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Finding Equity without the Law of Equity: Asset Management, Fiduciary Duty and Financial Consumer Protection in China

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I. Introduction

In Mainland China, there has been a considerable private wealth accumulation as a consequence of rapid economic growth, and the wealth/asset management becomes a highly demanded and fast-growing business with a value of the assets under management (AUM) of 122 trillion yuan in 2020.[1] Foreigners have been allowed to fully own fund management companies since 1 April 2020,[2] and overseas asset management businesses have started to expend their shares in the Chinese asset management market. Understanding Chinese law on asset management businesses hence becomes fundamentally important. Unfortunately, this is not an easy task.

Where an institution holds and manages AUM for the benefit of investors, in common law jurisdictions, the customer/investor-manager relationship[3] is governed by the general principles of equity and trusts, in addition to the specific legislation regulating the asset management businesses. There is no such 'branch of law' of equity and trusts in China, which is a civil law jurisdiction.[4]

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[1] Pan et al, 'China Private Banking Development Report (2020) and China's Wealth Management Industry Risk Management White Paper' (China Banking Association, 2020).中国私人银行发展报告（2020）暨中国财富管理行业风险管理白皮书, 中国银行业协会, 2020.

[2] Implementation Rules on Administrative Licensing of Foreign-funded Banks (外资银行行政许可事项实施办法) (China Banking and Insurance Regulatory Commission (CBIRC)) *ling* [2019] 10).

[3] It refers to the relationship between the investor and the manager of a securities investment fund or other investment funds/instruments, unless otherwise indicated in the context.

[4] The institution of trust, originally a common law concept, has been adopted in many civil law jurisdictions including Japan, Korea, Taiwan and Mainland China mainly for financial purposes without adopting the concept of equity. China enacted the Trust Law in 2001 but it was not intended to be a law of fiduciary obligations but as a commercial instrument for individual and institutional investors. Guoqing Liu, 'Tust without Equity: the Commercial Nature of Chinese

However, issues that commonly arise around fiduciary relationships[5] in common law jurisdictions should also exist in civilian jurisdictions.[6] The need for fiduciary relationships exists in any society that recognize private property and the freedom of business.[7] The question is then how do Chinese law and courts protect the investors whose assets are under management by another, in the absence of a (branch of) law of equity and trusts?

Regarding the investor-manager relationship, three fundamental legal issues need to be answered by Chinese law. Firstly, who holds the title to the AUM, the manager or the investor? Do Chinese law and courts recognize the investor's 'equitable title' to the AUM? Secondly, what is the nature of the relationship between the manager and the investor? Would Chinese law and courts treat the relationship as a purely contractual one or a trust/fiduciary relationship? Thirdly, are the investors 'financial consumers', hence protected by the generic consumer protection law? This paper attempts to answer these questions through a detailed analysis of the development of the 'law' and court decisions on the asset management relationship. It should also shed lights on other issues, such as whether the administrative regulations and directives made for regulatory purposes are applied by Chinese courts in dealing with private law issues; whether Chinese law will introduce the general principles of equity and trusts into its private law; and whether a trust may be inferred from a person holding other types of

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Trust Law' (2016) 22 Trusts & Trustees 1118.

[5] In this paper, unless otherwise indicated, the 'fiduciary relationship' refers to such a relationship of trust and confidence in which one person (the 'beneficiary' or 'principal') is entitled to rely on another (the 'fiduciary') who has the (single-minded) obligation of loyalty owed to the 'principal'/'beneficiary'. *Mothew v Bristol & West Building Society* [1998] Ch 1 at 18; *Chirnside v Fay* [2007] 1 NZLR 433 (SC) at [80].

[6] Michele Grqziadei, 'Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014), 294.

[7] Rudolf B Schlesinger et al, 'Comparative Law: Cases, Texts and Materials' in Gold and Miller (n 7) 783.

property such as company shares and real property for another.

II. Who owns the Assets Under Management (AUM)?

Asset management started as a business in Mainland China in the early 1990's, soon after the Shanghai Stock Exchange and Shenzhen Stock Exchange officially started operations in 1990. It was called 'managing wealth on behalf of customers', and was initially carried out by some stock broking companies.[8]

To meet the needs of its 'market-oriented economy', which was officially declared in 1992, China enacted some important statutes, including, inter alia, the Company Law (Act),[9] Guarantee Law, Securities Law,[10] and Contract Law. The General Principles of Civil Law [11] and the Property Law[12] contain some rules regarding ownership and other rights to property. Notably, the Trust Law[13] introduced a statutory institution into the civilian system which may have some of the attributes of the common law express trust.

Unfortunately, these statutes, including the Trust Law, do not answer the question whether the asset manager or the investor owns the title to the AUM. Firstly, it is questionable whether the act of putting the fund/asset under the manager's management alone creates a trust. Historically, the concept of 'trust' was not a part of Chinese law.[14]

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[8] Yan Liu, 'Structure, Function and Nature in Law of Asset Management Planning: Asset Management Planning of Securities Institutions as an Example (资管计划的结构、功能与法律性质 — 以券商系资管计划为样本)' (2019) 3 Investor 3.

[9] A 'Law' in China refers a statute enacted by the National People's Congress (NPC) or its Standing Committee, similar to an 'Act' in common law jurisdictions.

[10] Securities Law (证券法) (1998, effective on 1 January 1999).

[11] (民法通则, 1996, effective on 1 January 1987), repealed and replaced by The General Rules of Civil Law (民法总则, 2017, effective on 1 October 2017). The later was repealed and replaced by the Civil Code (民法典, 2020, effective on 1 January 2021).

[12] Property Law (物权法, 2007, effective on 1 October 2007), repealed and replaced by the Civil Code.

[13] Trust Law (信托法, 2001, effective on 1 October 2001).

[14] For detailed discussions on how 'trust' was introduced into China, see Guoqing Liu (n 5).

Trust Law was a breakthrough in that it recognises one type of trust, that is, the express trust.[15] A trust may only be set up by a written '*trust* contract', will, or document prescribed by law and regulations', [16] which must record 'the purpose of the trust, the trustor and trustee, beneficiary or category of beneficiary, the trust property' and other prescribed matters.[17] When the investor places the funds with the manager, usually a bank or non-bank financial institution, a written contract will generally be entered into between them. The contact, however, could very likely be an 'asset *management* contract', saying that the managing institution will 'act on behalf of the investor' in investing the entrusted fund into what products. It will most likely also include a disclaimer waiving the institution from liabilities for misjudgements or even misconducts, which may or may not be a '*trust* contract'. This term is not defined in the Trust Law or any other Laws. In the absence of a 'trust contract' in writing, it is uncertain whether a 'trust', as defined by the Trust Law, has been established by entering into the 'asset management contract'.

Secondly, even if the 'asset management contract' meets the criteria of a 'trust contract', and the Trust Law applies, there will still be no certainty as to whether the title to the assets 'entrusted' would be transferred to the managing institution. The introduction of the 'trust' concept into Chinese law caused confusion and controversy as to ownership to the property 'entrusted', because the idea of dual ownerships to the trust property is inherently inconsistent with the civil law notion of 'one property, one ownership'.[18]

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[15] The Trust Law (article 2) defines a 'trust' as 'an act by which the trustor *entrusts* its property rights to the trustee based on the trust placed upon the trustee who manages or disposes the entrusted property rights for the benefit of the beneficiary or for a specific purpose' (Emphasis added. The wording of 'entrusts' (委托给) avoids the word 'transfers').

[16] Ibid art 8.

[17] Ibid art 9.

[18] A fundamental civil law principle rooted in Roman law, meaning there can be only one ownership over one property. Liming Wang, 'Discussions on the Principle of "One Property, One Ownership" ("一物一权"原则探讨)' (2019) 1 Legal Science 4.

The primary controversy is whether, by virtue of the property being *entrusted* to the trustee, the ownership to the property has been *transferred* to the trustee. It has been argued that the definition of trust in Article 2 of the Trust Law suggests that the ownership of the entrusted property could either have been transferred to the trustee, or could have been retained by the trustor/settlor, depending on the particular circumstances in each case.[19] The argument may be plausible in theory but problematic in practice. On one hand, if the asset management contract expressly says that the title to the 'entrusted property' is transferred to the manager, the law will respect the parties' freedom of contract. However, such a term may not be accepted by Chinese investors who, without basic understanding of the 'foreign' notion of trust,[20] would not be comfortable with giving up the ownership to his/her assets. On the other hand, the managing institution would not be comfortable if the asset management contract provides that the ownership to the AUM would remain with the investor after the funds/assets are 'entrusted' to it.

It seems that the Trust Law deliberately leaves open the fundamental issue of (dual) ownership to the entrusted property.[21] If the civil law notion of indivisible ownership is stuck to, the question remains whether the sole and indivisible ownership to the AUM is still with the investor or has been transferred to the manager after the property has been 'entrusted'.

Although the controversy continues, Chinese scholars commonly agreed that the benefits to the beneficiary should be treated as an independent entitlement.[22] If this is

[19] Baoyu He, *A Study on the Principles of Trust Law* (信托法原理研究) (China Legal Publishing House, 2nd ed, December 2015) 192.
[20] Lusina Ho, 'Business Trusts in China: A Reality' (2020) 88 UCLR 767.
[21] Ruiqiao Zhang, 'Trust Law of China and its Uncertainties: Examination of the Rights and Obligations of Trusts and Ownership of Trust Property' (2015) 10 NTULR 45.
[22] He (n 23) 232.

so, notwithstanding being a lot more restricted, the 'trust' under Chinese law would still be able to fulfill the conceptual function of the notion of equitable ownership adopted in the common law jurisdictions. With such an understanding, 'trust', originally a common law concept may be introduced into China, and perhaps as with other civil law jurisdictions, without the need to give up the civil law doctrine of indivisibility of ownership and the principle of *numerus clausus*.[23]

For settlement funds and securities held by security brokers, the Securities Law provides that a security broking company may not include the settlement funds and securities of its customers into its own assets, and they are not part of the assets available for enforcement orders against the security broking company.[24] The provision shows at least that, if the customers' settlement funds and securities are treated as properties 'entrusted' to an asset manager, they are not part of the property of the managing institution (trustee). Some Chinese courts adopted the idea of 'ultimate ownership' or 'actual ownership' rather than the 'equitable ownership' where a trust relationship is found.[25]

III. A Fiduciary Relationship?

As discussed above, it is uncertain whether in China an 'assent management contract' creates a trust falling within the definition of 'trust' in the Trust Law. The question then, is, how are the investor's rights and interests protected? The answer depends, to a large

[23] Lusina Ho, 'Trust laws in China: history, ambiguity and beneficiary's rights' in Lionel Smith (ed), *Re-imaging the Trust: Trusts in Civil Law* (Cambridge University Press, 2012) 220.
[24] Securities Law (as amended 2005), art 139.
[25] Eg, *Shenyang FRP Fan Factory v Dai,* Shenyang Intermediate People's Court (IPC) (2008) Shen Zhong Min San Zhong 1445. A company holding a registered trademarks for another was held to be a trustee and was referred to as the 'nominal owner of the rights' by the Supreme People's Court (SPC) in *Guangdong Province Light Industry Import and Export (Group) Company v TMT Trading Company Limited,* SPC (1998) Zhi Zhong 8.

extent, on the clarification of the nature of the relationship between the investor and the asset manager.

In this regard, the PRC law and courts underwent a gradual process of changes. Based on observations and analyses of the legislation and the land-marking decisions of the PRC courts, this paper submits that there are four stages of developments of Chinese 'law', in the broadest sense, on the nature of the asset management relationship.

A. The early stage (prior to 2005)

In the absence of general legal principles on equity and trusts in China's civil law system, a fiduciary relationship may only exist where the (statutory) law so provides or recognizes it. Prior to the Trust Law, the Securities Law provided that security broking companies and their employees are not allowed to engage in any 'deceptive conduct that may harm the interests of the customers', including 'misappropriating the securities entrusted by the customer or the funds in the customer's account'.[26] Interestingly, however, the Securities Law did not include securities investment fund units as a type of security,[27] although the first public offering of a security investment fund happened in China in 1998 and the Securities Law was enacted on 29 December 1998.[28] Therefore, at least up to that point, there were no statutory provisions about whether funds raised by public offerings were separate from, and independent of, the managing companies' assets, or whether the fund managing companies owed a fiduciary duty to

[26] Securities Law (1998), art 73(3).
[27] Ibid arts 2.
[28] There were already a few asset management institutions at the time. Zimu, 'Effective and Institutional Regulation is the Guarantee for Stable Development of fund industry: Finding the Source of the 'Unique Phenomenon' in China's Fund Industry in the Past 20 Years (有效监管和制度规范是基金业稳定发展的制度保障——中国基金行业 20 年'独特现象'探源")' (2018) 5 TUFLR 26.

the investors.

In China, the duty of loyalty was initially provided for in the Trust Law,[29] so that relief may be available to the beneficiary where a trustee breaches that duty of loyalty.[30] The Security Investment Funds Law[31] suggests that managers and custodians of the investment funds owe investors a fiduciary duty of good faith and due diligence as joint trustees,[32] and the relationship between the fund managers/custodians and the investors is perceived as a trust relationship.[33] It also allows the Trust Law and Securities Law to be applied to security investment funds.[34] These statutory provisions impose the fiduciary duty that is owed to the investors on managers of investment funds raised by public offerings.[35]

Chinese private law development has lagged behind the fast-changing business practice. This was also the situation in the early stages of the asset management businesses. The Chinese courts had to resolve disputes arising out of such business relationships without comfortably applicable 'laws' in place to resolve those disputes. The Judiciary had to either stretch and apply the existing law to the 'new' types of relationships, or use the

[29] Sub-part 2 of Part 4 of the Trust Law.
[30] However, Chinese courts have been reluctant to impose fiduciary duties on the trustee of the business trusts 'who has a clear trust contract to perform'. Guoqing Liu, 'Trusts without fiduciary duty: the commercial nature of Chinese trust business' (2016) 22 Trusts & Trustees 1104, 1105. The reluctance could be illustrated by the Chinese court judgments in the early stages as discussed below.
[31] Securities Investment Fund Law (证券投资基金法, 2003, effective on 1 January 2004).
[32] Ibid arts 2 & 9(1).
[33] The National People's Congress Standing Committee Legislative Affairs Commission, *Interpretations of the Securities Investment Funds Law* (证券投资基金法释义) (Law Press, 2013) 4.
[34] Securities Investment Fund Law (2003), art 2.
[35] It was extended to include managers of investment funds raised by private offerings in 2012, by virtue of the amendments to the Securities Investment Fund Law in 2012. See Securities Investment Fund Law (as amended 2012), art 2. Arguably, by allowing the application of the Trust Law, these provisions are also the legal authority that the funds are trust property, independent of the manager's property.

SPC's 'Judicial Interpretations', to make 'rules or guidelines' for the lower courts, which could be either genuine 'judicial interpretations' for the proper application of the statutory legislation, or in essence a set of temporary 'quasi laws'[36] made by the judiciary in the absence of available statutory legislation on the matter.

In *Xineng Technology Ltd v Guotai Junan Securities Ltd*,[37] the SPC held that the entrusted asset management company *Guotai* owed the investor *Xineng* a duty of care and due diligence based on the interpretation of the terms of the asset management *contract* between them. The legal authorities cited by both the SPC and the lower Court were provisions in the Contract Law,[38] which suggested that the Courts were of the view that the investor and the asset manager were in an agency relationship, so that the manager as the agent, owed to the investor, the principal, duties of care and due diligence. It is arguable, however, that the Court's legal reasoning was still based on interpretation of the contractual terms and categorizing it as an agency contract. The effect was to imply into the contract a term requiring such duties of an agent owed to the principal. Nothing was mentioned about an asset manager's fiduciary duty, or anything about a 'trust contract' or a 'trust', although the Trust Law would have been applicable to this case had a 'trust' or 'trust contract' been found.

In 2005, the SPC made its decision in *Century Securities Ltd v Tianjin Housing Provident Fund Management Center and Others*,[39] citing article 122 of the Contract Law, which allowed the investor to sue the asset manager either for breach of contract

[36] There is no stare decisis in China. However, SPC's 'Judicial Interpretations' would bind all the Chinese courts. Where there is no statutory legislation applicable to the new type of disputes, the provision of a new rule for determining such disputes in a 'Judicial Interpretation' would in effect be a law making function.
[37] SPC (2003) Min 2 Zhong 82, included in (2004) 8 SPC Gazette (最高人民法院公报) (Issue 96).
[38] Contract Law, arts 60, 114(1) and 401.
[39] SPC (2005) Min 2 Zhong No 207.

or in tort where the asset manager misappropriated funds or securities in the customer's account.[40] The SPC decision also cited article 132(2) of the Securities Law (as effective at that time, prior to the 2005 Amendments), which states that customers' funds must be deposited with a bank in a separate account. This was a step forward compared to the SPC's decision in *Xineng Technology v Guotai Junan Securities*, in that it went beyond the Contract Law and relied on a statutory provision requiring customers' funds to be kept in a separate account, even though when the two SPC judgments were made, the available statutory legislation was exactly the same provisions in the Contract Law and the Securities Law (prior to the 2005 Amendments).

Neither of the above decisions referred to the Trust Law or the Securities Investment Funds Law, or anything about trusts or fiduciaries. This might suggest that the SPC were of the view that based on the law at the time, the relationship between the investors and the asset managers was not generally a trust relationship or a fiduciary relationship.[41]

B. Developments in 2005 – 2010/2011

The most significant development was that the Securities Law was further amended in October 2005. The Amendments became effective on 1 January 2006, about a month after the SPC's decision in *Century Securities*. The 2005 Amendments not only kept Article 132(2), heavily relied upon by the SPC in *Century Securities,* but added a new provision (Article 139) stating that a security (broking) company is not allowed to

[40] This could be seen one step further allowing the investors to claim against the asset managers for breach of law, in addition to breach of contract. See also *Tang v Asset Management Company X,* Shanghai 2nd IPC (2012) Hu 2 Min 6 (Shang) Zhong 170.

[41] Although the Securities Investment Funds Law as at the time provides that the Trust Law applies to securities investment funds raised by public offerings, the cases did not involve such funds.

include the customers' settlement funds and securities into its own property; and that those funds do not comprise any part of the company's assets in either bankruptcy or liquidation proceedings, and are not subject to any preservation, freezing or enforcement orders against the company.[42] The customer's settlement funds and securities now start to be treated as independent trust property in nature although the word 'trust' was not used in the provision. Article 139 also requires *each* customer's settlement funds to be kept and managed in a separate account – a step beyond the 2004 Amendments which only required customers' settlement funds to be kept separate from the broker's account.[43] Furthermore, a security company must make sure the security asset management business is completely separate from its other businesses including security brokerage, securities underwriting, and its own security investment businesses.[44] These provisions under the 2005 Amendments seemed to follow the Trust Law and the Securities Investment Funds Law, and started to treat customers' assets held by the manager (security company) as trust property and made it clear that the manager owes the customer a fiduciary duty.

The 2005 Amendments extended the application of the Securities Law to trading[45] of security investment units[46] , which was the first time that a Chinese statute accepted securities investment fund units as a kind of security to which the Securities Law applies. Security asset management was also added to the allowable businesses of security (broking) companies.[47] By virtue of the 2005 Amendments, the Securities Law

[42] The provision was preserved in the 2019 amendments and became Article 131 of the Securities Law (as amended 2019).
[43] Securities Law (as amended 2004), art 132(2).
[44] Securities Law (as amended 2005), art 136(2).
[45] Issuing and offering of security investment fund units are still governed by the Securities Investment Funds Law.
[46] Securities Law (as amended 2005), art 2(2).
[47] Ibid art 125.

started to work together with the Securities Investment Funds Law to govern the offering, issuing and trading of security investment fund units.

The changes brought by the 2005 Amendments were made with a dual-purpose - protecting the investors and the government from liability arising out of misconduct by securities brokers. In the years prior to the 2005 Amendments, there had been an outbreak of large scale misappropriations of customer funds and securities by security companies in China, causing substantial losses. In many circumstances these losses were greater than the value of the assets held by the company, so the Chinese government had to step in for social stability concerns. The government closed dozens of security companies and used public funds to compensate the investors for their losses. [48] The effect was that taxpayers were left footing an unexpected, unacceptable and unsustainable bill for the wrongs perpetrated by the security companies as the asset managers. The regulators realized that the settlement funds of the investors must be kept independent of and separate from the property of the brokers (managers), and there should be a long-term and stable institutional mechanism to protect the investors' interests. As a result, the 2005 Amendments were formulated, and the China Security Investors Protection Fund Corporation Limited (CSIPF) was set up by the government.

The Insurance Law was also amended in 2009. The Amendments provide for the setting up of insurance asset management subsidiaries by insurance companies, and the Securities Law applies where the insurance assets companies are engaged in 'securities

[48] These were carried out according to the Opinions on Purchasing Personal Debtor's Rights and Customer Security Settlement Funds (个人债权及客户证券交易结算资金收购意见) *zhengjian fa* [2004] 11, and the Implementation Measures on Purchasing Personal Debtor's Rights and Customer Security Settlement Funds (个人债权及客户证券交易结算资金收购实施办法) *zhengjian fa* [2005] 10. Both were jointly issued by the People's Bank (PBC), Ministry of Treasury, China Banking Regulatory Commission (CBRC), and China Securities Regulatory Commission (CSRC).

investment activities'.[49] The upside of the amendments is that the Securities Law (with the 2005 Amendments), which requires the AUM of each investor to be kept in a separate account, and separate from the manager's own assets and businesses,[50] now applies to insurance asset management where 'securities investment activities' are involved. The downside is that it leaves uncertainty around whether the same rules would apply where other investment activities[51] are involved.

As regulatory bodies were trying to cope with issues arising out of the rapid growth of asset management businesses, the, as it was then, CBRC issued the Interim Measures for the Administration of Individual Financial Management Services of Commercial Banks (商业银行个人理财业务管理暂行办法) (CBRC Interim Measures 2005),[52] which included asset/wealth management into the 'financial management services' provided by commercial banks,[53] and require commercial banks to carry out 'individual financial management business' prudently and responsibly according to the principle of 'meeting the interests and fitting the risk tolerance of the customer'.[54] Commercial banks must put in place rules and a code of conduct for their employees to prevent 'misleading customers and improper sales/promotions' and misappropriation of AUM.[55] These requirements seem to suggest the imposition of a quasi-fiduciary duty on the commercial banks in respect of their asset management for individual investors. Another provision, however, points the other way, providing that asset management funds shall be managed and used in accordance with the contract between the bank and

[49] This provision survived the amendments in 2014 and 2015, and is now the Insurance Law (as amended 2015) art 107.
[50] Securities Law (as amended 2005), art 136(2) & 139.
[51] Eg., lending the insurance assets/funds to land developers for interests return.
[52] CBRC *ling* (2005) 2 (effective 1 November 2005, repealed 2018).
[53] Ibid arts 2 & 9.
[54] Ibid art 4.
[55] Ibid art 17.

its customer.[56] This provision emphasizes the contractual basis, rather than the independence of the AUM and the fiduciary duty of commercial banks as trustees in the asset management.

There were obvious limits with the CBRC Interim Measures 2005, which was merely a ministerial directive (arguably inferior to 'regulations'), made without any statutory delegation.[57] A commercial bank violating the administrative directive may be punished by the regulatory body, but the civil liabilities of the bank were not governed by the *administrative* directive. The directive only regulates commercial banks, which leaves non-bank financial institutions engaged in asset/wealth businesses untouched.[58]

The Chinese Courts after 2005, in dealing with disputes arising out of asset management relationships, started to shift legal reasoning away from relying on a contract-law based agency relationship to relying on an equity-law based trust or fiduciary relationship. An example of this was that the concept of 'entrusted persons' (trustees) was expanded to include 'other financial institutions'.[59]

In Wu v Standard Chartered Bank (China),[60] the appellate Court stated that an imbalance of information between the individual entrusting party and the entrusted bank could easily arise out of the entrusted financial asset management relationship, and so the bank, as the trustee, now has the obligation to disclose truthful, complete and accurate information and warn the customer of the risks. The judgment was included in

[56] Ibid art 27.
[57] The Commercial Banks Law (商业银行法, 1995, amended in 2003 and 2015), the core statute regulating commercial banks, is silent as to the asset management by banks.
[58] Although, to date, most asset/wealth management services in China were provided by commercial banks.
[59] The terms of 'other financial institutions' and 'non-bank financial institutions' are used interchangeably in China.
[60] Shanghai 2nd IPC (2008) Hu 2 Zhong Min 3 (Shang) Zhong 509.

the SPC's official publication *People's Judiciary* (人民司法) ,[61] with the editor commenting that although the PBC and the CSRC have provided some regulations/rules regulating the entrusted financial asset management, the institutions regulated were limited to security companies, and as these regulations/rules did not include other types of institutions doing entrusted financial asset management businesses, the existing regulations/rules did not meet the needs of market reality. Therefore, this case judgment was included in the authoritative SPC publication aimed to assist the courts when determining similar cases and also provide the legislature with a reference for consideration in improving future legislation.

The judgment was significant in the sense that it relied more on legal reasoning based on the trust/fiduciary relationship than on existing legislation. The Court, faced with the new circumstances, took an active role in making new rules or even 'quasi law'. There is no *stare decisis* in China, so the judgment is not binding on other courts and judges. However, the publication of it as a 'classic case' in the SPC's official publication with supporting comments of the editor, gives the judgment a persuasive effect. Other Chinese courts and judges in dealing with similar cases would very likely follow this judgment unless, and until, new legislation in this regard is available.

C. Developments in 2011-2017

The Securities Investment Funds Law was amended in 2012. The amendments provide that where securities investment funds are involved the underlying investor-manager relationship is a trust relationship and the managing institution is the trustee.[62] This

[61] Introduction to the *People's Judiciary* (人民司法简介) http://rmsf.chinacourt.org/article/detail/2009/10/id/6382717.shtml> access 30 December 2021.
[62] Securities Investment Funds Law (as amended 2012), arts 2 & 3.

provision also applies to securities asset management companies by virtue of the amendments to the Securities Law in 2019.[63]

The Insurance Law was further amended in 2014 and 2015. Unfortunately, the issue of whether the Securities Law would apply to the insurance assets management where the assets put into investment activities other than 'securities investment activities' remains unsettled.

Regulatory bodies were more active, in granting asset management business licenses and making regulatory directives.[64] The regulatory directives, however, are primarily for administrative regulation purposes, which may not be very helpful in clarifying the nature of the asset management relationship. There might be an exception to this "not very helpful' assertion, that is, the Measures on Suitability Management of Securities and Future Investors (证券期货投资者适当性管理办法) (CSRC Measures on Suitability), [65] which clearly imposes upon the managing institutions a duty of suitability. When providing the security or future services,[66] the managing institution must request information from the customer/investor regarding his/her knowledge and experience in the investment field relevant to the specific type of product/service offered or demanded, which enables the institution to assess whether the

[63] Securities Law (as amended 2019), art 120.
[64] Eg, the Interim Measures on Entrusted Insurance Asset Management (保险资金委托投资管理暂行办法) *baojian* [2012] 60, Measures on Pilot Businesses of Future Companies' Asset Management (期货公司资产管理业务试点办法）*zhengjian* [2012] 81, Interim Provisions on Asset Management of Securities Investment Funds via Public Offerings (资产管理机构开展公募证券投资基金管理业务暂行规定) *zhengjian fa* (2013) 10, Notice on Issues on Pilot Asset Management Businesses Operated by Insurance Asset Management Companies (关于保险资产管理公司开展资产管理产品业务试点有关问题的通知) *baojian fa* [2013] 124.
[65] CSRC *ling* (2016) 130 (issued 26 May 2016, effective on 1 July 2017, revised 30 October 2020).
[66] Ibid art 2.

product/service envisage is suitable for the investor.[67]

The Chinese judiciary system seems to be more open to the fiduciary relationship between the investor/customer and the managing institutions. A new and separate 'type of case', based on the categorization of the cause of action, 'entrusted financial management disputes' (previously subsumed in the 'agency contracts disputes' category), was added by the SPC in 2011,[68]. This newly added category was further devided into two sub-categories, namely, 'entrusted financial management by financial institutions disputes (where the manager is a financial institution)' and 'entrusted financial management disputes between private parties (where none of the parties is a financial institution)'. The change was significant because previously such disputes had been indifferently treated as 'agency contract disputes'.[69] The change shows that the SPC finally realized and recognized that entrusted financial management is a different type of legal relation in nature to an agency contract, and the duties of the entrusted including the fiduciary duty could be different depending on whether a financial institution is involved as the entrusted party.[70]

Wu v Bank X [71] illustrated the application of this newly added cause of action. In that case, the cause of action recognized by the Court was the 'entrusted financial management dispute'. The customer Wu wanted to place a term deposit with Band X,

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[67]Ibid art 6.

[68] Provisions on Causes of Action for Civil Cases (2011), as amended by the SPC Decisions on Amendments to the Provisions on Cause of Action for Civil Cases (最高人民法院关于修改〈民事案件案由规定〉的决定) *fa* [2011] 41.

[69] Provisions on Causes of Action for Civil Cases (民事案件案由规定) *fa fa* [2008] 11; SPC Task Group, *Understanding and Application of the Supreme People's Court Provisions on Causes of Action for Civil Cases* (最高人民法院民事案件案由规定理解与适用) (People's Courts Press, 2008) 125.

[70] SPC Task Group, *Understanding and Application of the Supreme People's Court Provisions on Cause of Action for Civil Cases* (最高人民法院民事案件案由规定理解与适用) (People's Courts Press, 2011) 176-177.

[71] Shanghai 1st IPC (2012) Hu 1 Zhong Min 6 (Shang) Zhong 164.

but the bank staff recommended an investment fund product to him instead. Wu purchased the fund and suffered a substantial loss. The Court held that the bank failed its duty of disclosure, duty of care and due diligence imposed by law. In selling or recommending to its customer a financial product, the financial institution has a duty to investigate the customer's knowledge, understanding and preference of risks, to assess the customer's financial situation, and to disclose and explain information about the investment products and, on such bases, recommend 'suitable (appropriate)' investment products. Bank X failed to prove that it has fulfilled these duties so it should be liable for the loss to the investor who relied on the advice or recommendation. However, the customer Wu as an adult with full capacity, contributed substantially to his loss, because he neglected to read the risk warning notice and the risk assessment prompted by the online purchasing system before making the purchase. The Court held that the bank was liable for 30% of Wu's loss.[72] The judgment is significant in China. The cause of action and legal reasoning of the Court was completely based on a fiduciary relationship rather than merely on a contractual relationship. So the financial institution's fiduciary duty (duty of disclosure and duty of care and diligence) owed to their customers is unequivocally recognized. It also makes clear that the burden of proof of the fulfillment of the duty rests on the financial institution (trustee).

PRC courts also started to refer to the investors of the financial products, and customers of the asset/wealth management institutions, as 'financial consumers' in the judgments although there have been no statutory provisions in this regard.[73]

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[72] The percentage is decided based on the facts in each case reflecting each party's contribution/fault to the loss, as the Court thinks fair, exercising its discretionary power. See also *Wang v ICBC,* Shangdong Higher People's Court (HPC) (2020) Lu Min Zhong 435.
[73] Detailed discussions in Part IV.

D. The most recent changes since 2018

The Securities Law was further amended in December 2019. The 2019 Amendments add a provision that security (broking) companies operating asset management businesses shall comply with the Securities Investment Funds Law, other laws and administrative regulations.[74] The change is significant. Firstly, the provision, in connection with the Securities Investment Funds Law, which provides for the application of the Trust Law,[75] is clear statutory legislation confirming that the relationship between the customer/investor and the security (broking) company is a trust relationship, and the company as a trustee owes a fiduciary duty to its customer. Secondly, the provision is a clear delegation of power, giving binding effects to 'administrative regulations' by the regulatory bodies regarding security-related asset management.[76] The wording of the provision suggests a retrospective effect regarding regulations made prior to the 2019 Amendments. The 2019 Amendments require the settlement funds and securities of each customer to be deposited separately with a commercial bank,[77] which reiterates the 2005 Amendments.[78] The combined effect of these provisions is that the customer's funds and securities are to be treated as trust properties, independent of and separate from the broker/managing company's, and the relationship between the investor and the managing company is a trust relationship.

The 2019 Amendments also include the first *statutory* provision recognizing the asset managers' duty of suitability[79] (of the financial products for the investor taking into

[74] Securities Law (as amended 2019), art 120(3).
[75] Securities Investment Funds Law (as amended 2012), art 2.
[76] For asset management businesses not governed by the Securities Law and the Securities Investment Funds Law, the situations are less certain, due to the lack of statutory delegation of power.
[77] Securities Law (as amended 2019), art 131.
[78] Securities Law (as amended 2005), art 139.
[79] The duty of suitability was firstly introduced by the CSRC Measures on Suitability 2016,

account the investor's knowledge, experience, capability and willingness of taking risks and other relevant factors).[80] A distinction between professional and non-professional investors is added.[81] Where there is any dispute between a non-professional investor and the managing company, the company has a burden of proving its compliance with the relevant statutes, the administrative regulations and '*other directives'*[82] of the security regulatory body, and the non-existence of misleading or deceptive conduct on its part; and must compensate the investor for any loss if it fails to discharge the burden of proof.[83]

There was a significant asset management regulatory paradigm shift in China in 2018. Previously, various asset management instruments, although very similar or even 'identical in essence', had been subject to different regulatory regimes (sectoral regulation).[84] Different regulatory bodies, namely, the CBRC, CSRS, China Insurance Regulatory Commission (CIRC) and the People's Bank of China (PBC), were involved and different laws and regulations/directives were applied, depending on the different types of the managing institution (a bank, securities company, insurance company, or a trust company), and the different types (or even labels) of the instruments. The sectoral regulation gave 'room for regulatory arbitrage'[85] and incentives for the parties to structure/label the asset management instruments for 'regulation shopping'. Many

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which is not a statute.

[80] Securities Law (as amended 2019), art 88.

[81] Ibid art 89.

[82] Adding the 'other directives' is in essence an expansion of the delegation of power, as otherwise the legal effect of the 'directives' of the regulatory bodies may be subject to challenges.

[83] Securities Law (as amended 2019), art 89(2).

[84] Joseph Lee and Yonghui Bao, 'Private law and public regulation for investor protection in the asset management industry: Aims and practices of transposing the UK model in China', (2021) 28 MJECL 59, 69.

[85] Ibid.

shadow banking activities were disguised as 'asset management'.[86] These factors, and the diminished boundaries of different financial market segments, including banking, securities, insurances, trusts, etc. pushed the Chinese government to shift to the 'uniformed' regulatory paradigm which initiated the era of '大资管 (extensive asset management)'.[87] The ministerial directive 'Guiding Opinions on Regulating Asset Management Business of Financial Institutions (关于规范金融机构资产管理业务的指导意见)', was jointly issued by the PBC, the CBIRC (which was set up in 2018 to replace the CBRC and CIRC), the CSRC, and the State Administration of Foreign Exchange in 2018, widely referred to as '资管新规', meaning 'New Asset Management Regulations' (New AMR 2018),[88] which is highly important for any asset management operations in China, notwithstanding the humble wording of the title 'Guiding Opinions'. This is so, not only because it was jointly issued by the powerful regulatory bodies of financial markets, but also by virtue of the 2019 Amendments to the Securities Law,[89] its legal effects are clearly recognized by the statutory legislation where 'securities' (as defined in the Securities Law), or securities investment funds (as defined in the Securities Investment Funds Law) are involved. For asset management businesses not involving 'securities' or 'securities investment funds', the New AMR 2018 would still be applicable *de facto*, taking into account the prevailing practice in China.[90] The New AMR 2018 regulates asset management services provided by

[86] Ibid.
[87] Shen and Li, 'The New Asset Management Regulations for A Uniformed Regulation: Reasons, Tools and Boundaries' (迈向统一监管的资管新规：逻辑、工具和边界) (2019) 5 Financial Law 89, 90.
[88] *Yin fa* [2018] 106.
[89] Securities Law (as amended 2019), arts 120(3) & 89.
[90] In China, many administrative directives were made without statutory delegation but with 'binding' effects in practice. This is partially because the Administrative Procedure Law (1989, as amended 2017), art 13(2) excludes 'administrative regulations, directives and universally binding decisions/orders' from the judicial review.

financial institutions, including banks, trusts, security brokers or other security-related institutions, funds and future services providers, and insurance asset management institutions.[91]

According to the New AMR 2018, the entrusted financial institution has a duty of good faith and a duty of care and due diligence to act for the benefit of the trustor (investor and the beneficiary),[92] and is liable for the loss of the investor should it fail any of such duties.[93] The entrusted institutions must not defraud or mislead an investor in (recommending) investment products beyond the investor's risk-bearing capability.[94] They are also required to apply the prudential management principle and set up reasonable strategies and mechanisms for risk control.[95] It is arguable that these duties imposed on the entrusted financial institutions are, together, akin to a 'fiduciary duty', although the term is absent in the New AMR 2018.

The judiciary also actively participated in this wave of development of the rules on asset management. In 2019, the Supreme People's Court issued the Minutes of the (9th) National Conference on Civil and Commercial Trials, widely known in China as '九民纪要', literally meaning 'the 9th civil minutes' (SPC Minutes 2019),[96] which refer to the New AMR 2018 and state that the courts shall apply the Trust Law in dealing with disputes arising out of the asset management as long as a trust relationship can be found, whether the financial institution involved is a trustee company or not.[97] Chinese

[91] New AMR 2018, arts 2 & 3.
[92] Ibid art 2.
[93] Ibid art 8(3).
[94] Ibid art 6.
[95] Ibid art 8(1).
[96] Minutes of the National Conference on Civil and Commercial Trials (全国法院民商事审判工作会议纪要) *fa* [2019] 254.
[97] Ibid minute 88.

academics support the judicial guidelines. They argue that all asset management services provided by financial institutions should be deemed to involve a trust relationship;[98] and that in common law jurisdictions a fiduciary relationship may arise not only from a trust, but other circumstances where factors such as 'high reliance', 'managing property or affairs for another', 'discretionary power' and 'vulnerability' present.[99] Such factors exist in all the asset management services regulated by the New AMR 2018, therefore the managing institutions owe the investors a fiduciary duty.[100]

The SPC Minutes 2019 state that the asset manager (as with the seller of the investment products) owes the 'duty of suitability' to the investor, that is, the financial institution must do their due diligence as to the investment product and the investor, and make sure only 'suitable investment products' are recommended or provided to the investor, with the purpose to make sure that the investor is fully aware of the investment products, the risks involved and is able to make informed decisions.[101] The s*eller's* (rather than the buyer's) due diligence is the default and the core fulfillment of its 'duty of suitability' in promoting and selling high-risk financial products or services.[102] The financial institution also has a 'broader' duty of suitability to disclose and explain to the investor important information about the financial products.[103] It is arguable that these judicial

[98] Xiaolong Li & Yikai Zhao, 'An Analysis on Hearings of Entrusted Financial Management Disputes from the Trust Law Perspective (信托法适用视角下的委托理财纠纷审理探究)' [2018] 1 Law Journal of Tianjin 37, 37-40. Qi Wang, 'Meaning and Function of the Fiduciary Duty in Asset Management Business (资管业务中受托人信义义务的内涵与功能) [2020] 1 Economic Law 239.

[99] Li Guo & Yucheng Peng, 'A Study on Asset Manager's Fiduciary Duty in the New Environment (新发展格局下资管业务管理人信义义务研究) [2021] 7 Jianghan Forum 137, 141-143; Xinyu Mao, 'A Study on the Construction of a System of Fiduciary Duty of Asset Managing Institutions in the Context of Strong Asset Management Regulation (强资管背景下资产管理机构信义义务制度构建研究—以民事裁判为视角)' [2020] 11 Business and Management 86, 86-87.

[100] SPC Minutes 2019, minute 88.

[101] Ibid minute 72.

[102] Ibid.

[103] Ibid minute 76.

guidelines support the position that financial institutions as the managers of the entrusted asset owe the investors a duty highly analogous to the fiduciary duty recognized by the law of equity in common law jurisdictions.

The SPC Minutes is not a formal 'judicial interpretation' hence not binding, but a summary of some views or legal principles widely accepted by the Chinese judges, now with the support of the SPC, regarding some controversial issues discussed in the conference.[104] Chinese judges shall not 'cite [the Minutes] directly, but 'may' undertake a 'reasoning' in discussing the application of law, based on the Minutes, in the '[T]his Court is of the view' part of a judgment.[105] The SPC Minutes 2019, however, are highly influential and persuasive, which can be illustrated by some Chinese courts' decisions thereafter, although a decision of the SPC applying the Minutes to the asset management disputes remains to be seen.

In *China Minsheng Bank v Liu*,[106] the appellate Court overturned the lower court's decision made prior to the SPC Minutes 2019, one the basis that the caveat emptor rule could apply only where the seller of the financial products fulfilled its obligations of information disclosure and risk-warning in good faith. The judgment with its reasoning was upheld by the HPC in the retrial proceeding.[107] In *Wang v Standard Chartered Bank Beijing Zhongguancun Branch*,[108] the retrial Court stated that the asset manager's fulfillment of its duty of suitability was a prerequisite for avoiding its liabilities. These decisions, made after the SPC Minutes 2019, showed a clear change of legal reasoning and outcomes from the previous decisions which mainly relied on the asset

[104] Notice on issuing the Minutes of the National Conference on Civil and Commercial Trials (SPC [2019] 254), item 1 & 3.
[105] Ibid item 3.
[106] Hefei IPC (2019) Wan 01 Min Zhong 8546.
[107] Anhui HPC (2020) Wan Min Shen No 3081.
[108] Beijing HPC (2020) Jing Min Shen 3398.

management contracts and emphasized the caveat emptor principle.[109]

Notably, the Shanghai Financial Court (FC) in an appellate proceeding[110] specifically stated that the asset manager as the *trustee* must handle the entrusted affairs in the best interests of the entrusting investor, and must perform its obligations including contractual obligations with due diligence, honesty, prudence and effective management in good faith. In March 2022, the Shanghai Finance Court published its 'classic cases of 2021', one of which is a case regarding an asset management dispute.[111] In this case, an asset managing company (Jupai), associated with the investment fund manager (Juzhou Ltd), *without any (formal) contractual relationships with the plaintiff investor and Juzhou*, but participated in selling/managing the fund, was held jointly liable to the investor, due to the contravention of the regulatory rules and *the failure of its fiduciary duties*, including the duties of suitability, loyalty and due diligence.

The significance of the SPC Minutes 2019, which clearly provide for the fiduciary duty of the asset manager, could also be well illustrated by the completely different judgments of the same case made before and after the Minutes. In this case, the plaintiff investor, Wang, purchased an asset management product from the defendant bank and suffered a substantial loss. The District People's Court, in the first instance,[112] held that the plaintiff had signed the documents including the notice of risk warning prior to the purchase so the defendant bank should not be liable for her loss. The plaintiff investor

[109] Eg, *Hao v Changjiang Securities Ltd,* Wuhan IPC (2014) E Wuhan Zhong Minshang Zhong 00572; *Tang v Ping An Bank*, Dalian IPC (2017) Liao 02 Min Zhong 3115; *Xia v Dongwu Securities Ltd,* Huangpu District People's Court (DPC) (2017) Hu 0101 Min Chu 18118.
[110] *Zhan v Lianchu Securities Co Ltd,* Shanghai FC (2021) Hu 74 Min Zhong 1586.
[111] *Juzhou Asset Management (Shanghai) Ltd and Jupai Investments Group Ltd v Cao,* Shanghai FC (2021) Hu 74 Min Zhong 1478.
[112] *Wang v ICBC Bank,* Dongchen DPC (2019) Jing 0101 Min Chu 11188.

appealed. During the appellate proceeding, the SPC Minutes 2019 was issued. The appellate Court overturned the lower court's decision and held that the defendant bank was liable for 30% of the loss of the investment principal, which in the Court's view was a proper portion reflecting the defendant's failure of its duty of suitability.[113] The Court specifically referred to the SPC Minutes 2019 and stated that the fundamental issue was whether the defendant bank had adequately fulfilled its duty of suitability which should be determined by looking at the relevant facts in the circumstance, including the financial situations of the investor, the financial product, and the risks of the investment activities. The prerequisite of the application of the caveat emptor principle was that the defendant had adequately fulfilled its due diligence duty and other duties, and the mere fact that the plaintiff, who was a non-professional investor, had signed the documents alone, was insufficient to discharge the defendant's burden of proof of its fulfillment of its obligations of due diligence, adequate disclosure and suitability of the financial product.

The above analysis of the cases shows that Chinese courts have adopted the asset managers' fiduciary duty and have inferred a trust relationship between the investor and the manager, as long as the elements of a trust were found from the facts. A trust relationship has been found or inferred in the absence of a 'trust contract' or even any (formal) contractual relationships between the investor and the liable manager at all, as shown in *Juzhou Asset Management*.[114] The recent judgments, especially those after the SPC 2019, as discussed above, also show that the asset managers, who would have been able to escape their liabilities based on the contracts, were held liable based on the trust relationship found or inferred by the Courts. This suggests that the applicability of the

[113] Bejing 2nd IPC (2019) Jing 02 Min Zhong 15312.
[114] Shanghai FC (2021) Hu 74 Min Zhong 1478 .

Trust Law would eventually prohibits lowering the fiduciary duty of the asset manager as the trustee to the level of the contractual obligations.[115] The Trust Law should also provide the investor with remedies that would otherwise unavailable had a pure contractual relationship been relied upon.

E. Comments on the 'fiduciary relationship' issue

The above stages of developments show a gradual progress of recognizing the independence of the AUM[116] and the fiduciary duty of the asset manager. Initially the relationship between the investor and the entrusted asset manager had been treated as an agency contract so that the investor's remedies were limited to those of breach of contract by the asset manager. Later, investors were allowed the choice to sue the asset manager for breach of contract or for breach of law (in tort). Finally, the independence and 'ultimate/actual ownership' (similar to the 'equitable title' concept in common law jurisdictions but different from the shareholder's entitlement to the assets of a corporate company) of the AUM are now recognized by the law[117] as if they were the trust property under the Trust Law; and the asset manager's duties of loyalty, care and due diligence as their fiduciary duties owed to the clients (investors) are now recognized by the law.

There are obvious advantages in recognizing the fiduciary duty, especially where the asset manager is a financial institution and the investor is an individual. Financial products and services are so complicated that many investors have to pass control of

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[115] See, in particular, *Zhan v Lianchu Securities,* Shanghai FC (2021) Hu 74 Min Zhong 1586 . See also Guoqing Liu (n 5) for persuasive arguments supporting this point.
[116] It is understood that the 'ultimate or actual ownership' remains with the investor but the asset manager is given the power to manage the assets with the opportunity of misappropriation. This is still so notwithstanding the provision in Article 131 of the Securities Law (as amended 2019).
[117] Securities Law (as amended 2019), arts 92(2) & 131, Securities Investment Funds Law (as amended 2015) arts 2, 3, 5 & 19.

their accounts to the manager. The investors place trust and confidence on the institution as the manager. There is a significant imbalance of knowledge, experience and bargaining positions between the entrusting investor and the entrusted manager, which justifies the imposition of the fiduciary duty on the financial institution as the asset manager. Categorizing such a customer/investor-manager relationship as an agency is far-fetched although it has been adopted by some Chinese courts, because the asset management relationship does not comfortably conform to the characteristics of an agency, but is more in line with the trust relationship. [118]

To date, as a result of the long-term joint efforts of the Chinese legislature, regulatory agencies, law academics, and the courts in particular (which seem to have taken a pre-emptive and active role in the development), the fiduciary nature of the customer/investor-manager relationship in asset management, and the manager's fiduciary duty have been recognized, although there may still be gaps, inconsistencies and other problems. [119]

Recognizing the fiduciary duty of the asset manager is significant. The fiduciary duty, which is mandatory and cannot be contracted out, [120] calls for a high level of loyalty which is generally not required for 'fair-dealing contractual' relationships. [121] Investors are hence better protected.

IV. A Financial Consumer?

[118] Some argue that the asset management should be an implied trust. Yan Yan, 'Financial Commodities Based on Implied Trusts (基于非明示信托的金融商品：法律分析与规制)' in Jian Fan (ed) *China Trust Law Forum 2014* (Law Press, 2015) 41.
[119] See discussions in part V.
[120] *Armitage v Nurse* [1998] Ch 241, 253.
[121] This is consistent with the view that the fiduciary duty of the trustee, even under the PRC Trust Law, should not be lowered to the level of contractual obligations. Guoqing Liu (n 5).

Another attempt was trying to squeeze the investors of financial products/services including the AUM into the legal concept of 'consumer', so that the generic consumer protection law could apply to protect them. The attempt is also controversial.

In *Wu v Bank X*, [122] the Court commented that Wu was a 'financial consumer' who placed his trust and reliance upon the bank. That was a breakthrough in Chinese law in the sense that the recognition of an investor as a 'consumer' completely went beyond the possible legal definition of 'consumer' in PRC law which limits consumers to those acquiring goods/services for 'living consumption'.[123]

Prior to 2010, it had been argued that purchasers of financial products including securities should be uniformly categorised as 'financial consumers' although the majority of Chinese academics at the time insisted that the purpose of investment was for investment return rather than 'for living consumption' so investors should not be consumers.[124]

In 2015, the State Council General Office issued the 'Guiding Opinions on Strengthening the Protection of the Rights and Interests of Financial Consumers (关于加强金融消费者权益保护工作的指导意见)' which officially raised the issue of 'financial consumers' protection and called for 'an appropriate system' for regulating the financial institutions' conducts to protect financial consumers.[125] In 2016, the PBC issued the 'Implementation Measures for Protection of the Rights and Interests of

[122] Shanghai 1st IPC (2012) Hu 1 Zhong Min 6 (Shang) Zhong 164 .
[123] Consumer Rights and Interests Protection Law (消费者权益保护法) (1993, as amended 2013), art 2.
[124] Ye and Guo, 'The Future Direction of China's Securities Law: on Issues concerning Protection of Financial Consumers(中国证券法的未来走向——关于金融消费者的法律保护问题) [2008] 6 Academic Journal of Hebei 156.
[125] *Guoban fa* [2015] 81.

Financial Consumers (金融消费者权益保护实施办法)' (PBC 2016 Measures) to regulate the conduct of financial institutions that provide financial products and services to a 'financial consumer' who was defined as 'a natural person who purchases/uses financial products/services provided by banks or payment institutions'.[126] The New AMR 2018 stated that protection of consumers of banking and insurance services is an important aspect for maintaining the financial order, preventing financial risks and the sustainable development of financial institutions.[127]

The SPC Minutes 2019 specifically provide the judges with some legal reasoning bases for 'hearing cases on protection of financial consumers' rights and interests'.[128] The general principle is 'to correctly handle the relationship between freedom of contract and justice of contract, with the consideration of giving priority to the protection of the lawful rights of financial consumers as players in the special markets'.[129] The 'financial consumer' was not defined in the Minutes.

The above developments show that law academics, the judiciary and the financial institution/market regulatory agencies considered the needs for the 'financial consumer' concept and the justifications for the protection of the investors. The concept of 'financial consumer' was loosely referred to but was only defined in the PBC 2016 Measures. For AUM investors this definition may be both too narrow (only 'natural persons' using services of 'banks/payment institutions' are included) and too wide

[126] *Yin fa* [2016] No 314, amended by *yin fa* [2020] 5, arts 1 & 2.
[127] New AMR 2018, Preamble, arts 11 & 26.
[128] SPC Minutes 2019, minutes 72-78.
[129] Supreme People's Court (2nd Civil Division), 'Understanding and Application of the Minutes of National Conference on Civil and Commercial Trials (全国民商事审判工作会议纪要理解与适用)' (People's Court Press, 2019) 410.

(users of financial services other than the asset management are included). Statutory legislation on the 'financial consumer' still needs to be developed.

V. Conclusion

A. A Critique on the status quo

Chinese academics, lawmakers and the judges already realized the necessity of recognizing the AUM as trust property independent of and separate from the manager's own property, and the fiduciary duty of the asset manager owed to the investor based on a trust relationship between them. The PRC legislature, regulatory agencies and the courts have made significant progress in these regards. The current position of the Chinese 'law' (in the broadest sense) on asset management businesses may be summarized as below:

a) For security investors, settlement funds and securities held by the security (broker) companies, are independent of and separate from the property of the security (broker) companies. The relationship between them is recognized as a trust relationship and the asset manager owes a fiduciary duty to the investor. These are now clearly recognized by statutory legislation.[130]
b) For investors of securities investment funds, whether the fund units were issued via public offerings or private offerings, the investment fund units are independent trust property, and the fund issuers and managers as trustees owe a fiduciary duty to the investor. These are now clearly recognized by statutory legislation.[131]

[130] The Securities Law, Securities Investment Funds Law, and Trust Law.
[131] Ibid.

c) For investors of financial products provided by or via commercial banks,[132] if the funds from selling the products are invested into the security market including investments via security investment funds, and the commercial bank is treated as a customer of the security broker and fund manager, the above mentioned statutes[133] apply and the broker/manager would be the trustee owing a fiduciary duty to the commercial bank. However, there is no statutory provision recognising the commercial bank as a trustee or the fiduciary duty owed by the bank to the purchasers of the financial products.[134] The Commercial Banks Law is silent concerning either of these points. Investors may only rely on the ministerial directives (inferior to regulations), especially the New AMR 2018 which regulates all asset management services provided by financial institutions.

d) Similarly, for investors of insurance assets/products,[135] if the funds collected are invested by the insurance company into the security market, the Securities Law applies, and the security company is the trustee and owes a fiduciary duty to the insurance company as the investor.[136] There is no statutory provision regarding the nature of the relationship between the insurance asset investors and the insurance company. Investors may only rely on the New AMR 2018

[132] Chinese commercial banks issued their own financial products, some of which were bonds with a 'fixed return' (no longer allowed by the New AMR 2018).
[133] The Securities Law, Securities Investment Funds Law, and Trust Law. They would not apply if the funds collected are not invested into the security markets, but invested in other ways such as lending to a land developer.
[134] New AMR 2018.
[135] In China, some insurance policies are issued for both insurance and investment purposes.
[136] Statutes in n 132. The Insurance Law (as amended 2015) art 107 provides the application of the Securities Law in this circumstance. There is no equivalent provision in the Commercial Banks Law (as amended 2015).

which imposes a fiduciary duty on the financial institutions providing asset management services including insurance asset management.[137]

e) In other circumstances, including where the asset manager is not a financial institution, the New AMR 2018, which regulates asset management services by *financial institutions*, would not apply. The investor may only seek help from the SPC Minutes 2019, which provides judges with a 'legal reasoning' guideline that the Trust Law shall apply to asset management disputes where 'a trust relationship can be found'.[138]

f) Investors of financial products have not been recognised by any statutory provisions as a 'financial consumer' so that their protection by the generic consumer statutory legislation is extremely unlikely.

It is noted that asset management businesses are regulated and dealt with differently in different circumstances. There are problems with this approach.

Firstly, whether the asset manager is a trustee and owes a fiduciary duty to the investor depends on which law, regulations (directives), or judicial guidelines apply. This in turn highly depends on a) the types of financial products (securities, securities investment funds or others) and b) the types of the managing institution (a securities company, bank, insurance company, commercial trust, or the other) are involved.

As a consequence, a huge gap is left untouched by statutory provisions where investors purchase a financial product provided by or via a commercial bank or an insurance company, and the funds collected are not invested in the security market. Both the Commercial Banks Law and the Insurance Law are silent in this regard.

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[137] New AMR 2018, arts 2, 6, 8, 10, 12 & 13.
[138] SPC Minutes 2019, minute 88.

The New AMR 2018 seems to be the 'law' with the broadest coverage, but it is only a ministerial directive at most, inferior to 'regulations', so that its authority may be subject to challenges. Furthermore, it covers only asset management services by financial institutions, leaving untouched asset management services by other persons.

Secondly, the statutes and the ministerial directives are mainly regulatory in nature, with the primary purpose of supervising the asset management service providers, although some of them vaguely consider the nature of the investor-manager relationship and the asset manager's (fiduciary) duty. The SPC Minutes 2019 primarily deals with the private law issues, and it does provide a useful guideline allowing the application of the Trust Law in asset management relationships.[139] Unfortunately, however, the 'Minutes' is not a binding judicial interpretation. On the other hand, if it were binding, a constitutional law issue could arise in that the judiciary makes law (although for the purpose of fixing the gap of the existing law).[140]

B. The possible solutions

Amendments to the core consumer protection statute does not appear to be a good alternative. The Consumer Rights and Interests Protection Law have been in force for nearly 30 years, changing the definition of 'consumer' so that it may include 'investors' as 'financial consumers' would undermine the long-held understanding that in PRC a 'consumer' must be an individual purchasing or using the goods or services for personal/household consumption. Furthermore, consumer law generally does not categorize the consumer-supplier relationship as a trust relationship or treat the supplier as the trustee of the consumer.

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[139] Ibid minute 88.
[140] There is no 'judge-made law' in Mainland China.

The broader context should also be considered. In addition to asset management disputes, there are also many other disputes brought to the Chinese courts regarding a person holding/managing other types of property (eg, shares in a company, or real estate) for another. In the absence of a (branch of) general law on equity and trusts, these cases present tremendous difficulties to Chinese courts.

Ideally, if there was a branch of law of equity and trusts, with the fundamental general principles in these areas, such as the co-existence of equitable title and legal title, and fiduciary duty of the trustee, introduced into the Chinese private law, it will make determining those cases much easier and more certain.

One way is to facilitate this is to add general principles and rules on equity and trusts to the Civil Code. This option, however, may not be practical looking at the fact that the Civil Code was just enacted in 2020 and came into force on 1 January of 2021. Furthermore, unlike the active involvement shown in relation to the asset management businesses, there seems to be no law, regulations, other administrative directives, judicial interpretations, or guidelines recognizing a trust relationship, nor a fiduciary duty owed by the holder to the 'true owner' of company shares or real estate.[141] This may suggest that the lawmakers and the judiciary tend to treat these relationships differently, taking into account the public policy consideration of upholding the utmost authority of registration (of the title to the company shares and land).[142]

A better alternative may be amendments to the Trust Law. Expanding the legal definition of 'trust' so that it also includes the implied trust, resulting trust, and constructive trust is relatively simple. It would give the judges the *statutory* authority

[141] There may be very limited exceptions, including where enterprise annuity funds were used to buy shares in the company.
[142] The law in these areas deserves further research beyond this paper.

a) to find or infer a trust where it is just to do so, no longer dependent on a (written) 'trust contract' between the parties;[143] and b) to impose the fiduciary duty on the asset manager as the trustee, beyond and above their contractual obligations. A broader application of the Trust Law to the investor-manager relationship is both desirable and beneficial. The modern commercial/business trust, which evolved from and can be traced back to the medieval 'use' and the traditional trust, has become a successful commercial device for the management of portfolio of financial assets.[144]

Another desirable amendment would be the recognition of 'equitable title'. This would resolve the controversy in relation to who owns the AUM. Perhaps the provisions around the trustee's obligations could also be amended so that those obligations are more in line with those of a fiduciary (trustee) in common law jurisdictions.[145]

These amendments would still be significant for a civil law system. However, the changes would not be a more radical break-through than the first introduction of the concept of 'trust' into the PRC civil law system by the Trust Law in 2001 . Furthermore, the Chinese judiciary has already adopted such thinking to a large extent, as shown, most notably, by the SPC Minutes 2019 and the judgments thereafter.

If these amendments are made to the Trust Law, the problems with the *status quo* should be to a large extent satisfactorily resolved. There will be statutory law authority recognizing both the asset investor-manager as a trust relationship and the fiducial

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[143] Although most of the asset management businesses would involve an 'asset management contract' which might be the basis of an express trust, a 'commercial trust'. Ruiqiao Zhang, 'The new role of trusts plays in modern financial markets: the evolution of trusts from guardian to entrepreneur and the reasons for the evolution' (2017) 23 Trusts & Trustees 453,456.

[144] Ibid 455; Paul S Davis, Graham Virgo and EH Burn (eds), Equity & Trusts Texts, Cases, and Materials (2nd ed, OUP2016) 24-25.

[145] Detailed discussions on issues with the current Trust Law provisions on trustee's duties may be found in Guoqing Liu (n 5) 1132-1133.

duties of the manager as the trustee, irrespective of what types of assets or what kinds of institutions are involved. The inconsistencies resulting from the sectoral regulations will be removed and the integrated regulatory paradigm in the 'extensive asset management era' will be upheld by statutory provisions.

Of course such amendments to the Trust Law may have an 'overflow' effect, in that holding shares or land for another may also be covered by the expanded definition of 'trust'. If it is necessary to exclude these situations, possibly the Trust Law could still be limited to apply only to 'business trusts',[146] or 'trust' other than the 'express trust' may apply only to business trusts with a definition of the 'business trust' requiring the trustee to be a person in trade.

[146] The Trust Law would still be very helpful, because a business trust may contain some contractual elements, but it is essentially a fiduciary relationship and is governed by the law of trusts rather than the law of contract. Guoqing Liu (n 5).