁷ *Background*, UNITED NATIONS ENV’T PROGRAMME FINANCE INITIATIVE, <https://www.unepfi.org/about/background/> (last accessed June 12, 2023).

¹⁸ *ORG. FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE* (2015), <https://www.oecd.org/corporate/principles-corporate-governance.htm> (last accessed June 12, 2023).

¹⁹ *Fiduciary Duty in the Twenty-first Century*, <https://www.fiduciaryduty21.org/> (last accessed June 12, 2023).

²⁰ See, e.g., GERALF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (2010); Roger Cotterrell, *What Is Transnational Law?*, 37 *L. & SOC. INQUIRY* 500, 500 (2012); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 *ANN. REV. L. & SOC. SCI.* 231, 232 (2016).

term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.²¹

Given the phenomena described, the rather obvious question driving this chapter is subsequently: Is there such a thing as transnational fiduciary law? Answering this question and mapping a research agenda proves to be a thorny issue, however, because the object of analysis is difficult to grasp. It is not only fiduciary law that is “elusive,”²² but also transnational law and transnational legal theory. More than one scholar attempting to capture the concept of transnational law ends up with playing a fugue in a minor key: “Transnational law remains an imprecise notion.”²³ Anyone slogging through the heap of literature on transnational legal theory ends up in “a jungle without a map.”²⁴ Given that “[t]here is no unicity of its sources and no systemic form of justification” and that “it does not conform to a general or universal model,”²⁵ it is no wonder that definitions of transnational law have multiplied over the years.²⁶

Moreover, some lawyers, especially those with a common law background, may question if the project is not seriously limited from the start. If the trust is a creature born and bred in the common law, how can a transnational fiduciary law framework encompass both civil law and common law countries? This is a question traditionally allocated to the comparativist’s breadbasket. But again, the scholar seeking to stand on the shoulders of others is in danger of a misstep. Comparative law and transnational law have a lot in common. Not even the latest edition of the Oxford Handbook of Comparative Law,²⁷ arguably one of the most sophisticated and far-reaching volumes on the subject, contains a distinct section on the relationship of comparative law and transnational law, let alone one on comparative fiduciary law.²⁸ Methodologically, this makes thinking about transnational fiduciary law a daunting task. It cuts across transnational law, fiduciary law, and comparative law with only one certainty: Even fundamental issues are unclear, elusive, and hotly debated. At least at first glance, the endeavor of finding a vantage point puts the

²¹ PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956).

²² See DeMott, *supra* note 2.

²³ Cotterrell, *supra* note 20, at 522.

²⁴ Shaffer, *supra* note 20, at 232.

²⁵ H. Patrick Glenn, *A Transnational Concept of Law*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 839, 860 (Mark Tushnet & Peter Cane eds., 2005).

²⁶ Excellent overviews are provided by Cotterrell, *supra* note 20; Shaffer, *supra* note 20; LARS VIELLECHNER, *TRANSNATIONALISIERUNG DES RECHTS* 159 (2013). See also Glenn, *supra* note 25, at 849.

²⁷ *THE OXFORD HANDBOOK OF COMPARATIVE LAW* (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

²⁸ On this blind spot of comparative law, see Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 *TUL. L. REV.* 1103, 1108 (2001).

author in a legal cockleshell without oars in the middle of the Atlantic, drifting along on an ocean of literature.

Grappling with all these issues, this chapter aims to make a threefold contribution: First and foremost, it lays a foundation stone for transnational fiduciary law as a field, existing at the intersection of transnational law and fiduciary law and including both common law and civil law traditions. It shows that from a functional comparative perspective it is possible to bridge the common law/civil law divide in fiduciary law. Germany, to give but one example, solves many problems located in fiduciary law and equity in the common law through contract. Second, methodologically, this chapter connects transnational law and comparative law inquiries, arguing that inquiries into transnational legal ordering (TLO) require a comparative, functional approach to legal problems and institutions. This problem-focused approach complements TLO theory's focus upon the construction of legal orders in response to social problems. Third, and relatedly, this chapter expands both transnational law and fiduciary law by establishing new perspectives on how law develops transnationally and how fiduciary law in particular has developed in both common law and civil law jurisdictions. It explores how transnational law may evolve out of national norms through horizontal entanglement of national legal orders. Moreover, it demonstrates how the diffusion and implementation of nonnational norms engender transnational legal orders through vertical integration. The argument proceeds as follows.

Section 2.2 deals with a significant preliminary. According to many a common lawyer's intuition, the divide between common law and civil law with respect to equity and the trust as a legal institution gives cause to question the project as a whole. From a functional perspective, however, the different legal traditions do not present a significant obstacle. Both civil law and common law countries have to deal with the phenomenon of one person enjoying some sort of discretionary power over the interests or position of another. Comparatively speaking, this establishes a common *tertium comparationis* and therefore a point of entry for transnational fiduciary law.

Anyone talking about transnational law needs to take a stand and clearly set out their premises, otherwise they run the risk of becoming incoherent. Accordingly, Section 2.3 takes a deeper look into the methodological toolbox and scrutinizes the horizontal and vertical ordering of fiduciary law. On the horizontal level, transnational fiduciary law may come into existence as a consequence of entangled national legal orders. The starting point is a blind spot left by conventional transnational legal theory. Concentrating on "norms beyond the nation-state," most scholars neglect that national laws themselves might be a suitable basis for the emergence of a transnational legal order. Drawing on the theory of *histoire croisée* and connected histories, this chapter argues that transnational law may come into existence through the entanglement of national laws. Spreading out from Japan, the trust has been diffused over South Korea, Taiwan, and China – all countries with a

strong civil law background. Close historical ties and traditions shared among the “East Asian four” have established connections between the legal systems and a strong sense of awareness as to how the respective others develop their national laws – allowing legal reforms in one country to echo changes in the laws of the others. Going far beyond standard comparative fare, these coevolutions make it impossible to understand national norms without taking into account this background of entangled laws.

Vertical ordering of fiduciary law occurs whenever norms “beyond the state” become implemented in multiple national systems. A good example is the standards and principles concerning environmental, social, and governance (ESG) issues. These standards and principles, generated by the United Nations, the OECD, and other nonstate actors, contain a rich body of norms on fiduciary law, aiming at integrating stakeholder interests into the fiduciary duties of corporate boards and investment managers. They address policy makers and legislators all over the world and purport to provide benchmarks for the creation of legal norms on the national level.²⁹ Given their intended scope of application and transformation into laws within multiple nation-states, such frameworks potentially provide the basis for transnational legal orders and, in the present context, for transnational fiduciary law. The question remains, however, as to whether and how these norms turn from nonbinding standards and principles into law, at least from a socio-legal perspective. Pundits close to the Delaware approach in corporate law and traditional US investment managers’ fiduciary law are quick to deny the legal relevance of ESG standards. Both the *loi PACTE*, a recent piece of French legislation, and EU ESG reporting standards prove them wrong, however. Nation-states with stakeholder-oriented governance systems provide doors that allow so-called soft law to enter and settle down as hard fiduciary law.

However, merely looking at the spaces of legal ordering is not enough. Transnational legal orders “articulate . . . a set of norms for legal subjects over a given territory.”³⁰ Consequently, a transnational legal order is not only defined by its regional extension or geographic scope, but also by its normative elements or what may be called its intension. In other words, talking about “orders” implies being able to define an order’s legal scope.³¹ This can only be done by identifying the relevant norms at play in a specific area of legal ordering spanning a certain geographic space. Therefore, Section 2.4 engages with different elements in the transnational ordering of fiduciary law. Viewing fiduciary law(s) through the lens of transnational

²⁹ See, e.g., OECD, *supra* note 18, at 9. (“On the basis of the *Principles*, it is the role of government, semi-government or private sector initiatives to assess the quality of the corporate governance framework and develop more detailed mandatory or voluntary provisions that can take into account country-specific economic, legal, and cultural differences.”)

³⁰ Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3, 28 (Terence C. Halliday & Gregory Shaffer eds., 2015).

³¹ *Id.*

legal theory helps to shed some light on its confines, even within the common law world. Fiduciary law is defined by specific elements, specific traditions, and the extent to which it binds actors in a particular type of social relationship. Two examples serve as illustrations, the first relating to the duty of loyalty and the second to the duty of care: Whereas the duty of loyalty serves as the distinctive marker of fiduciary relationships in the common law, set apart from contract and contract law principles, it cannot do comparable work in civil law countries. Many of contract law's shortcomings in the common law do not exist in a civil law regime. Therefore, the duty of loyalty is not distinctive in the way it is in England, the United States of America, and other regions of the globe resting on equity traditions. Loyalty is distinctive, however, in that it separates fiduciary relationships from other agreements by implementing an obligation unknown to "regular" contracts. Again, the trust in East Asia illustrates how this plays out as a socio-legal matter. As the example of the duty of care shows, different orders of fiduciary law evolve even in the common law world. Whereas, for example, the United States recognizes the duty of care as a fiduciary obligation, English and Australian courts explicitly deny this possibility. Courts communicating across the borders of England and Australia have built an entangled regime of national fiduciary law, producing a transnational version of fiduciary law to a certain extent set apart from other nations of the common law.

Section 2.5 concludes by summarizing the chapter's findings concerning transnational legal ordering of fiduciary norms.

2.2 THEORIZING TRANSNATIONAL FIDUCIARY LAW AND THE CIVIL LAW/COMMON LAW DIVIDE

Anyone theorizing about transnational fiduciary law must grapple with a challenge absent from the conventional legal material that transnational legal theory addresses. A strong line in transnational legal theory relates to transnational legal orders established by contract. For Western nation-states, freedom of contract is a core principle of their respective private laws; thus, talking about contract law and contractual models does not encounter significant obstacles with respect to methodology. Fiduciary law, with its strong roots in equity traditions not known in civil law jurisdictions, is different. As shown in Section 2.2.1, comparative law and the functional method it relies on provide tools for overcoming differences in doctrine and legal traditions.³² What remains to be elucidated, however, is the relationship between transnational law and comparative law. It will be argued in Section 2.2.2

³² At least according to the still-prevailing view in the literature on comparative law. This chapter is not the place for a discussion on this, but rather must build on what the majority of scholars in comparative law still uses as the methodological standard. For a (critical) review, see Ralf Michaels, *The Functional Method of Comparative Law*, in Reimann & Zimmermann, *supra* note 27, at 345.

that transnational law necessarily involves comparability. After these methodological preliminaries, Section 2.2.3 deploys the tools. Given that the comparative literature is sparse and gives a bird's-eye view of civil law regimes,³³ and, alas, is not always very precise, it seems useful to discuss a specific example in greater detail in order to show the mechanisms at work. Regarding Germany's position as one of the major and most traditional civil law orders, it seems especially suitable as the basis for a case study.

2.2.1 *The Challenge of Theorizing Transnational Fiduciary Law*

Many of those thinking about transnational legal theory take their cue from commercial practice and the web of social norms fostered and stabilized by standardized contractual arrangements. The staple examples looming large in the literature emanate from what many coin "law merchant" or *lex mercatoria*.³⁴ Examples abound, such as the Uniform Customs and Practices for Documentary Credits and the INCOTERMS (both issued by the International Chamber of Commerce in Paris),³⁵ the International Swaps and Derivatives Association's master agreements for derivatives,³⁶ Internet Regulation by ICANN,³⁷ and standards set by the International Organization for Standardization (ISO).³⁸ An important factor driving the success story of transnational private legal ordering is freedom of contract. At least in Western capitalist democracies, market participants enjoy considerable leeway to shape their relations with others and act under obligations they choose to undertake. Discrepancies in detail notwithstanding, most common law and civil law countries share a baseline.³⁹ As a consequence, there is no need to build a bridge between the legal systems in order to have a starting point for research.

³³ See Gelter & Helleringer, *supra* note 11; Michele Graziadei, *Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions*, in Gold & Miller, *supra* note 1, at 287.

³⁴ Be it real or imagined, see Graf-Peter Calliess, *Transnationales Verbrauchervertragsrecht*, 68 RABELSZ 244, 254 (2004); CALLIESS & ZUMBANSEN, *supra* note 20, at 28; Gunther Teubner, "Global Bukovina": *Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3, 8 et seq. (Gunther Teubner ed., 1997), on the one hand; and Halliday & Shaffer, *supra* note 30, at 15 (with note 8), on the other.

³⁵ See, e.g., Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147 (2009).

³⁶ INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC., www2.isda.org (last accessed June 12, 2023). See, e.g., Johan Horst, *Lex Financiaria. Das transnationale Finanzmarktrecht der International Swaps and Derivatives Association (ISDA)*, 53 ARCHIV DES VÖLKERRECHTS 461 (2015).

³⁷ See Lars Viellechner, *Governing through Transnational Arrangements: The Case of Internet Domain Allocation*, in SOCIETY, REGULATION AND GOVERNANCE: NEW MODES OF SHAPING SOCIAL CHANGE? 106 (Regine Paul et al. eds., 2017).

³⁸ See, e.g., TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORD ECONOMY* 162 (2011).

³⁹ "Most," considering that some members of each family may deviate. China, to give one example, is a civil law country. Freedom of contract in a Western sense, however, seems not to be the all-foundational principle of its legal order, judged from the outside.

Fiduciary law is different. Common law lawyers may question the endeavor of transnational fiduciary law from the start because of their own fiduciary law's specific background and history.⁴⁰ It evolved on a general level out of equity and equitable remedies and is tightly bound to the trust as a legal institution.⁴¹ Civil law systems, by contrast, traditionally lack both equity⁴² and the trust institution,⁴³ though a number of civil law countries recognize the trust as a matter of private international law (e.g., Italy, Netherlands) or have adopted the trust (e.g., Japan).⁴⁴ How can there be “real” transnational fiduciary law if the latter group lacks equity and traditionally does not know the trust as a core institution? Furthermore, fiduciary duties, especially the duty of loyalty, have a strong anchor in national law and parties may not, at least according to conventional wisdom, contract out of it.⁴⁵ Establishing a framework constituting fiduciary standards beyond the nation-state is thus apparently much more challenging in jurisdictions putting fiduciary relationships in the vicinity of contract law. After all, the Hague Trust Convention has not met with much approval in the civil law world.⁴⁶

On the other hand, however, no one can deny the successful diffusion of the trust in East Asia. Starting out in Japan, the trust as a legal institution spread via South Korea and Taiwan to China.⁴⁷ Regardless of their legal family background, the respective trust laws include a duty of loyalty or at least duties requiring a trustee's loyal behavior.⁴⁸ There are attorneys, corporate directors, trustees in bankruptcy,

⁴⁰ *But see* Frankel, *supra* note 14.

⁴¹ On the importance of both equity and the trust for common fiduciary law: Joshua Getzler, *Fiduciary Principles in English Common Law*, in Criddle et al., *supra* note 1, at 471. That is not to say that today trust is the only foundation of fiduciary law. The second pillar, especially in the United States, is agency law. On agency law as a source of fiduciary law: Deborah DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in Smith & Gold, *supra* note 1, at 321; Deborah DeMott, *Fiduciary Principles in Agency Law*, in Criddle et al., *supra* note 1, at 23.

⁴² Gelter & Helleringer, *supra* note 11, at 585.

⁴³ *See* Bundesgericht [BGer] [Federal Supreme Court] Jan. 29, 1970, 96 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 79, 88, for Switzerland.

⁴⁴ On the trust in East Asia, *see* Section 2.3.1.2.

⁴⁵ DeMott, *supra* note 2, at 885–86; Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303 (1999); TAMAR FRANKEL, *FIDUCIARY LAW* 229–35 (2011). For an opposing view, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425 (1993); with certain reservations John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 671 (1995); *see also* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1492 (2002).

⁴⁶ *See* Hague Conf. on Priv. Int'l L. [HCCH], *Status Table 30: Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition*, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59> (last accessed June 12, 2023).

⁴⁷ Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 IOWA L. REV. 2229 (2018).

⁴⁸ *See* Section 2.4.3.

guardians, and a plethora of other persons working in positions and exercising functions similar to their fiduciary counterparts in Australia, England, and the United States of America.⁴⁹ German courts and scholars, to give one example from one of the most “civilistic” of the civil law countries, employ the rhetoric of fiduciary law, even though, for lack of an established model such as the trust in common law jurisdictions, it is impossible to go forward by analogy to an archetype serving as a guidepost.⁵⁰ In many instances, what is called “fiduciary duty” and “fiduciary law” in the United States is mirrored by *Treuepflicht* in Germany.⁵¹ The fact remains, however, that many of the relationships deemed “fiduciary” in Germany and other civil law countries are governed by contract or quasi-contractual mechanisms. At first glance, this contrasts starkly with the majority opinion in common law fiduciary law scholarship according to which fiduciary law is *not* contract.⁵² Before pondering whether comparative law’s functional approach may help to resolve this predicament (Section 2.2.3), an intermediate step has to be taken. Resorting to comparative law in the context of transnational law requires exploring the relationship between these two.

2.2.2 *Transnational Law and Comparative Law*

The relationship between transnational law or transnational legal theory and comparative law and its methodology has mostly evaded scholarly attention so far. Although many scholars of transnational law heavily invest in exercises in comparative law, the methodological premises are rarely made explicit. Two books on transnational legal theory which have been (justifiably) widely perceived as important contributions to the field⁵³ do not put their finger on the issue. The rare book chapter here and there pointing to comparative law as a necessary tool for transnational law⁵⁴ sketches an idiosyncratic definition of the latter that stands square to conventional theory. Others tackle the rapport between transnational law and comparative law from the direction of the latter and either declare comparative

⁴⁹ See, e.g., Smith, *supra* note 45, at 1450–83 (listing types of relationships courts have concluded are fiduciary in nature).

⁵⁰ See RUSCH, *supra* note 7, at 193 et seq.

⁵¹ See the examples *supra* at notes 7–10.

⁵² See, e.g., DeMott, *supra* note 2, at 887–88; FitzGibbon, *supra* note 45; Smith, *supra* note 45, at 1492.

⁵³ See CALLIESS & ZUMBANSEN, *supra* note 20; Halliday & Shaffer, *supra* note 30.

⁵⁴ Mathias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 *COLUM. J. TRANSNAT’L L.* 753, 753–54, 763 (2004) (defining transnational law as “general principles of law that are recognized by a significant number of national laws” and demanding “converge[n]ce on the same solution to a particular problem”). For a discussion in the same vein that relies on Lehmann’s definitions, see Reza Dibadj, *Panglossian Transnationalism*, 44 *STAN. J. INT’L L.* 253, 289–97 (2008).

law to be transnational law⁵⁵ or want to enrich comparative law by integrating insights from transnational legal theory.⁵⁶

The necessary starting point for thinking through the relationship between transnational law and comparative law is a definition of transnational law accepted by the majority of authors working in the field. According to many pundits, it transcends national law, but is not international law – or at least not limited to it.⁵⁷ Additionally, there has to be some connection of the transnational norm to national law or national lawmaking.⁵⁸ If transnational legal orders unfold through “the adoption, recognition, or enforcement of the norms” by legal institutions within multiple nation-states,⁵⁹ tracing these various instances of norm-acceptance must employ the conceptual apparatus of comparative law. As not all legal orders are alike, not even within one legal family, the means by which the process of norms being “uploaded” from or “downloaded” into national legal orders⁶⁰ are unique to the environment originating or receiving them. Different conceptions of public and private law, diverging boundaries of contract and tort⁶¹ – these and other rifts in the legal landscape inevitably lead to a broad variety of instruments and strategies for placing transnational norms within a given national legal order. Locating the transnational norm in question thus presupposes an exercise in comparative law and searching for functional equivalence of legal institutions.⁶² Institutions are comparable if they serve similar purposes (*function*) in the systems compared.⁶³ A function, at least according to a popular definition in the comparatist’s methodological quiver, is the

⁵⁵ Russel A. Miller & Peer C. Zumbansen, *Introduction – Comparative Law as Transnational Law*, in *COMPARATIVE LAW AS TRANSNATIONAL LAW: A DECADE OF THE GERMAN LAW JOURNAL* 3 (Russel A. Miller & Peer C. Zumbansen eds., 2011).

⁵⁶ Reimann, *supra* note 28, at 1115–19. Reimann’s approach did not generate a large following. See Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 *BROOK. J. INT’L L.* 385, 424 (2011). In the ensuing ten years, to be fair, comparativists did not rush to engage with what Reimann called “vertical comparisons.”

⁵⁷ See, e.g., Halliday & Shaffer, *supra* note 30, at 4, 19; VIELLECHNER, *supra* note 26, at 167.

⁵⁸ CALLIESS & ZUMBANSEN, *supra* note 20, at 110; Halliday & Shaffer, *supra* note 30, at 13.

⁵⁹ Halliday & Shaffer, *supra* note 30, at 13.

⁶⁰ Harold H. Koh, *Why Transnational Law Matters*, 24 *PENN STATE INT’L L. REV.* 745–46 (2006).

⁶¹ Whereas German law knows a pre-contractual liability norm, the “culpa in contrahendo,” and puts it under a quasi-contractual roof, common law deals with similar situations under tort law (if at all), see, e.g., the classical essay of Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 *HARV. L. REV.* 401 (1964). See Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 *TUL. EUR. & CIVIL L. F.* 97 (1997), for a more recent take.

⁶² See Michaels, *supra* note 32, for a (critical) review of the functional method in comparative law.

⁶³ See Hugh Collins, *Methods and Aims of Comparative Law*, 11 *OXFORD J. COMP. L.* 396 (1991), and UWE KISCHEL, *RECHTSVERGLEICHUNG*, 93–94 (2015), for a strong commitment to the function method.

relation between institutions and problems.⁶⁴ Therefore, one first has to nail down the problem, which then may serve as the constant for the comparative work.⁶⁵

As a result, the fact that relevant relationships in civil law countries are governed wholly or in part by contract law does not take them out of the equation a priori. The heart of the problem lies in the question as to whether, for example, the German contract law provisions serve the same purpose as the rules of fiduciary law in the United States or in England. Similitude or difference in remedies may well count as circumstantial evidence. From a methodological point of view, however, neither the one nor the other is decisive. Factual or purely descriptive methods do “not tell us whether these [similarities or differences] are accidental or necessary, or how they relate to society.”⁶⁶ They “simply” have to fulfill the same purpose.⁶⁷ The next section illustrates this point.

2.2.3 *Fiduciary Law in Civil Law Jurisdictions: Germany as a Case Study*

Even though the exact confines and definitions of a fiduciary relationship are still subject to a lively debate,⁶⁸ nearly all theories agree on the core problem: the other-regarding powers conferred or taken by one person over another’s interests (broadly construed), combined with an element of discretion.⁶⁹ In the language of law and economics, this gives rise to a principal-agent problem.⁷⁰ The person having the interests in question, i.e., the principal, is vulnerable. They cannot sufficiently observe the agent’s actions and, in many situations, will lack the skill for monitoring the agent.⁷¹ That creates an opportunity to engage in opportunistic behavior or, in the famous phrase coined by Oliver Williamson, “self-interest seeking with guile.”⁷² The agent may engage in hidden actions under conditions of moral hazard.⁷³ They can, for example, misappropriate assets belonging to the principal or act despite

⁶⁴ Michaels, *supra* note 32, at 371.

⁶⁵ *Id.*

⁶⁶ *Id.* at 369.

⁶⁷ Dubious therefore Gelter & Helleringer, *supra* note 11, at 595–96.

⁶⁸ *Cf.*, to name just three recent attempts at a general definition and theory: Paul B. Miller, *The Fiduciary Relationship*, in Gold & Miller, *supra* note 1, at 63, developing a “fiduciary powers theory”; Smith, *supra* note 45, testing a “critical resource theory” and; Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993 (2017).

⁶⁹ See Paul B. Miller, *The Identification of Fiduciary Relationships*, in Criddle et al., *supra* note 1, at 367, 379. Critics interpret some instances of fiduciary relationships as lacking the element of discretion, for example, when an investment adviser is either not given discretionary power to act on their client’s behalf or refuses to assume discretion. See Arthur Laby, *Book Review*, 35 L. & PHIL. 123, 132–34 (2016) (reviewing Gold & Miller, *supra* note 1).

⁷⁰ See Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in Gold & Miller, *supra* note 1, at 197, 198.

⁷¹ *Id.* at 199.

⁷² Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233, 234 n.3 (1979).

⁷³ Sitkoff, *supra* note 70, at 199.

having a conflict of interests. This leads into the question as to whether and how a given legal system addresses these risks. In the common law system, it is first and foremost the duty of loyalty. The duty of loyalty prohibits incurring profits other than those agreed upon when the parties entered the relationship and requires the agent to avoid conflicts of interest.⁷⁴ These “no conflict” and “no profit” rules build the fiduciary loyalty’s core in the common law.⁷⁵ They serve as entry points for more specific duties such as to ask for consent in conflicted transactions and remedies such as disgorgement of profits.⁷⁶ German law reacts to a similar set of real-world problems by means of functionally equivalent rules.

Contracts between attorneys, investment advisors, tax consultants and their clients, distribution agreements (*Vertriebshändlervertrag*), commercial agency agreements (*Handelsvertretervertrag*), construction management contracts (*Baubetreuungsvertrag*), the duties of corporate directors vis-à-vis the corporation, duties of trustees in bankruptcy (*Insolvenzverwalter*) to creditors, to name but a few examples – they all create the problems sketched earlier. In these relationships, one person enjoys discretionary powers over the interests of another, followed by the danger of the agent acting opportunistically. In Germany, just as in other civil law countries, the knot tying these and comparable relationships together is primarily the *mandate contract*.⁷⁷

The German Civil Code (*Bürgerliches Gesetzbuch – BGB*) provides default rules for an agreement to act on another person’s behalf⁷⁸ in the shape of a mandate contract (*Auftrag*).⁷⁹ These rules are the foundation for the development of a functional equivalent to fiduciary duties in the common law world. Just like the legal norms governing a common law fiduciary relationship, the provisions of the mandate contract deal with the rights and duties of a person in a position of power over rights and interests of another. The German Civil Code subjects the agent to a regime of contract law rules governing, inter alia, the agent’s duty to notify the mandator if they want to deviate from instructions and then to wait for a decision,⁸⁰

⁷⁴ Andrew S. Gold, *The Fiduciary of Loyalty*, in Criddle et al., *supra* note 1, at 385, 387, 389; Paul B. Miller, *A Theory of Fiduciary Liability*, 6 MCGILL L.J. 235, 257 (2011). See Sitkoff, *supra* note 70, at 201, from a law and economics point of view.

⁷⁵ Gold, *supra* note 74, at 386.

⁷⁶ *Id.* at 387, 394.

⁷⁷ See generally Gelter & Helleringer, *supra* note 11, at 588–90.

⁷⁸ German law distinguishes the agent’s authority to act from the agreement to act between agent and principal. See BASIL S. MARKESINIS ET AL., *THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE* 109, 158 (2d ed. 2006).

⁷⁹ The mandate contract is a contract in which one person takes on a duty to act on behalf of another without receiving remuneration. See *id.* at 158.

⁸⁰ Section 665 of the BGB: “The mandatary is entitled to deviate from the instructions of the mandator if he may assume in the circumstances that the mandator would approve of such deviation if he were aware of the factual situation. The mandatary must make notification to the mandator prior to such deviation and must wait for the decision of the latter unless postponement entails danger.” BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ,

a duty to provide the mandator with information on the status of the transaction and, after carrying out the mandate, to render account for it,⁸¹ the disgorgement of profits,⁸² and a penalty in case the agent misappropriates assets under his management.⁸³ Generally, it is an accepted (if unwritten) basic rule that the agent has to put the principal's interests before their own and avoid conflicts of interest.⁸⁴

The mandate contract in itself is of limited practical significance because it covers only those relationships in which the agent acts without remuneration. Its importance results from a regulatory choice. The rules of the mandate contract form a nucleus other provisions piggyback on. Other types of contract do not have their own provisions about an agent's duties, but only refer to the agent's duties as defined by the norms of the mandate contract. They are applied by analogy. One example is section 675(1) of the *BGB*, a linchpin of German contract law regulating what – reluctantly – may be called agency agreements:⁸⁵

Nongratuitous management of the affairs of another

(1) The provisions of sections 663, 665 to 670 and 672 to 674 apply to a service contract or a contract to produce a work dealing with the management of the affairs of another to the extent that nothing else is provided in this subtitle and, if the person obliged is entitled to terminate without complying with a notice period, the provisions of section 671 (2) also apply with the necessary modifications.

This – if read out of context admittedly slightly cryptic – piece of legislation contains an essential set of duties. An agreement in the sense of section 675(1) of the *BGB* is a contract for services or work and labor in exchange for remuneration. “[D]ealing with the management of the affairs of another” is understood by the

https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last accessed June 12, 2023).

⁸¹ Section 666 of the *BGB*: “The mandatary is obliged to provide the mandator with the required reports, and on demand to provide information on the status of the transaction and after carrying out the mandate to render account for it.” *Id.*

⁸² Section 667 of the *BGB*: “The mandatary is obliged to return to the mandator everything he receives to perform the mandate and what he obtains from carrying out the transaction.” *Id. See also* Graziadei, *supra* note 33, at 287, 295 (discussing disgorgement of profits under civil law).

⁸³ BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 668, translated in https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last accessed June 12, 2023). (“If the mandatary spends money for himself that he must return to the mandator or spend for the mandator, then he is obliged to pay interest on it from the time of spending onwards.”)

⁸⁴ Michael Martinek & Sebastian Omlor, in STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, BUCH 2, VORBEMERKUNGEN ZU §§ 662 ff margin no. 28 (14th ed. 2017).

⁸⁵ “Reluctantly” because of the content any common lawyer will immediately think of in connection with agency. Although there is an overlap of agency agreements in the common law and those of the German civil law variety as to content, significant differences remain, such as the difference between the authority to act and the agreement to act. See MARKESINIS ET AL., *supra* note 78, at 158–60. See also *BGB* § 675(1), translated in https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last accessed June 12, 2023).

BGH, the Federal Court in private law matters, as an independent activity⁸⁶ of an economic character⁸⁷ on behalf of another within a foreign⁸⁸ sphere of interest.⁸⁹ This section does not define the duties applying to agency agreements, but refers to provisions of the mandate contract, inter alia those governing notification and information duties and disgorgement of profits. Moreover, the agent is subject to a duty of loyalty, which is deemed to be the decisive characteristic distinguishing a *Geschäftsbesorgungsverträge* from other contracts, for example, regular service contracts and contracts for work and labor.⁹⁰

German scholars observe that *Geschäftsbesorgungsverträge* fit well into concepts of economic contract theory and demand a specific set of duties in order to counter the various problems discussed under the rubric of agency theory and in the incomplete contracts literature.⁹¹ The rules governing mandate contracts and agency agreements address exactly those problems fiduciary law addresses in the United States. Therefore, from a functional point of view, it is completely legitimate to categorize the German contract law provisions just discussed as fiduciary law from a comparative perspective.⁹²

The mandate contract, however, is not the only way to establish a fiduciary relationship and a duty of loyalty. In addition to contract law, other parts of German law also provide for fiduciary obligations. Examples already mentioned in this chapter's introduction are the relationship between guardian and ward⁹³ and the trustee in bankruptcy (*Insolvenzverwalter*).⁹⁴ A director on the executive board of a public corporation (*Vorstand der Aktiengesellschaft*) owes specific fiduciary duties to the corporation itself. These duties are not grounded in the employment contract, but in the corporate relationship of the director and the corporation.⁹⁵ Moreover,

⁸⁶ As opposed to an employment relationship.

⁸⁷ In contrast to a mandate in the sense of section 662 of the BGB, which is a similar contract without consideration. Additionally, this criterion excludes contracts related to activities traditionally considered having a noneconomic purpose from section 675's scope – for example, contracts between doctors and patients, teacher and pupil, and artists and “customer.” See Martinek & Omlor, *supra* note 84, § 675 margin no. A 16.

⁸⁸ As opposed to one's own sphere of interest.

⁸⁹ See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 25, 1966, 45 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 223 (228).

⁹⁰ Christoph Benicke, in SOERGEL, 10 BÜRGERLICHES GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN (BGB) § 675 margin no. 5 (13th ed. 2011); Klaus J. Hopt, *Interessenwahrung und Interessenkonflikte im Aktien-, Bank- und Berufsrecht*, 33 ZGR 1, 20 (2004).

⁹¹ Kuntz, *supra* note 6, at 766; see also CHRISTOPH KUMPAN, DER INTERESSENKONFLIKT IM DEUTSCHE PRIVATRECHT 59–63 (Mohr Siebeck Tübingen 2014) (discussing in the context of conflicts of interests); Martinek & Omlor, *supra* note 84, VORBEM ZU §§ 662 ff margin no. 77.

⁹² Kuntz, *supra* note 6, at 766.

⁹³ BGHZ, *supra* note 7; RUSCH, *supra* note 7; Zimmerman, *supra* note 7.

⁹⁴ BGHZ, *supra* note 8; BECKER, *supra* note 8.

⁹⁵ See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 20, 1995, 129 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 30 (34); 1

public law enriches and subjects several relationships to a special fiduciary law regime, even though the parties are bound by contract, as is the case with investment advisors⁹⁶ and attorneys⁹⁷ toward their clients. Several courts and authors even underscore that fiduciary duties are stricter than those flowing from the covenant of good faith and fair dealing,⁹⁸ echoing the well-known adage coined by Judge Cardozo who famously expected a trustee to show the “punctilio of an honor the most sensitive.”⁹⁹ Even though the relationships just mentioned are not mandate contracts in terms of legal doctrine, this does not mean that the trustee in bankruptcy or a guardian enjoys the privilege of a more lenient regime. Either the relevant specific regulations contain supplementary rules or courts draw from the rules governing mandate contracts by analogy.

The no-profit rule may serve as an example: In cases where no express reference is made to this rule, courts apply the relevant section 667 of the *BGB*¹⁰⁰ by way of analogy – for example, in case of a guardian letting entailed land after receiving a “commission”¹⁰¹ or an insolvency trustee holding monies in an escrow account on behalf of the debtor.¹⁰² Should the fiduciary engage in illegal competition, German law provides another set of norms serving as no-profit rule, for example, in section 88 of the German Stock Corporation Act (*Aktiengesetz*) with respect to the board of directors of a stock corporation (*Aktiengesellschaft*).¹⁰³ These and other prohibitions

HOLGER FLEISCHER, BECK-ONLINE GROSSKOMMENTAR ZUM AKTIENGESETZ § 93 margin no. 117 (Gerald Spindler & Eberhard Stitz eds., as of April 1, 2023).

⁹⁶ See Wertpapierhandelsgesetz [WpHG] [German Securities Trading Act] § 63(1) (“Investment firms shall be required to provide investment services and ancillary services honestly, candidly and with the requisite degree of expertise, care and diligence in the best interests of their clients.”) (Thilo Kuntz trans. 2020); see also Hopt, *supra* note 90, at 1, 6–8; KUMPAN, *supra* note 91, at 119–21.

⁹⁷ Oberlandesgericht [OLG] [Court of Appeal] Brandenburg, Mar. 5, 2012, *Neue Juristische Wochenschrift – Rechtsprechungsreport* [NJW-RR] 1191 (1193).

⁹⁸ See Oberlandesgericht [OLG] [Higher Regional Court] Nov. 18, 2019, *DIE AKTIENGESELLSCHAFT* [AG] 462, 463, 2011; FLEISCHER, *supra* note 95, § 93 margin no. 115.

⁹⁹ Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).

¹⁰⁰ See *supra* note 83.

¹⁰¹ Reichsgericht [RG] [Federal Court of Justice] May 30, 1940, 164 *ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN* [RGZ] 98 (103).

¹⁰² BGH Dec. 15, 2011, *NEUE ZEITSCHRIFT FÜR INSOLVENZRECHT* [NZI] 135 (136), 2012.

¹⁰³ Aktiengesetz [AktG] [German Stock Corporation Act] § 88. (“(1) Members of the executive board may not engage in any trade or enter any transactions in the line of the corporation’s business without prior approval by the supervisory board. They may not be member of another corporation’s executive board, director of a limited liability company or general partner of another commercial enterprise. [. . .]; (2) The corporation may claim damages from a member of the executive board who violates this prohibition. In lieu thereof, the corporation may require said member to treat any transaction made on his own behalf as if he had acted on behalf of the corporation and deliver up any remuneration received for actions on behalf of another, or assign his rights to such remuneration. (3) [. . .]. (2) The corporation may claim damages from a member of the executive board who violates this prohibition. In lieu thereof, the corporation may require said member to treat any transaction made on his own behalf as if he had acted on behalf of the corporation and deliver up any remuneration received for actions

of engaging in competition with the principal are also applied analogously, for example, to the directors of a limited liability company (*Gesellschaft mit beschränkter Haftung*)¹⁰⁴ or a trustee in bankruptcy appropriating the debtor's corporate opportunities.¹⁰⁵

In the end, German contract law and other legal institutions address problems arising out of relationships in which one party enjoys other-regarding powers over another's interests, combined with an element of discretion. From a comparative perspective, this establishes the functional equivalence of these solutions to the common law approach. That means that the differences between equity-based common fiduciary law and German civil law, as significant as they are in general, do not stand in the way of the current project. Given the same set of problems that both civil law and common law must solve, the differences in the regulatory "technique" are irrelevant as far as concerns the establishment of transnational law. Everyone knows that many, if not all, roads lead to Rome.

2.3 SPACES OF TRANSNATIONAL FIDUCIARY LAW

Transnational law exists in different spaces¹⁰⁶ and so does transnational fiduciary law. Notwithstanding the ubiquity of fiduciary law, there is no "world" or "global" fiduciary law, as will be discussed in Section 2.2.3. Legal ordering of fiduciary law rather occurs in two dimensions. Entanglement of national laws can entail the emergence of transnational legal orders on the horizontal level (Section 2.2.1). On the vertical plane, norms created "beyond the state" may trickle down into national legal systems either because legislators and courts transform them in national laws or actors make use of them in enforcing rights and remedies (Section 2.2.2).

2.3.1 *Horizontal Transnational Ordering of Fiduciary Law*

The horizontal transnational ordering of fiduciary law is a consequence of several national legal orders becoming entangled through norms flowing back and forth between the respective systems. This claim rests on a nontrivial premise – namely, the assumption that national law can provide a basis for transnational legal ordering. Considering national law's uncertain status in transnational legal theory, this is a point in need of some elaboration as a first step. Having cleared the ground, a

on behalf of another, or assign his rights to such remuneration. (3) [...]” (Thilo Kuntz trans. 2020).

¹⁰⁴ BGH Oct. 26, 1964, WERTPAPIERMITTEILUNGEN [WM] 1320 (1321), 1964.

¹⁰⁵ BGH Mar. 16, 2017, WERTPAPIERMITTEILUNGEN [WM] 776 (779), 2017.

¹⁰⁶ See Halliday & Shaffer, *supra* note 30, at 18–19.

second step then helps to chart the territory, taking up the example of the diffusion of the trust as a legal institution in East Asia.

2.3.1.1 National Law's Uncertain Status in Transnational Legal Theory

Workers in the vineyard of transnational legal theory have long been underlining that transnational law has a distinctive geographic component.¹⁰⁷ Contrary to traditional national law, it reaches beyond the nation-state and expands beyond the confines of a legally defined territory and scope of application.¹⁰⁸ Its extension varies¹⁰⁹ and remains to be determined case by case, depending on the market participants, legislators, courts, and other institutions applying and subjecting themselves to transnational law.¹¹⁰ Pointing this out, many scholars conclude that transnational orders vary in geographic scope.¹¹¹ This geographic approach is rooted in the idea of transnational law being based on norms “beyond” the nation-state as a starting point. Building their theories on normative arrangements like the contract models typically collected under the umbrella term *lex mercatoria*,¹¹² the overwhelming majority of writers, while stressing the importance of national laws,¹¹³ take this as a given.¹¹⁴ Whatever their respective position on what transnational law actually “is” may be, these scholars – at least implicitly – carve out orders exclusively based on national laws.

At first glance, this strategy of erecting a dichotomy not only provides for a manageable definition of transnational law, but also sensibly divides labor between transnational law on the one hand and comparative law on the other. Just having two or more national legal orders look alike does not imply norms reverberating across borders and beyond the nation-state. Legal transplants are not transnational law either, at least according to typical view of the field.¹¹⁵ Even though such repotting of a legal rule or legal institution from one national system and into

¹⁰⁷ See *id.* at 18–19, 28. See also Shaffer, *supra* note 20, at 232.

¹⁰⁸ International private law excluded for a moment. That is not to say that national law never can have extraterritorial reach, to the contrary. But as this is the exception rather than the rule, this issue does not alter the thrust of the argument developed above. On the status of international private law, which the discussion here brackets, see text cited *infra* note 123.

¹⁰⁹ Halliday & Shaffer, *supra* note 30, at 18.

¹¹⁰ *Id.* at 12–13.

¹¹¹ *Id.* at 18–19.

¹¹² See *supra* note 34 and accompanying text. For a broader view, see, e.g., Halliday & Shaffer, *supra* note 30, at 13–15.

¹¹³ CALLIESS & ZUMBANSEN, *supra* note 20, at 19; Glenn, *supra* note 25, at 839; Halliday & Shaffer, *supra* note 30, at 13.

¹¹⁴ See, e.g., CALLIESS & ZUMBANSEN, *supra* note 20, at 63 (noting “contested relationship between *lex mercatoria* and the state legal order”); Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447, 450 (2006); Halliday & Shaffer, *supra* note 30, at 12; VIELLECHNER, *supra* note 26, at 180–85.

¹¹⁵ A couple of authors beg to differ; see, e.g., Jonathan Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27

another national bed refers to a border-crossing movement, the issue is not so much the creation of an additional point of reference. The question is rather whether the receiving system accepts or rejects the transplant. Legal transplants thus appear “as elements of local law reform.”¹¹⁶ Even though transnational law cannot forego exercises in comparative law,¹¹⁷ the latter remains reduced to the status of an auxiliary discipline to the former. Methodologically speaking, comparative law does not gain anything or grow just by being employed for the purposes of the transnational enterprise.

And still, there is a curious ambiguity in many established narratives on how transnational law comes into being and which role national law may play. One does well to bring to mind that riding the transnational train does not add value in generating another substantive body of norms. What makes the trip worth the while is the methodological aspect of giving process pride of place.¹¹⁸ Theorizing transnational legal ordering moves the “construction, flow . . . and settlement of legal norms”¹¹⁹ into the spotlight and helps to understand how the production of national laws interacts with “different levels of social organization, from the transnational to the local” – for example, “the migration across borders, . . . contestation and homologies among the transnational, national, and local levels.”¹²⁰

Nation-states create “true” legal norms in the sense of classical positivist legal theory. Consequently, contrary to what is the case concerning norms of transnational law, the theoretical puzzle to ponder is not normativity in a legal sense,¹²¹ but this: If several nation-states generate trust law, and this process of norm production is interdependent, because legislators and courts of each of the states look at what the other is doing, does this not also constitute *transnational law*? After all, transnational law is “transnational” not because of the norm-giving involved or because the norm-producing institutions are non-state actors, but because of its reach in terms of geography.¹²²

ECOLOGY L.Q. 1295 (2001); Anna Dolidze, *Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant*, 26 EUR. J. INT’L L. 851 (2015).

¹¹⁶ Ralf Michaels, *State Law as a Transnational Legal Order*, 1 UC IRVINE J. INT’L. TRANSNAT’L. & COMP. L. 141, 148 (2016).

¹¹⁷ See Section 2.2.2.

¹¹⁸ Halliday & Shaffer, *supra* note 30, at 37–38; Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183–84 (1996); Shaffer, *supra* note 20, at 237; Peer Zumbansen, *Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back*, 1 UC IRVINE J. INT’L. TRANSNAT’L. & COMP. L. 161, 166 (2016). The extent to which these views are all purely procedural is subject to debate. See, e.g., Halliday & Shaffer, *supra* note 30; Michaels, *supra* note 116, at 144. See JESSUP, *supra* note 21, at 2, for a differing view, putting emphasis on substantive law rather than process.

¹¹⁹ Shaffer, *supra* note 20, at 237.

¹²⁰ *Id.*

¹²¹ On this problem, see Halliday & Shaffer, *supra* note 30, at 11.

¹²² Michaels, *supra* note 116, at 154.

In a more recent turn of events, a group of scholars has already started moving into this direction, grounding their approach in international private law.¹²³ (National) international private law, so their argument goes, “engage[s] institutions in foreign states, too.”¹²⁴ Stressing the political – and therefore regulatory – nature of international private law,¹²⁵ these authors conclude that international private law and cross-border litigation engender transnational (private) law.¹²⁶ National law can also turn into transnational law, or so some propose, through national judges developing common private international law principles.¹²⁷

Delving into the debate’s details is not of interest for the purposes of this text.¹²⁸ What is of interest, however, is the fact that scholars are able to attribute international private law – state law – to a popular definition of transnational legal orders. This undergirds the conjecture of conventional accounts of transnational law having blind spots with respect to the “transnational potential” of national laws. Entanglement of national laws is another entity, highly relevant for fiduciary law, as will be argued in Section 2.3.1.2.

2.3.1.2 Transnationalization through Horizontal Entanglement of National Laws

The starting point for the following discussion of the meaning and consequences of entanglement is the diffusion of trust law in East Asia. The legal systems of Japan, South Korea, Taiwan, and China have a civil law core. Nevertheless, Japan introduced the trust as a legal institution, which then spread over East Asia for various reasons. It would be a mistake, however, to qualify this as a problem of transplanting law from one national legal system to another. Doing so would seriously neglect the fact that these East Asian countries’ laws are in many ways connected and intertwined. As a consequence, to truly understand trust law in East Asia – and with it, large portions of fiduciary law – presupposes an understanding of the trajectories that these national legal orders share. Building on the case study of trust law in East Asia, the section moves forward by exploring the consequences for transnational fiduciary law more generally. It constructs the theoretical framework for understanding how entanglement and *histoire croisée* establish a process of transnationalization.

¹²³ See, e.g., Michaels, *supra* note 116; Robert Wai, *Transnational Law and Private Ordering in a Contested Global Society*, 46 HARV. INT’L L. J. 471 (2005).

¹²⁴ Michaels, *supra* note 116, at 153.

¹²⁵ E.g., Wai, *supra* note 123, at 473.

¹²⁶ See Michaels, *supra* note 116; Wai, *supra* note 123.

¹²⁷ Craig Scott, “Transnational Law” as Proto-Concept: Three Conceptions, 10 GER. L. J. 859, 870–71 (2009); see also Shaffer, *supra* note 20, at 244 (“legal Esperanto”).

¹²⁸ Apart from the question if the analysis in general stands up to closer scrutiny, there is a further debate within that group whether in addition to the rules of international private law the applicable substantive law should be part of transnational law as well. See Michaels, *supra* note 116, at 153.

(A) Introductory Example: The Diffusion of Trust Law in East Asia Japan, South Korea, Taiwan, and China not only share a rich history as a region,¹²⁹ they also share a common legal framework as they are all civil law jurisdictions with strong historical roots in the German civil code (*Bürgerliches Gesetzbuch*).¹³⁰ As a consequence, these East Asian countries lack equity courts and are historically situated within a framework built around the concept of single ownership, which runs counter to a core element of trust architecture: dual ownership.¹³¹ This distinguishes them from their common law siblings: Hong Kong, Singapore, and Malaysia.¹³² Nevertheless, after the Secured Bond Trust Act of 1905 was introduced as a piece of specific legislation, Japan followed through with the enactment of the Trust Business Act of 1922.¹³³ As part of its colonial rule over Taiwan, acquired from China in 1895, and Korea, annexed in 1910,¹³⁴ Japan imposed its trust legislation.¹³⁵ China, the latest addition to the East Asian civil law and trust family, included the trust as an institution only after the Opening Up policy implemented by Deng Xiaoping in 1979; the legal institution based on the Trust Act entered into force only in 2001.¹³⁶ Both Taiwan and South Korea kept the trust after Japanese colonial rule ended.¹³⁷ What did not end, however, was the influence of Japanese trust law. Given its status as the root of modern trust regulation in these two jurisdictions, it still oftentimes served as a pacesetter for Taiwanese and South Korean trust law and exercises some influence on the 2001 Chinese legislation.¹³⁸ At the same time, the trust laws of the group members echo US models on trust.¹³⁹

The implementation of a common law institution into a jurisdiction with a solid civil law background led to shared problems and points of departure for doctrinal

¹²⁹ See CHARLES HOLCOMBE, *A HISTORY OF EAST ASIA* (2d ed. 2017).

¹³⁰ See Lusina Ho & Rebecca Lee, *Reception of the Trust in Asia: An[isic] Historical Perspective*, in *TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS* 10–11 (Ho and Lee eds., 2013). China did not directly adopt and adapt German law, but took it over from the Soviet legal system. Lusina Ho, *Trust Laws in China*, in Smith, *supra* note 13, at 183.

¹³¹ See Lusina Ho, *The Reception of Trust in Asia: Emerging Asian Principles of Trust*, 2004 *SING J. LEGAL STUD.* 287, 289 (2004).

¹³² Ho & Lee, *supra* note 130, at 10.

¹³³ See Tamaruya, *supra* note 47, at 2231, for a detailed description of the Japanese reception of trusts and trust law.

¹³⁴ See HOLCOMBE, *supra* note 129, at 273 (on Korea); *id.* at 384 (on Taiwan), for a concise introduction into this period of East Asian history and Japanese imperialism.

¹³⁵ Tamaruya, *supra* note 47, at 2242.

¹³⁶ On the trust in China, see, e.g., Ho, *supra* note 131; Charles Zhen Qu, *The Doctrinal Basis of the Trust Principles in China's Trust Law*, 38 *REAL PROP. PROB. & TR. J.* 345 (2003); see also Tamaruya, *supra* note 47, at 2245; HOLCOMBE, *supra* note 129, at 369 (on the Opening Up policy).

¹³⁷ Ho & Lee, *supra* note 130, at 12; Tamaruya, *supra* note 47, at 2246.

¹³⁸ See Tamaruya, *supra* note 47, at 2246.

¹³⁹ *Id.*

development. There is no constructive trust on traceable assets.¹⁴⁰ Additionally, even though there are functional equivalents of the duty of loyalty in the respective trust laws, the content and extent of these rules awaits further clarification compared to their common law counterparts.¹⁴¹ Reviewing these common points of departure, it comes as no surprise to find solutions closely resembling each other.¹⁴²

Bearing in mind the historical development of trust legislation of the “East Asian Four” means that a traditional comparative approach is not enough. The individual legal orders do not simply stand alongside each other either nor did they each on their own “simply” accept a legal transplant which now becomes part of the national body of law.¹⁴³ They rather interlace on several levels and form a discernible space of trust law and fiduciary regulation. Trust legislation in South Korea, China, Taiwan, and Japan develops with a view to the respective other(s). Comparative studies typically neglect this element of interaction and the accompanying echo-chamber effect. This case leads to a challenging methodological issue: Does the obvious and persistent connection between national laws and national legal institutions give rise to a transnational legal order, even though there is no set of rules or standards “produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state”?¹⁴⁴ As will be shown later, the answer is affirmative.

(b) Entanglement, Histoire Croisée, and Transnational Legal Spaces The evolution of the legal frameworks over time and the historical intersections generated what historians writing about transnational history term *histoires connectées*,¹⁴⁵ connected histories,¹⁴⁶ and *histoire croisée*.¹⁴⁷ Moving forward from comparative

¹⁴⁰ Ho, *supra* note 131, at 301.

¹⁴¹ *Id.* at 297; see Tamaruya, *supra* note 47, at 2251, for a more detailed analysis; see also Section 2.4.3.

¹⁴² See also Section 2.4.3.

¹⁴³ On this effect of transplanting law, see Michaels, *supra* note 116, at 148.

¹⁴⁴ Halliday & Shaffer, *supra* note 30, at 12.

¹⁴⁵ See, e.g., Caroline Douki & Philippe Minard, *Histoire globale, histoires connectées: Un changement d'échelle historiographique?*, 54 REVUE D'HISTOIRE MODERNE & CONTEMPORAINE 7 (2007), translated in https://www.caim-int.info/article-E_RHMC_545_0007-global-history-connected-histories.htm.

¹⁴⁶ ROBERT W. STRAYER, *THE MAKING OF THE MODERN WORLD: CONNECTED HISTORIES, DIVERGENT PATHS: 1500 TO THE PRESENT* (Strayer ed., 2d ed. 1995); Sanjay Subrahmanyam, *Connected Histories: Notes towards a Reconfiguration of Early Modern Eurasia*, 31 MODERN ASIAN STUD. 735 (1997).

¹⁴⁷ Foundational: Michael Werner & Bénédicte Zimmermann, *Penser l'histoire croisée: Entre empire et réflexivité*, 58 ANNALES HSS 7 (2003) (in French; for an English version see Michael Werner & Bénédicte Zimmermann, *Beyond Comparison: Histoire Croisée and the Challenge of Reflexivity*, 45 HIST. & THEORY 30 (2006)). The methodological differences between *histoires connectées* and *histoire croisée* are minor and negligible for the purposes of this Article. They share a common interest in going beyond comparative history; this is the important point for the text above. *Histoire croisée* complements comparative history; it does not supplant it. See Jürgen Kocka, *Comparison and Beyond*, 42 HIST. & THEORY 39, 43–44 (2003).

history, these scholars emphasize the element of interaction and echo-chamber effects resulting from shared narratives and histories.¹⁴⁸ With this changed perspective comes an interest not in the merger of institutions or hybridizations of formerly singular institutions, but in how the crossings affect the parties involved and create something new.¹⁴⁹ What historians working in this methodology's ambit want to achieve is a transnational view on history, not by adding another layer on top of regional, local or national history, but rather through readjusting the focus on how the interaction and connections came into being, which specific logic lies behind them, and how they structure space.¹⁵⁰ Apparently, there is something unique in these *histoires croisées* worth looking at in its own right. All the issues and vantage points just mentioned surface in East Asian trust regulation, making it a fine example of a transnational phenomenon.

A historian researching the entangled developments and evolution of trust law and trust-related fiduciary law in East Asia has to retrace the “construction, flow . . . and settlement of legal norms,” the production of national laws and the latter’s interaction with “different levels of social organization, from the transnational to the local,” including “the migration across borders, . . . contestation and homologies among the transnational, national, and local levels.”¹⁵¹ This is where *histoire croisée* and transnational legal theory meet. Even though historians (with the arguable exception of legal historians) do not operate in the shadow of questions of legal normativity, historians grapple with issues surprisingly similar to what legal scholars have to address. Conventional comparative history and comparative law both follow a static approach and tend to neglect interactive processes. Insofar, historical methodology undergirds the claim that the entanglement of national laws may constitute transnational law. It adds a vertical dimension to comparative law’s horizontal plane.¹⁵² Paying close attention to how norms gain transnational character according to leading legal theorists proves the point.

Transnational norms are norms “adapted transnationally.”¹⁵³ They do not necessarily have to originate outside the nation-state.¹⁵⁴ Transnational legal orders are transnational if they (at least) have social effects in more than one jurisdiction¹⁵⁵ and “engage legal institutions within multiple nation-states.”¹⁵⁶ The ways in which legal

¹⁴⁸ See Werner & Zimmermann, *supra* note 147, at 12 (2003); *id.* at 35 (2006).

¹⁴⁹ *Id.* at 16 (2003); *id.* at 38 (2006).

¹⁵⁰ *Id.* at 22 (2003); *id.* at 43 (2006).

¹⁵¹ For the quotations, see *supra* at notes 119–120.

¹⁵² Cf. Reimann, *supra* note 28, at 1116. (Traditional model of comparative law operates “on the horizontal plane.”)

¹⁵³ Halliday & Shaffer, *supra* note 30, at 19. But see also *id.* at 15 (the requirement of “recognition” in the context of religious norms), and the justified criticism by Michaels, *supra* note 116, at 150.

¹⁵⁴ Halliday & Shaffer, *supra* note 30, at 19.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 13.

institutions engage with the norms – bottom-up, top-down, or horizontally – does not matter, at least not for their qualification as parts of transnational legal orders, because the concept of transnational law comprises processes in all directions.¹⁵⁷ What is important is that multiple nation-states lace into each other as a consequence of recognizing norms with an international scope.¹⁵⁸ Law enacted by a foreign state and then transplanted into and adapted to the needs of another nation-state’s legal system fits the description of “rules of extra-state origin.” From the transplanting nation-state, this foreign state law is just as nonbinding as any model law or framework drafted by an international organization or informal network of private actors. Furthermore, leading theorists increasingly point out the importance of persuasive authority in transnational law, such as engagement with and references to foreign law and judicial opinions.¹⁵⁹ According to these criteria, trust regulation in Japan, Taiwan, South Korea, and China spawns transnational fiduciary law insofar as trust law contains fiduciary norms.

Critics might ask what is added by the transnational approach as developed in the preceding sections. The answer is that given by many scholars of transnational legal theory: It shows the flow, diffusion, and construction of norms across national borders, fostering a deeper understanding of the process of lawmaking in a globalized world.¹⁶⁰

2.3.2 Vertical Transnational Ordering of Fiduciary Law

Vertical transnational legal ordering involves norms, as some scholars succinctly put it, “downloaded” from a domain beyond the nation-state into national legal systems or “uploaded, then downloaded.”¹⁶¹ In the course of their voyage, norms created by non-state actors may gain normative force comparable to state law. This is one of the basic insights of transnational legal theory, not only true for *lex mercatoria*,¹⁶² but also for fiduciary norms. Given that the movement of norms stands at the center of transnational legal theory,¹⁶³ the following section can forego another exercise in theorizing transnational law. Instead, it explores the issue based on a case study centering on fiduciary law. Specifically, it discusses the potential of transnational legal ordering in the area of environmental, social and (corporate) governance (ESG) matters¹⁶⁴ in corporate law.¹⁶⁵ ESG regulation unfolds normative force from

¹⁵⁷ See *id.* at 16; Koh, *supra* note 60, at 745–46.

¹⁵⁸ See Michaels, *supra* note 116, at 154.

¹⁵⁹ Shaffer, *supra* note 20, at 244.

¹⁶⁰ See Section 2.3.1.1.

¹⁶¹ See Koh, *supra* note 60.

¹⁶² See Section 2.2.1.

¹⁶³ See Section 2.3.1.1.

¹⁶⁴ See Section 2.1, text before note 30.

¹⁶⁵ On investment managers and the “sole interests rule,” see Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731 (2019) (on the

a socio-legal perspective. This is true even for the United States, regardless of critiques pointing to the requirements of national law. Standards and principles on ESG relevant for corporate law have been floating around for a while now. Even though they are “soft law” (i.e., not law in the sense of classical positivist accounts of law), these norms find their way into national legal systems, either by way of legislation or through enforcement by private actors.¹⁶⁶

2.3.2.1 Standards and Principles

Two important international organizations, the United Nations (UN) and the OECD, have been setting standards for corporate law and corporate fiduciaries for some time. The UN Environment Programme joined with more than 200 private institutions to form the UNEP Finance Initiative (UNEP/FI),¹⁶⁷ which delivered a report on “Fiduciary Duty for the Twenty-first Century” in 2015¹⁶⁸ – a follow-up on an earlier report delivered in 2005.¹⁶⁹ The report lays out a framework under which it would be not only legal to take ESG-matters into account, but which even requires fiduciaries to pay attention to ESG. A broader perspective is employed by the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles), holding business enterprises obliged to respect human rights.¹⁷⁰ These UN Guiding Principles aver that the responsibility to respect human rights “is a global standard of expected conduct for all business enterprises wherever they operate.” According to the UN Guiding Principles, this responsibility “exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations and does not diminish those obligations.” The guideline commentary positions it “over and above compliance with national laws and regulations protecting human rights.”¹⁷¹ The G20/OECD 2015 principles on corporate governance recommend that corporate boards should take stakeholder interests into account.¹⁷²

one hand); Max M. Schanzbach & Robert H. Sitkoff, *The Law and Economics of Environmental, Social, and Governance Investing by a Fiduciary*, 72 STAN. L. REV. 381 (2020) (on the other).

¹⁶⁶ Bearing in mind the heated debate on ESG, a proviso seems in order: This article is neutral on the question whether this is a laudable or deplorable development. The only issue of interest is to show that these principles are at work. To decide if this is for better or for worse is up to the reader.

¹⁶⁷ See *supra* note 17.

¹⁶⁸ See *supra* note 19.

¹⁶⁹ UN Env’t Programme [UNEP] Finance Initiative, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*, https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf (last accessed June 12, 2023).

¹⁷⁰ UN Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹⁷¹ *Id.* at 13.

¹⁷² OECD, *supra* note 18, at 46.

2.3.2.2 Normative Effects of Nonbinding Rules

Notwithstanding the purported softness and the nonbinding character of the rules, it would be a mistake to discard them as politics or mere wishes of non-governmental actors, thereby carving them out of transnational fiduciary law. They are highly influential in shaping practice and legislation, especially in the last twenty years and increasingly so after the financial crisis of 2007/2008. As a consequence, they stand at the beginning of what appears now as the emergence of a transnational legal order. It is somewhat beside the point to argue that actions like a self-commitment to invest in line with ESG standards run counter to actual law requiring directors to maximize shareholder wealth. Clearly, *Dodge v. Ford Motor Co.*'s¹⁷³ progeny seems to prove these critics right, especially its modern Delaware offspring.¹⁷⁴ Two things have to be borne in mind, however. Regardless of the “strictly legal point of view,” the critique carries only so far. It does not reach beyond state law pursuing the Delaware take on corporate directors’ fiduciary duties. Many jurisdictions outside the United States do follow a different path, among them major economies like France¹⁷⁵ and Germany,¹⁷⁶ to name but two.¹⁷⁷ Even in the United States, a number of state corporate laws establish a stakeholder-oriented model of corporate governance, which at least makes it possible to take stakeholder-interests into account on the same footing with those of the shareholders.¹⁷⁸

Three examples may help to undergird the general claim expressed above that “soft law” on ESG exercises a normative thrust which has to be reckoned with, both from a more technical legal perspective and as a matter of socio-legal impact.¹⁷⁹ The first example concerns recent French legislation on corporate law, the *loi PACTE*; the second one concerns ESG-disclosure rules in the EU, and the third concerns acknowledgment through enforcement of rights and remedies and the exercise of power.

¹⁷³ 204 Mich. 459, 170 N.W. 668 (Mich. 1919).

¹⁷⁴ See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010). See Brett McDonnell, *The Corrosion Critique of Benefit Corporations*, 101 B.U. L. Rev. 1421 (2021), for a recent review of the Delaware case law.

¹⁷⁵ See *infra* Section 2.3.2.2(a).

¹⁷⁶ See, e.g., Jens Koch, *Commentary on the German Stock Corporation Act*, in *AKTIENGESETZ*, § 76 margin no. 30 (17th ed. 2023).

¹⁷⁷ On the many twists and turns in the United Kingdom, e.g., Marc T. Moore, *Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law*, in *RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW* 142 (Harwell Wells ed., 2018).

¹⁷⁸ See McDonnell, *supra* note 174, at 8, 16.

¹⁷⁹ See, e.g., OECD, *supra* note 18, at 11. (“The *Principles* are widely used as a benchmark by individual jurisdictions around the world. They are also one of the Financial Stability Board’s Key Standards for Sound Financial Systems and provide the basis for assessment of the corporate governance component of the Reports on the Observance of Standards and Codes of the World Bank.”)

(A) The French “Loi PACTE” The French law on the growth and the transformation of businesses,¹⁸⁰ known in shorter form as the *loi PACTE*,¹⁸¹ contains, inter alia, new provisions on fiduciary duties.¹⁸² Pursuant to the reformed Chapter 1833 of the French *Code Civil*, a corporation has to be managed in its social interest, taking into consideration its activities’ social and environmental effects,¹⁸³ replacing the old focus on the common interest of the shareholders.¹⁸⁴ PACTE relies to a considerable extent on the Notat-Sénard report,¹⁸⁵ prepared by two high-profile individuals – one representing an ESG- and Union-perspective (Nicole Notat), the other “big business” (Jean-Dominique Sénard).¹⁸⁶ Notat and Sénard explain their ESG-led reform proposals, inter alia, with reference to UN frameworks.¹⁸⁷ Even though these and other international guidelines and principles are not the sole reason or even the main driving force behind the French bill, they serve as an important reference point and anchor linking national French law and transnational perspectives. The PACTE firmly integrates these into national legislation and corporate fiduciary law.

(B) EU ESG-Reporting Standards EU law requires large companies to disclose certain information regarding the way they operate and manage social and environmental challenges.¹⁸⁸ The relevant Directive 2014/95/EU goes back to a strategy

¹⁸⁰ Loi no 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, J. officiel de la République française (May 23, 2019), https://www.cjoint.com/doc/19_05/IEyhRKuGrQh_joe-20190523-0119-0002.pdf (last accessed June 12, 2023).

¹⁸¹ “PACTE” is an acronym for the “plan d’action pour la croissance et la transformation des entreprises,” a plan developed by the French government to give business the means to innovate, to transform, to grow, and to create jobs (“donner aux entreprises les moyens d’innover, de se transformer, de grandir et de créer des emplois”). *La loi PACTE adoptée par le Parlement*, RÉPUBLIQUE FRANÇAISE, <https://www.economie.gouv.fr/plan-entreprises-pacte> (last accessed June 12, 2023).

¹⁸² See Pierre-Henri Conac, *The Reform of Articles 1833 on Social Interest and 1835 on the Purpose of the Company of the French Civil Code: Recognition or Revolution?*, in 1 Festschrift für Karsten Schmidt zum 80, for an overview in English.

¹⁸³ “La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité.”

¹⁸⁴ Conac, *supra* note 182, at 231. “Replace” concerns mainly the wording, in essence that stakeholder approach has long been the French law of the land. See *id.* at 230.

¹⁸⁵ Nicole Notat & Jean-Dominique Sénard, *L’entreprise, objet d’intérêt collectif*, MINISTRES DE LA TRANSITION ÉCOLOGIQUE ET SOLIDAIRE, DE LA JUSTICE, DE L’ÉCONOMIE ET DES FINANCES DU TRAVAIL (Mar. 9, 2018), <https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000133.pdf> (last accessed June 12, 2023) [hereinafter Notat-Sénard Report]. On the influence of this report, see Conac, *supra* note 182, at 231. (“The Notat-Sénard report [...] served as the ‘intellectual’ basis for the PACTE Bill.”)

¹⁸⁶ Nicole Notat is president of Vigeo Eiris, a rating firm specializing on ESG, and former head of the Union CFDT. Jean-Dominique Sénard was the CEO of Michelin at the time the report was delivered.

¹⁸⁷ See Notat-Sénard Report, *supra* note 185, at 34, 41.

¹⁸⁸ Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34 as regards disclosure of nonfinancial and diversity information by

paper of the EU Commission.¹⁸⁹ It grounds its policy approach, inter alia, in the UN Guiding Principles, qualifying them to be one element of “authoritative guidance . . . provided by internationally recognised[*sic*] principles and guidelines” and belonging to a “core set of internationally recognised[*sic*] principles and guidelines represents an evolving and recently strengthened global framework for CSR [i.e., corporate and social responsibility].”¹⁹⁰ Companies subject to the Directive’s reporting and disclosure regime may rely on international frameworks in order to structure their non-financial disclosure document,¹⁹¹ among them the UN Guiding Principles.¹⁹² The EU regulation partly builds on a French role model on ESG reporting, enacted in its earliest form in 2001.¹⁹³ Even if these reporting requirements, as the more reserved-minded argue, are just that and not fiduciary duties in the narrow sense, fiduciaries still have to explain themselves.¹⁹⁴ Whereas this might not affect the legal grid of the fiduciary’s obligations directly, the normative expectations it has to cater to will change. This clearly is the EU’s idea, describing the disclosure requirements as part of a broader agenda.¹⁹⁵

Inhabitants of the planets Hart and Kelsen may still stress that legally, the fiduciary duties in a technical sense have not changed at all. But this argument does not prove much in the context of transnational law (and thus transnational fiduciary law) which conceives “norm” in a broader sense.¹⁹⁶ What is relevant here is that the EU legislator clearly acts based on an understanding of the UN Guiding Principles and other international ESG standards as “authoritative” and “internationally recognised [*sic*] principles” for CSR and CSR-related duties in general.¹⁹⁷ Disclosure rules concerning nonfinancial information are just one element of a broader strategy to push “enterprises [to adopt] a process to integrate social, environmental, ethical,

certain large undertakings and groups, 2014 O.J. (L 330) 1. It has been amended by the Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022, 2022 O.J. (L 322) 15.

¹⁸⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011–14 for Corporate Social Responsibility, COM (2011) 681 final (Nov. 25, 2011) [hereinafter Communication from the Commission]. Recital (2) of the Directive 2014/95/EU (*supra* note 188) explicitly refers to this document.

¹⁹⁰ *Id.* at 6.

¹⁹¹ Directive 2014/95/EU, *supra* note 188, at 6–8.

¹⁹² Communication from the Commission: Guidelines on Non-financial Reporting (methodology for reporting nonfinancial information), C/2017/4234, 2017 O.J. (C 215) 1.

¹⁹³ See Conac, *supra* note 182, at 229, 230.

¹⁹⁴ E.g., Holger Fleischer, *Vermessung eines Forschungsfeldes aus rechtlicher Sicht*, in CORPORATE SOCIAL RESPONSIBILITY 1, 31 (Holger Fleischer et al. eds., 2018). Some German scholars have argued to the contrary, i.e., that the reporting standards indirectly alter the board members’ fiduciary duties under German law, e.g., Peter Hommelhoff, *Nichtfinanzielle Ziele in Unternehmen von öffentlichem Interesse – Die Revolution übers Bilanzrecht*, in FESTSCHRIFT FÜR BRUNO KÜBLER 291 (Reinhard Bork et al. eds., 2015).

¹⁹⁵ See Communication from the Commission, *supra* note 189, at 7.

¹⁹⁶ Halliday & Shaffer, *supra* note 30, at 11.

¹⁹⁷ See Communication from the Commission, *supra* note 189.

human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders ...”¹⁹⁸ They represent an expression of this broader conception rather than being an exception to the rule. From a policy point of view, these guidelines and principles unfold normative thrust, especially in countries with already more stakeholder-oriented approaches in corporate law.

(c) Acknowledgment through the Enforcement Even in nation-states without comprehensive ESG legislation such as the United States, ESG standards start becoming influential in shaping fiduciary law, at least from a socio-legal perspective. Institutional investors increasingly put ESG on the corporate policy agenda, calling for boards to disclose and act according to established international frameworks such as the UN Guiding Principles. BlackRock, one of the world’s largest investment firms, professes to monitor and engage “with companies to encourage them to adopt business practices consistent with sustainable long-term value creation,” citing ESG as a prime example.¹⁹⁹ BlackRock has been a signatory to the United Nations-backed Principles for Responsible Investment (PRI) since 2008.²⁰⁰ Given this changing environment, corporate boards not dealing with ESG matters will more likely slide between a rock and a hard place, with nongovernmental organizations such as Oxfam as additional watchers on the wall.²⁰¹

Institutional investors like BlackRock and other groups hold a rich set of cards in their hands. They can submit shareholder proposals, initiate campaigns against incumbent directors at annual meetings or divest of their holdings in a corporation, to name but a few examples. Imagine Carl Icahn “tweeting” not that he had a “cordial dinner with Tim” (Cook),²⁰² but his dissatisfaction with management’s approach to environmental issues – “will divest US\$ 1 bill. in shares tomorrow.” Publicly asking management to explain why poultry workers – not in Bangladesh, but in the United States – have to wear diapers at work²⁰³ will not slip away

¹⁹⁸ *Id.* at 6–7.

¹⁹⁹ See *BlackRock Investment Stewardship: Protecting Our Clients’ Assets for the Long-Term*, BLACKROCK 1, 4, <https://www.blackrock.com/corporate/literature/publication/blk-profile-of-blackrock-investment-stewardship-team-work.pdf> (last accessed June 12, 2023).

²⁰⁰ *Id.* at 19.

²⁰¹ See, e.g., Chloe Christman, *PepsiCo Is Moving from Policy to Practice*, OXFAM: THE POLITICS OF POVERTY (Feb. 6, 2018), <https://politicsofpoverty.oxfamamerica.org/2018/02/pepsico-from-policy-to-practice/> (last accessed June 12, 2023).

²⁰² Carl Icahn (@Carl_C_Icahn), TWITTER (Oct. 1, 2013, 7:23 AM), https://twitter.com/carl_c_icahn/status/385047418284158976 (last accessed June 12, 2023). On the market reaction, see, e.g., Steven Russolillo, *Carl Icahn Tweets About “Cordial Dinner” with Tim Cook*, WALL ST. J.: MONEYBEAT (Oct. 1, 2013), <https://blogs.wsj.com/moneybeat/2013/10/01/carl-icahn-tweets-about-cordial-dinner-with-tim-cook/> (last accessed June 12, 2023).

²⁰³ See *US Poultry Workers Wear Diapers on Job over Lack of Bathroom Breaks*, THE GUARDIAN (May 12, 2016, last modified July 14, 2017), <https://www.theguardian.com/us-news/2016/may/12/poultry-workers-wear-diapers-work-bathroom-breaks> (last accessed June 12, 2023).

unattended on a corporate board agenda's backside. In these and other circumstances, reality in the boardroom will prevail over the courtroom, even in Delaware. Notwithstanding the Delaware creed of shareholder primacy and shareholder value only,²⁰⁴ measures like those mentioned before have to be addressed by corporate directors. Not doing so creates more bad publicity and, at least in many cases, causes stock prices to take a dive. Recent surveys suggest that the majority of corporate boards engage seriously and regularly with ESG-issues.²⁰⁵ One hundred eighty-one CEOs signed the 2019 statement of the "Business Roundtable" in the United States, proclaiming publicly a commitment to all stakeholders.²⁰⁶ There is good cause to question the motives behind corporate ESG-commitment.²⁰⁷ In 2022, BlackRock backed down from their grand agenda and announced that it was more reluctant in supporting sustainability shareholder proposals, arguing that "many of the climate related shareholder proposals coming to a vote in 2022 are more prescriptive or constraining on companies and may not promote long-term shareholder value."²⁰⁸ But there is no denying the fact that companies are implementing and debating ESG policies following the standards and principles outlined above.

Moreover, most pundits agree that shareholder primacy statutes such as the Delaware General Corporation Law leave room for paying attention to stakeholder interests in the course of ordinary business decisions.²⁰⁹ Whereas the norms in their purest form – "shareholders only" versus mandatory inclusion of stakeholders – grind against each other, the business judgment rule typically works as the sheet anchor, "though [management] may have to be just a bit careful about what they say."²¹⁰ Change of control and corporate takeovers are the scenarios in which Delaware courts require boards to act single-mindedly in the interests of shareholders.²¹¹ They do not happen on a daily basis.

²⁰⁴ See McDonnell, *supra* note 174, at 8, 18, for a recent overview.

²⁰⁵ See, e.g., *Pearl Meyer Quick Poll: Environmental and Social Governance (ESG) and Its Potential Link to Incentives*, PEARL MEYER (Mar. 2017), <https://www.pearlmeier.com/knowledge-share/research-report/pearl-meyer-quick-poll-environmental-and-social-governance-esg-and-its-potential-link-to-incentives> (last accessed June 12, 2023).

²⁰⁶ *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"*, BUSINESS ROUNDTABLE: CORPORATE GOVERNANCE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> (last accessed June 12, 2023).

²⁰⁷ Early stakeholder-friendly statutes in the United States just mirrored anti-takeover provisions in the articles of association, thereby giving cause to believe that the motive was protecting incumbent management, not protecting workers or the environment. See Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 94 (1999); with respect to Minnesota, see McDonnell, *supra* note 174, at 1442.

²⁰⁸ See BLACKROCK, *Shareholder Proposals in 2022*, <https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf> (last accessed June 12, 2023).

²⁰⁹ See McDonnell, *supra* note 174, at 20, 28.

²¹⁰ *Id.* at 20.

²¹¹ See the crisp analysis by McDonnell, *supra* note 174, at 1441-1445.

2.3.3 *Transnational, Not Global Fiduciary Law*

Not a few authors mining the veins of transnational legal theory posit the emergence of “world law”²¹² or “global law.”²¹³ Tamar Frankel, arguably the founder of the field of fiduciary law in the common law world, sees universal fiduciary principles at work and argues for the adoption of a hybrid system of fiduciary law.²¹⁴ Whereas the functional approach builds a bridge over the troubled waters separating common law and civil law, unifying the two worlds with respect to fiduciary law may appeal to many as a matter of legal politics, but is likely to run into serious trouble in practice. In light of the remaining differences between civil law and common law systems (and the considerable differences between legal systems within the respective families), a more cautious approach allowing for the emergence of several transnational legal orders²¹⁵ seems the more promising road to travel.

This is corroborated by the fact that, as Clifford Geertz famously put it, law is local knowledge.²¹⁶ Searching for and then comparing abstract legal principles therefore does not amount to much,²¹⁷ especially in transnational law or so-called “global” law. “[G]lobal doctrine becomes clothed in local knowledge.”²¹⁸ It is enmeshed in prior customs and legal traditions. Different legal systems may coexist side by side or tie the knot, leading to a hybrid, neither common law nor civil law, built on layers upon layers of regime changes and shifting political environments.²¹⁹ There is no peeling off the eggshells of common law or civil law and out comes the global fiduciary law chick. Acknowledging and accepting principles of fiduciary duty or, more generally, fiduciary law in any given system, no matter whether bred within it or transplanted from the outside, will work only if the relevant rules and principles latch on to what is there already. Transnational legal orders most likely arise based on preexisting bonds and shared traditions.

²¹² Harold J. Berman, *World Law*, 18 *FORDHAM INT’L L. J.* 1617, 1619 (1995). “[T]he word ‘transnational’ refers back to the era of sovereign national states and indicates that it is to be transcended. It does not, however, give a new name to the new era that all humanity has entered. The right name for the new era, I submit, is ‘emerging world society,’ and the right name for the law by which it is governed is ‘world law.’”

²¹³ Teubner, *supra* note 34, at 4. (“Thus we see a number of inchoate forms of global law, none of which are the creations of states.”)

²¹⁴ Frankel, *supra* note 14, at 432–34.

²¹⁵ See, e.g., Halliday & Shaffer, *supra* note 30, at 18–21.

²¹⁶ CLIFFORD GEERTZ, *LOCAL KNOWLEDGE* 167 (1993). (“[L]aw and ethnography are crafts of place: they work by the light of local knowledge.”)

²¹⁷ See *id.* at 218; see also Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 *INT’L. & COMP. L. Q.* 35 (2002).

²¹⁸ Harding, *supra* note 217, at 45.

²¹⁹ This has been demonstrated for South East Asia. See, e.g., Harding, *supra* note 217, at 45; Carol G. S. Tan, *Law and Legal Systems in South East Asia: Three Paths to a Viewpoint*, in *TRADING ARRANGEMENTS IN THE PACIFIC RIM – ASEAN AND APEC*, Commentaries, 1 (Paul J. Davidson ed., 1998).

2.4 ELEMENTS OF TRANSNATIONAL FIDUCIARY LAW

Transnational legal orders unfold in terms of geographic and legal scope.²²⁰ Until now, this chapter has dealt with the geographic scope as the first prong of transnational legal ordering. The following section takes up the second prong, the elements of transnational legal orders.

Employing a transnational perspective not only uncovers multiple spaces of transnational legal ordering of fiduciary law. It also reveals how fiduciary law on the transnational plane develops elements different from national legal orders, either as variations on common themes, such as the duty of loyalty, or because the content of fiduciary obligations diverges from national law. First of all, as Section 2.4.1 will show, the distinctiveness of the duty of loyalty, an issue of the highest importance in national common law legal orders, may play out differently, depending on the scope of contract. Secondly, Section 2.4.2 demonstrates that even within the common law, court communication between individual nation-states may engender several fiduciary legal orders. Thirdly, Section 2.4.3 argues that the duty of loyalty does not necessarily become manifest in a single norm which, when applied to a fact-pattern, unfolds in more fine-grained specific rules, but may also be the result of bundling together a number of particular rules. In other words, different legal orders may construct the duty of loyalty differently. Again, East Asia provides an example.

2.4.1 *The Fiduciary Duty of Loyalty and the Scope of Contract in Common Law and Civil Law*

Given the peculiarities of fiduciary obligations compared to contract law in the common law world, the outcome of a case hinges on which drawer a judge opens. It is most importantly the duty of loyalty where fiduciary law and contract law part ways. Loyalty “is one of the most prominent features of fiduciary law[,] . . . often considered essential to fiduciary relationships . . .”²²¹ It “is a part of what gives the field its distinctive qualities.”²²² Millet J, in the seminal decision *Bristol & West Building Society v. Mothew*, held it to be the “distinguishing obligation of a fiduciary . . .”²²³

Embracing a particular obligation as part of the duty of loyalty²²⁴ is of double import in the common law. At least historically, it helps to overcome several shortcomings of contract law. Fiduciary duties arise without having to follow a certain set of rules governing formalities of forming an enforceable

²²⁰ See Halliday & Shaffer, *supra* note 30.

²²¹ Andrew S. Gold & Paul B. Miller, *Introduction*, in Gold & Miller, *supra* note 1, at 5.

²²² Gold, *supra* note 74, at 386.

²²³ Millet J, *Bristol & West Building Society v. Mothew* [1996] EWCA (Civ) 33, [1996] 4 All ER 698 [711]–[712] (Eng.).

²²⁴ On the varying accounts of the duty of loyalty’s contents see Gold, *supra* note, 74, at 387–89.

agreement.²²⁵ Other than a party to a contract, the beneficiary of a fiduciary obligation may compel the fiduciary to specific performance and not only claim damages.²²⁶ Beneficiaries have rights against the fiduciary, whereas (English) contract law protects only the parties of the contract.²²⁷

Contract law in civil law jurisdictions typically requires specific performance and knows third-party beneficiaries. Consequently, there is no need for fiduciary duties enforcing specific performance and protecting third parties. The job is done by contract. As a result, at least to a certain extent, speaking of a duty of loyalty and fiduciary obligation(s) loses its significance in civil law jurisdictions. Sorting a breach into the register of “contract” instead of “loyalty” then does not make much of a difference, as long as the judge qualifies the fiduciary’s behavior as a breach of their obligations.

What makes this interesting from the perspective of transnational legal theory is not the comparative insight. Rather, it is important as a potentially constitutive feature of a transnational legal order. In the end, loyalty keeps pride of place as the distinctive feature of fiduciary law in its transnational version. But it is distinctive first and foremost viewed from an overarching functional perspective – wherever the law specifically requires a person enjoying discretionary other-regarding powers to act loyally toward a beneficiary, transnational fiduciary law emerges. Consequently, transnational fiduciary law knows different shades of loyalty and therefore offers room for different transnational fiduciary legal orders.

2.4.2 Contents of Fiduciary Obligations

Speaking of transnational fiduciary law in the common law world can mean two different things. First, all jurisdictions hold the duty of loyalty near and dear to the heart of the fiduciary relationship.²²⁸ Commonwealth courts frequently cite and discuss decisions of courts in other nation-states belonging to the same legal family. This horizontal dialogue is unsurprising, as these courts shared a common law background, tradition, and history stemming from the British Empire.²²⁹ Perhaps somewhat counter intuitively, especially for the civil lawyer dabbling in matters of equity law, it is not only English law and English courts influencing courts in the former dominion. Starting with an Australian case, court communication between Australian and English courts across national borders has led to a transnational legal order in fiduciary law in which the duty of care has lost its quality of a *fiduciary* duty.

²²⁵ See Sarah Worthington, *The Commercial Utility of the Trust Vehicle*, in *EXTENDING THE BOUNDARIES OF TRUST AND SIMILAR RING-FENCED FUNDS* 135, 147, 150 (David Hayton ed., 2002).

²²⁶ *Id.* at 150.

²²⁷ *Id.* at 150. In the United States, the situation is different. See Langbein, *supra* note 45, at 653.

²²⁸ See Section 2.2. 3.

²²⁹ See Section 2.3.1.2(b), for theoretical background on connected history and entanglement.

It remains part of fiduciary law in the United States of America, however. This means that, as a consequence of transnational ordering, there is no longer a unitary common fiduciary law.

Second, in the seminal case *Permanent Building Society (in liq) v. Wheeler*, the Australian Supreme Court, led by Ipp J, denied the duty of care having a fiduciary character, qualifying only the duty of loyalty as truly fiduciary in nature.²³⁰ That was taken up by the English High Court and Millet J in the also seminal decision *Bristol & West Building Society v. Mothew*.²³¹ Just like the example of trust legislation in East Asia, courts in the United Kingdom and Australia watch each other and, sometimes, communicate in their reasoning. This establishes another example of connected histories in the development of the law – fiduciary law in this case – which is the product of shared experiences and legal reasoning across national borders.

A skeptic might argue that even those who think of the duty of care as a fiduciary obligation doubt its quality as a distinctive feature of fiduciary relationships²³² or even deny it.²³³ Starting with this critical view as a premise, one might deny the existence of two transnational orders of fiduciary law in the common law world. Nevertheless, the question remains relevant. Where the duty of care kept its place under the fiduciary roof, it interacts with the duty of loyalty.²³⁴ Put differently, courts seem to construe the demands of loyalty in light of how the duty of care works, inside or outside the fiduciary relationship – defined narrowly. Vice versa, as the Japanese example shows,²³⁵ duties of care can gobble up parts of what in Australia is defined in terms of loyalty.

²³⁰ Ipp J, *Permanent Building Society (in liq) v. Wheeler* (1994) 11 WAR 187, 239 (Austl.); see also *Breen v. Williams* (1996) 186 CLR 71 (Austl.).

²³¹ Millet J, *Bristol & West Building Society v. Mothew* [1996] EWCA (Civ) 33, [1996] 4 All ER 698 [711]–[712] (Eng.). This is not to say that the issue has been definitely settled either in the United Kingdom or in Australia. The line of cases mentioned above is subject to severe criticism. See, e.g., Dyson Heydon QC, *Modern Fiduciary Liability: The Sick Man of Equity?*, 20 TRUST & TRUSTEES 1006 (2014). In recent years, several court decisions may well be interpreted as scaling back on the issue and at least propagating a more nuanced view. The courts are carefully citing cases of the pre-1994 era. See, e.g., *Pitt v. Holt* [2011] EWCA (Civ) 197 and [2013] UKSC 26 (Eng.); *Ancient Order of Foresters in Victoria Friendly Society Limited v. Lifeplan Australia Friendly Society Limited* [2018] HCA 43 (Austl.). For the purposes of this chapter, however, these criticisms and newer developments in the case law do not change the fact that – at least for more than a decade – English and Australian courts developed a distinct concept of fiduciary law by communicating across borders.

²³² On the fiduciary duty of care and its precarious status in the United States, see John C. P. Goldberg, *The Fiduciary Duty of Care*, in Criddle et al., *supra* note 1, at 405.

²³³ Peter Birks, *The Content of Fiduciary Obligation*, 34 ISRAEL L. REV. 3, 35 (2000). (The duty of care “is a fiduciary obligation, but is not, as such, distinguishable from any contractual or non-contractual duty of care.”)

²³⁴ Goldberg, *supra* note 232, at 407.

²³⁵ See Section 2.4.3.

It is open to further research to assess court practice and see to what extent judges following the Australian and English approach allocate issues to the duty of loyalty their US counterparts would solve referring to the duty of care.

2.4.3 *Constructing the Duty of Loyalty*

Anyone looking for a duty of loyalty as the distinctive feature of transnational fiduciary law has to consider that not all jurisdictions construct this duty comparable to the common law approach, i.e., as a single rule which then is divided into several sub-norms depending on the fact pattern in case. Alternatively, or in addition, the duty of care bears the potential of solving loyalty-related issues. Again, the functional perspective governs the analysis of fiduciary law on the transnational level.²³⁶ Once more, the “East Asian Four” provide an example.²³⁷

Until recently, China, Japan, Taiwan, and South Korea did not have an open-ended standard establishing a fiduciary duty of loyalty in trust law. They have implemented a more diverse set of rules, each addressing a more specific aspect of the trustee’s obligation.²³⁸ Combined in a bundle, however, they yield the idea of loyalty.²³⁹ Moreover, they “impose the core trust obligations on a trustee.”²⁴⁰ This turns the common law doctrine on its head; instead of loyalty as a ground rule from which courts extract more specific duties,²⁴¹ they generate a general rule by induction. As in Germany and other civil law jurisdictions, these duties add to the regular set of contractual obligations without having fundamentally different remedies.

One should hasten to add that, in 2006 and 2011, respectively, Japan and South Korea introduced generic duties of loyalty.²⁴² What remains to be seen, however, is the extent to which these duties will be able to lead a life on their own. Taking into account the other and more specific rules on a trustee’s obligations, it is likely that courts will construe a much narrower scope of application and judge cases referring to the more specific duties and other sets of rules.

Experiences with Japanese corporate law corroborate this assumption. Under US military rule, Japan introduced a duty of loyalty in its corporate law in 1950, in addition to an older provision on agency law, also applicable on corporate directors, which imposes a duty of care.²⁴³ Nevertheless, the Japanese Supreme Court held the general agency provision to comprise a duty of loyalty, rendering the later

²³⁶ See Section 2.2.2.

²³⁷ On East Asia, see *supra* Section 2.3.1.2(a).

²³⁸ Ho, *supra* note 131, at 296–98. On China, see *Id.* at 210–17.

²³⁹ *Id.* at 297–98.

²⁴⁰ *Id.* at 297.

²⁴¹ See Gold, *supra* note 74, at 386.

²⁴² Tamaruya, *supra* note 47, at 2250.

²⁴³ See J. Mark Ramseyer & Masayuki Tamaruya, *Fiduciary Principles in Japanese Law*, in Criddle et al., *supra* note 1, at 643, 646–47.

corporate law provision superfluous.²⁴⁴ It was only later, in 1989, that the Supreme Court switched gears in corporate law and now solves at least some loyalty issues by relying on the specific corporate law provision.²⁴⁵ Nevertheless, Japanese courts do not use this provision extensively²⁴⁶ and still seem to cling to the old Supreme Court decision.²⁴⁷ Corporate and comparative law scholars weigh different reasons for this reluctance.²⁴⁸ One of these reasons, however, unsurprisingly seems to be the legal environment into which the duty of loyalty was transplanted.²⁴⁹ The idea was already there²⁵⁰ and found its way into court practice by other normative means. Outside the corporate law arena, Japanese judges solve loyalty issues based on the general agency provision.²⁵¹

2.5 CONCLUSION

Viewing fiduciary law from the perspective of transnational legal theory provides important insights into the emergence of legal orders and processes of legal ordering transcending the boundaries of nation-states. All legal systems have to address problems arising out of relationships in which one person enjoys discretionary powers over the interests of another. Interestingly, but perhaps not surprisingly, both common law and civil law jurisdictions have developed a set of tools subjecting the person having powers under loyalty constraints in various ways. Regardless of their differences in traditions and technical approaches, from a functional perspective the divide between common law and civil law may be crossed.

On the one hand, this perspective makes it possible to paint a picture of fiduciary law outside the common law. It shows how norms and institutions taken from the common law (such as the trust) may survive and develop in civil law systems, which lack an equity tradition. On the other hand, using the example of trust law as an instance of fiduciary law shows that conventional transnational legal theory leaves a blind spot, because it concentrates too much on norms “beyond” the nation-state being incorporated or acknowledged in national legal institutions.

Transnational fiduciary law develops in different spaces and may develop in horizontal and vertical dimensions. Horizontal transnational ordering concerns the flow of norms between nation-states. The example of the trust in four East Asian countries, Japan, Taiwan, South Korea, and China, demonstrates that legal orders may evolve in reaction to each other, using and implementing norms created

²⁴⁴ *Id.* at 648.

²⁴⁵ Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 895 (2003).

²⁴⁶ *Id.* at 898–901.

²⁴⁷ Ramseyer & Tamaruya, *supra* note 243, at 651, 651 n.6 and accompanying text.

²⁴⁸ See Kanda & Milhaupt, *supra* note 245, at 898–901.

²⁴⁹ *Id.* at 900.

²⁵⁰ *Id.* at 899.

²⁵¹ Ramseyer & Tamaruya, *supra* note 243, at 649, 657.

in other nation-states. This recursive process is not captured by traditional accounts of comparative law. Transnational legal theory offers a methodological toolbox, which allows one to better focus on the process of norm creation beyond nation-states. The case study of so-called soft law on ESG is an example of vertical transnational ordering of fiduciary law. Exploring fiduciary law from a transnational angle and its socio-legal approach adds value, because it lays bare several ways in which nonbinding norms created by international organizations like the UN or the OECD have normative thrust, even in legal systems resting on legal concepts like shareholder value.

Last, but not least, employing a transnational perspective provides insights into how the contents of fiduciary obligations may be conceptualized differently in different (transnational) legal orders. Even though the duty of loyalty remains distinct, its import may differ from order to order. Moreover, the contents of fiduciary obligations may vary. Communication between courts in Australia and England led to a transnational fiduciary legal order where the duty of care is no longer considered having the quality of a fiduciary obligation.