君合研究简讯

JUNHE

2014 年 9 月 17 日

争议解决法律热点问题

中国最高法院判例承认境外接管人对境内关联企业的影响力

2014 年 6 月 11 日上午 9 时，中国最高人民法院公开开庭审理了 SINO-ENVIRONMENT TECHNOLOGY GROUP LIMITED（中华环保科技集团有限公司，以下简称“**中华环保**”）与大拇指环保科技集团（福建）有限公司（以下简称“**大拇指公司**”）股东出资纠纷一案[（2014）民四终字第 20 号]，并当庭作出判决。该判决是中国最高人民法院首次以判决形式正式承认了境外接管人对境内（仅为本文说明方便目的，“中国”或“境内”不包含香港、澳门及台湾地区）企业的影响力，这对于近年越来越频繁出现的境外接管人与境内关联企业间冲突的认定和处理，具有重要指导价值。

一、案情回顾

中华环保成立于 2001 年 10 月 2 日，注册于新加坡，并于 2006 年 4 月 28 日上市。2010 年 6 月 4 日，新加坡高等法院签发法院命令，裁定中华环保进入临时司法接管程序并指定了某会计师事务所的 S 先生和 E 女士为临时司法管理人。2012 年 3 月，新加坡高等法院又签发法院命令，将原司法管理人更换为 H 先生，接替前任司法管理人工作。

大拇指公司成立于2000年6月30日，是中华环保在中国境内持股的外商独资企业。 2011年1月20日及2011年3月24日，在司法管理人主导下，中华环保通过书面决议，免除了田某、陈某和潘某的大拇指公司董事职务，委派了三位大拇指公司的新董事，并由其中一位新董事担任大拇指公司法定代表人。2012年3月30日，中华环保又出具书面决议，重新委派了C先生、J女士和宋先生为大拇指公司董事，其中C先生为法定代表人。但是，上述决议并没有经过中国境内工商登记变更。与此相反，根据大拇指公司的工商资料，2009年5月25日大拇指公司的法定代表人为田某，2012年12月18日法定代表人变更为洪某。

因中华环保未缴纳完整增资额，大拇指公司向福建高院提起诉讼[（2013）闽民初字第43号]，要求中华环保履行股东出资义务，缴付增资款4500万元。面对大拇指公司的起诉，C先生以大拇指公司法定代表人的身份，向福建高院申请撤诉，认为大拇指公司的起诉状和授权书是无权人员盗用公司印章而为，未经合法的法定代表人同意，不能代表大拇指公司的真实意思。

福建高院一审经审理认为，按照中国法律的规定，工商登记的信息具有公示公信的效力，大拇指公司的法定代表人应以工商登记为准，在无证据证明 C 先生被登记为大拇指公司的法定代表人前，其代表

大拇指公司作出撤诉的意思表示不具有法律效力。福建高院一审判令中华环保在判决生效后十日内向大拇指公司缴纳出资款 4500 万元。

二、最高院的判决

中华环保不服上述福建高院的判决，向中国最高法院提起上诉[（2014）民四终字第20号]。2014年6月11日，最高院对该案进行审理并当庭宣判。

在该案审理中，最高院将“大拇指公司提起本案诉讼的意思表示是否真实”作为该案的核心和焦点问题。最高院认为，根据公司法和外资企业法的规定，一人公司的股东有权任命公司的董事和法定代表人，在本案当中，大拇指公司的唯一股东是中华环保，目前处于清盘阶段，合议庭认为其司法管理人委任公司法定代表人的决议是有效的，尽管工商登记的大拇指公司的法定代表人和中华环保委任的法定代表人存在不一致，法庭认为公司对外应以工商登记的法定代表人为准，对内应以股东决议任免决定为准，大拇指公司提起本案诉讼不能代表其公司真实意思表示，本案应驳回其诉讼请求。

最终，最高院当庭作出裁定，裁定撤销了福建高院的一审判决，驳回大拇指公司的起诉。

三、对最高院判决的思考

最高院就该案作出的终审判决显示境外司法接管人（司法管理人或清盘人）对境内关联企业的影响力和控制力已逐渐清晰和强大起来。

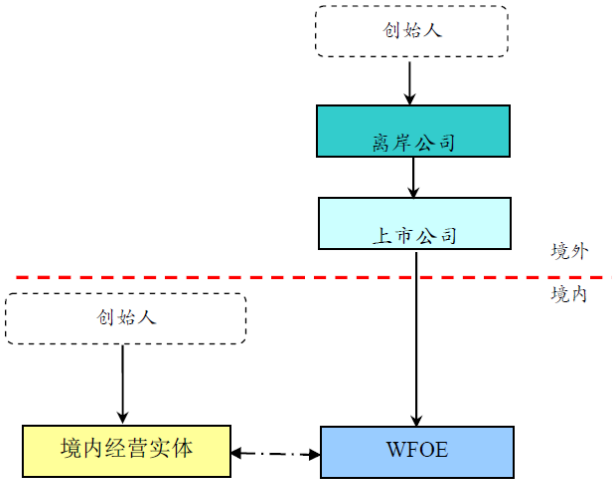
1、 司法接管制度的概念

普通法国家赋予法院比较大的权限，可以介入公司纠纷的领域也很广。《美国特拉华州普通公司法》在公司僵局中引入司法管理人制度；《新加坡公司法》在公司陷入财务困境时引入司法接管制度；《香港高等法院条例》规定法院认为在公正或适宜的情况下可以指定接管人；开曼群岛公司法在第223条至227条详细规定了接管令的申请、接管令的管理、接管令的解除等内容；而参照英国普通法律体系设立的英属维尔京群岛法律也赋予法官在“认为是正当或适宜的所有案件中”下达临时禁令（如财产冻结及/和信息披露）并指派一名财产接管人。于此同时，在公司面临清算时，清盘人也将介入并接管公司，比如《新加坡公司法》、香港的《公司条例》均有如此的规定。

考虑到接管的情形、接管的时间，各国对于接管公司的第三方主体有不同的称谓，为方便起见，在此统称为接管人。接管人属于一种法院外部干预型的司法救济措施，主要是为了否定债务人对其约定资产和业务的控制、管理和处分权利，并将该等权利移转由接管人行使，从而控制债权获偿的来源，保障债权的回收。通常，境外法院会出具命令任命接管人接管公司，在该案中，中华环保就是被新加坡法院指定了司法管理人予以接管。

2、 司法接管制度对境内企业的影响

随着投资的需要，越来越多的境内企业奔赴境外设立离岸公司，有的是为境外上市做准备，有的是为投资做跳板，有的是为了注册控股公司便于资本运作，还有的则是为了合法避税等目的。以寻求境外上市为例，其中有一种红筹上市模式，即境内企业到海外注册或者购买壳公司，由海外公司以收购、股权置换等方式取得对境内公司和资产的控制权，并以壳公司的名义在海外证券市场上市筹资的方式。一般的设立模式请见下图：



按照上图所示，一旦离岸公司或者上市公司在境外被涉入诉讼，那么境外法院就可以通过出具裁定要求接管人接管离岸公司或者上市公司。一般而言，境内关联企业作为离岸公司或者上市公司层层投资下的实体，势必会受到接管人的影响。

3、 中国法院对司法接管制度的态度

（1）中国法院不认可境外法院有关任命接管人命令的域内效力

根据《民事诉讼法》第281条的规定，中国境内法院所认可的境外法院的判决和裁定，必须是已经发生法律效力的，且两国之间已存在国际条约或者互惠原则。因此，境外法院有关任命接管人的命令在中国境内的承认和执行就碰到了以下障碍：1）命令是对接管人概括性的授权行为，是否具有直观和明确的裁判事项还有待考证；2）从我国与其他国家或地区签订的相关协定来看，一般而言，被承认的判决和裁定必须是终局且有执行力的；3）我国必须与作出判决和裁定的国家签订了条约或者存在互惠原则。

在实践中，上述规定也在中国境内的法院所作判决中得到了严格的遵守和体现。

一个可参考的案件就是中国最高法院认定香港清盘命令无域内效力的案件。2011年9月28日，最高院出具了《关于北泰汽车工业控股有限公司申请认可香港特别行政区法院命令案的请示的复函》[（2011）民四他字第19号]，认为香港特别行政区高等法院出具的清盘命令不属于《最高人民法院关于内地与香港特别行政区相互认可和执行当事人协议管辖的民商事案件判决的安排》所规定的“具有书面管辖协议的民商事案件中做出的须支付款项的具有执行力的终审判决”，因此，境外法院所出具的清盘令在我国境内不具有域内法律效力。

显然，根据上述法规以及判例，在中国境内，首先，任何外国法院司法文书的认可和执行都需要中国法院的确认。其次，为中国法院认可和执行的司法文书均需要是终局的，临时性的司法文书无法得到承认。因此，境外法院出具的临时禁令、接管令、清盘令的效力在中国法院认定时都会受到阻碍。

（2）中国法院对接管人身份的认定

根据上述判例，为司法主权保护目的，中国境内法院并不直接认可境外法院有关任命接管人命令的域内效力，但这并不代表接管人就无法影响和控制境内关联企业。最高院通过中华环保与大拇指公司案件的二审判决，确认新加坡法院指定的司法管理人的身份；与此同时，司法管理人所作出的变更大拇指公司法定代表人的股东决议效力也得到了认可。面对公司纠纷，最高院强调公司的对内意思表示应以股东决议为准。

沿循最高院的上述判例思路，根据境外法院的裁定或命令被任命的接管人一旦接管债务人公司，即可根据债务人公司章程及所在地法律规定代表债务人公司作出相关重大决议并办理变更登记，比如变更董事会成员、任免高级管理人员等，从而实际控制债务人公司。进而，被控制的债务人公司可通过

作出相关股东决议的方式任免或更换下属被投资企业（如关联的中国境内WFOE）的法定代表人、董事、监事及高级管理人员等，层层变更最终可能会实质影响到对境内关联的核心经营实体的控制力和企业意志。

4、 境外司法接管制度带来的启示

（1）法律制度的可兼容性将被重视

为了最大程度履行和完成相关境外法院所任命或托付的接管人职责，接管人势必会采取一切法律所许可的规则和方式行使其权力、完成其使命。在当今中国经济对外投射效应越来越加强的背景下，中国法律体系的开放性和兼容性势必会得到提升，从而会有越来越多的境外特有法律制度或概念在与中国法律体系的碰撞中找到新的对接点，任何看似平常的国内一般法律制度或概念很可能会在这种碰撞对接过程中被赋予新的功能和涵义。

（2）法律对抗的纵深将被拉长

对于离岸公司或者境外上市公司旗下的境内关联企业（特别是核心实体经营企业）而言，某些境外司法裁判（特别是中间命令和中间裁决）难以直接被中国法院承认和执行已不再是可靠的优势筹码。尽管境内法院不认可境外法院指定接管人命令的域内效力，但是，接管人通过层层控制和变更却可以间接控制和影响到境内关联企业。一旦境内关联企业面临脱离境内实际控制人控制的危险境地，境内实际控制人很可能会就此失去了在境内外法律纠纷中的有利地位而不得不做出重大利益妥协。

当然，在面临境内关联企业控制权易手威胁时，境内实际控制人也并非只能坐以待毙。根据君合近年来成功处理多起涉及境外接管人与境内关联企业（或其实际控制人）之间重大冲突案件的经验来看，境外法院任命接管人的命令、所适用准据法、以及中国境内适用的公司法乃至劳动法等，都有可能提供程序介入和抗辩反击的切入口或机会。当然，这种介入和抗辩往往是越早采取会越主动。

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JUN HE BULLETIN

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Dispute Resolution

PRC Supreme Court recognizes the influence of the overseas receiver of a non-PRC company on its PRC affiliate(s)

On June 11, 2014, the Supreme People's Court of the PRC (the "**Supreme Court**") held an open hearing of a case between SINO-ENVIRONMENT TECHNOLOGY GROUP LIMITED ("**Sino-Env**") and THUMB ENV-TECH GROUP (FUJIAN) CO., LTD. ("**Thumb Fujian**") concerning their dispute over shareholder's capital contribution (the "**Case**") (Case No.: *(2014) Min Si Zhong Zi No. 20*) and rendered a ruling (the "**Ruling**") with respect to the Case at the end of the hearing. By rendering the Ruling, the Supreme Court has for the first time officially recognized the influence of the overseas receiver of a non-PRC company over its PRC affiliate(s) in the form of a judgment, which would offer important guidance for the determination and handling of the disputes between the overseas receivers of non-PRC companies and their PRC affiliates that have arisen more and more frequently in the recent years (and for the purposes of this Bulletin, the term "**PRC**" or "**China**" does not include Hong Kong, Macau and Taiwan).

I. Overview of the Case

Sino-Env was incorporated in Singapore on October 2, 2001 and was listed on April 28, 2006. On June 4, 2010, the High Court of the Republic of Singapore issued a court order, ordering that Sino-Env should be placed under judicial management and appointing Mr. Seshadri Rajagopalan and Ms. Ee Meng Yen Angela from an accounting firm as judicial managers. In March 2012, the High Court of the Republic of Singapore issued another court order, replacing the initial judicial managers with Mr. Hamish Alexander Christie as the new judicial manager.

Thumb Fujian is a wholly foreign-owned enterprise (WFOE) incorporated in the PRC on June 30, 2000 and wholly owned by Sino-Env. On January 20, 2011 and March 24, 2011, Sino-Env adopted written resolutions under the management of the judicial managers, removing Tian Yuan, Chen Bin and Pan Chengtu from their offices of director of Thumb Fujian and appointing three new directors of Thumb Fujian and one of the new directors as the legal representative of Thumb Fujian. On March 30, 2012, Sino-Env issued another written resolution appointing Mr. Cosimo Borrelli ("**Mr. CB**"), Ms. Jocelyn Chi and Mr. Song Kuan as the directors of Thumb Fujian and Mr. CB as the legal representative of Thumb Fujian. However, the changes resulting from such resolutions were not registered with the competent authority of administration for industry and commerce (AIC) in China. To the contrary, based on the AIC files of Thumb Fujian, the legal representative of Thumb Fujian was Tian Yuan on May 25, 2009 and was changed to Hong Zhen on

December 18, 2012.

Since Sino-Env did not fully contribute to the increase in the registered capital of Thumb Fujian, Thumb Fujian sued Sino-Env in Fujian Higher People's Court ("**Fujian Higher Court**") (Case No.: *(2013) Min Min Chu Zi No. 43*), requesting Fujian Higher Court to order Sino-Env to perform its capital contribution obligation as shareholder by paying RMB 45 million yuan as its contribution to the capital increase of Thumb Fujian. In response to the suit commenced by Thumb Fujian, Mr. CB applied to Fujian Higher Court for withdrawal of the suit in his capacity as the legal representative of Thumb Fujian, arguing that the bill of complaint and power of attorney from Thumb Fujian were issued by unauthorized personnel with the seal of Thumb Fujian improperly used by them, without the consent of the legitimate legal representative of Thumb Fujian, and thus could not represent the "true intent" of Thumb Fujian.

Fujian Higher Court held that pursuant to the PRC law, full faith and credit should be given to the AIC registration information and the legal representative of Thumb Fujian should be that registered with the competent AIC authority, and the application for withdrawal made by Mr. CB on behalf of Thumb Fujian as a declaration of intent should have no legal force and effect in the absence of the evidence proving that he had been registered as the legal representative of Thumb Fujian. Therefore, in the judgment of first instance, Fujian Higher Court ordered Sino-Env to make a capital contribution of RMB 45 million yuan to Thumb Fujian within 10 days after the judgment becoming effective.

II. Ruling of the Supreme Court

Dissatisfied with the judgment rendered by Fujian Higher Court, Sino-Env appealed to the Supreme Court, and the Supreme Court heard the Case and rendered the Ruling on June 11, 2014.

In the hearing of the Case, the Supreme Court determined that "whether the commencement of the suit by Thumb Fujian in the Case was a declaration of true intent" should be a key issue under the Case. The Supreme Court held that pursuant to the PRC *Company Law* and the PRC *Law on Wholly Foreign-owned Enterprises*, the shareholder of a one-person company should have the right to appoint the director(s) and legal representative of the company. In the Case, since the sole shareholder of Thumb Fujian was Sino-Env (in the process of winding-up), the Supreme Court held that the resolutions of its judicial managers appointing the legal representative of Thumb Fujian should be valid. Although the legal representative of Thumb Fujian registered with the competent AIC authority was different from that appointed by Sino-Env, the Supreme Court held that externally, the legal representative of a company should be that registered with the competent AIC authority, but internally, the legal representative of the company should be determined pursuant to the appointment/removal decision in its shareholder resolution, and thus the commencement of the suit by Thumb Fujian in the Case could not constitute a declaration of the true intent of Thumb Fujian and the litigation claims made by Thumb Fujian in the Case should be rejected.

Therefore, the Supreme Court rendered the Ruling, cancelling the judgment of first instance rendered by Fujian Higher Court and rejecting the suit of Thumb Fujian.

III. Comments on the Ruling of the Supreme Court

The Ruling rendered by the Supreme Court with respect to the Case, which was final, indicates that the influence and control of the overseas judicial receivers / judicial managers / liquidators of non-PRC companies over their PRC affiliates have gradually become clear and strong.

1. Concept of Judicial Receivership

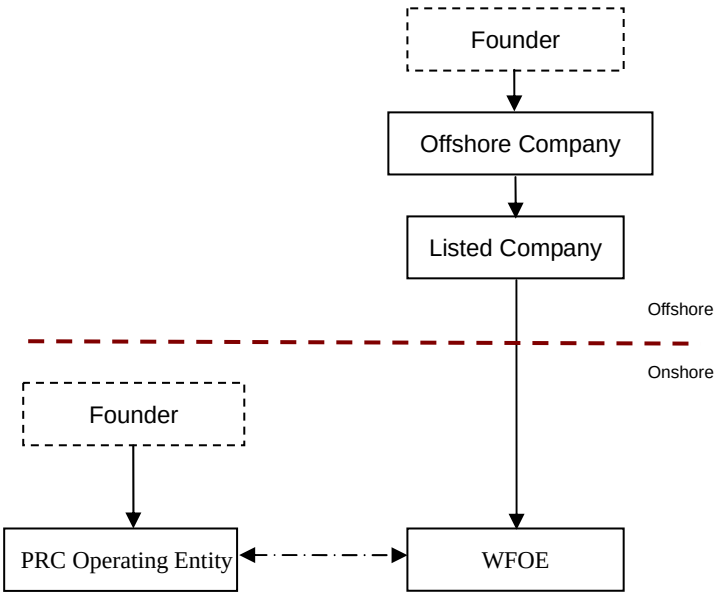
Courts in common law countries are granted with certain substantial powers and could intervene in a

very wide variety of corporate disputes. For instance, (i) the *General Corporation Law* of the State of Delaware has created the mechanism of judicial custodian that will apply in case of deadlocks of a corporation; (ii) the *Companies Act* (Chapter 50) of Singapore has introduced a mechanism of judicial receivership for companies in financial difficulties; (iii) the *High Court Ordinance* (Chapter 4) of Hong Kong provides that the Court of First Instance may by order appoint a receiver in all cases in which it appears to the Court of First Instance to be just or convenient to do so; (iv) sections 223 through 227 of the *Companies Law* of Cayman Islands contain detailed provisions on the applications for and administration and discharge of receivership orders; and (v) the laws of British Virgin Islands, which are similar to the common law system of England, provide that an injunction may be granted "*in all cases in which it appears to the Court to be just or convenient*" (such as freezing of property and disclosure of information) and a receiver of property of a company be appointed. In addition, in case of winding-up of a company, a liquidator will be appointed in respect of the company, for example, both the *Companies Act* (Chapter 50) of Singapore and the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Chapter 32) of Hong Kong contain such provisions.

Different terms are used in the laws of different countries to describe the third party taking the company into his custody or under his control, and for the purpose of convenience, each of such third parties is called a "receiver" herein. Receivership is a judicial remedy granted by a court for the primary purpose of denying the right of a debtor to control, manage and dispose of its relevant assets and business and transferring such right to the receiver in order to control the sources of debt repayments and ensure the repayment of debts. Usually, a non-PRC court would issue an order appointing a receiver in respect of a company, and in this Case, the judicial managers were appointed in respect of Sino-Env by a Singapore court.

2. Influence of Judicial Receivership on PRC Companies

More and more PRC companies have set up offshore companies in other jurisdictions, some do so for the purpose of preparing for listing in another jurisdiction or for the purpose of making investments through such offshore companies, and some do so for the purpose of conducting capital operations through an offshore holding company, or for the purpose of legitimate tax avoidance, etc. For example, under the red chip listing model, which is a way of listing in a jurisdiction other than the PRC, a PRC company will register or buy an offshore shell company, the offshore company would gain the control over the PRC company and its assets by way of acquisition or equity exchange or otherwise, and the shell company would be listed in an offshore securities market for financing purposes. The following chart shows the customary structure:



As shown in the above chart, if the offshore company or listed company is sued in a jurisdiction other than China, the relevant court in such jurisdiction could issue an order appointing a receiver in respect of the offshore company or

listed company. Generally speaking, the PRC affiliates of the offshore company or listed company would certainly be subject to the influence of the receiver since they are invested by the offshore company or listed company directly or indirectly through one or more intermediaries.

3. Attitude of the PRC Courts towards Judicial Receivership

(1) The PRC courts do not recognize the force and effect within the PRC territory of the orders of appointment of receiver issued by courts in the other jurisdictions.

Pursuant to Article 281 of the *Civil Procedure Law* of the PRC, the judgments and rulings rendered by the courts in another country that may be recognized by the PRC courts must have become legally effective, and there must exist relevant international treaty between the two countries or the principle of reciprocity shall apply as between the two countries. Therefore, the recognition and enforcement in China of an order of appointment of receiver issued by a court in another jurisdiction would encounter the following barriers: (i) the order grants authorizations to the receiver in a general way, and whether any matter is explicitly and directly judged therein is still to be examined; (ii) based on the relevant treaties between the PRC and other countries/regions, generally speaking, the judgments and rulings that may be recognized must be final and enforceable; and (iii) the PRC and the countries in which the judgments and rulings are rendered must have concluded relevant treaties or the principle of reciprocity should apply as between them.

In practice, the above provisions of law have been strictly complied with and reflected in the judgments made by the PRC courts.

One precedent is a case in which the Supreme Court determined that the relevant winding-up order issued by a Hong Kong court had no force and effect within the PRC territory (the "**Precedent**"). On September 28, 2011, in its *Reply to Request for Instructions with respect to the Case in which Norstar Automobile Industrial Holding Limited Applied for Recognition of Order Issued by Court of Hong Kong Special Administrative Region* (numbered *(2011) Min Si Ta Zi No. 19*), the Supreme Court determined that a winding-up order issued by The High Court of Hong Kong Special Administrative Region was not an "*enforceable final judgment requiring payment of money made in a civil or commercial case under a written jurisdiction agreement*" under the *Arrangement of the Supreme People's Court on the Reciprocal Recognition and Enforcement by the Courts of the Mainland and of the Hong Kong Special Administrative Region of the Judgments in Civil and Commercial Cases under Consensual Jurisdiction*. Therefore, winding-up orders issued by courts in the other jurisdictions have no legal force and effect within the territory of China.

Obviously, based on the above provisions of law and Precedent, in China, (i) the recognition and enforcement of any judicial document issued by a court in another jurisdiction would be subject to the confirmation of the competent PRC court; and (ii) the judicial documents that may be recognized and enforced by the PRC courts should be final, and no interim or provisional judicial documents could be recognized. Therefore, the (i) interim or provisional injunctions, (ii) receivership orders and (iii) winding-up orders issued by the courts in the other jurisdictions would encounter barriers when their force and effect are being determined by the PRC courts.

(2) Determination of the PRC courts on the capacity of receiver.

Based on the above Precedent, for the purpose of protecting judicial sovereignty, the PRC courts do not directly recognize the force and effect within the PRC territory of the orders of appointment of receiver issued by the courts in the other jurisdictions. However, this does not mean that the receiver of a non-PRC company will not be able to influence and control its PRC affiliates.

By issuing the Ruling, the Supreme Court confirmed the capacity of the judicial managers appointed by the relevant Singapore court and recognized the force and effect of the shareholder resolutions made by the judicial managers changing the legal representative of Thumb Fujian. The Supreme Court emphasized that in case of an internal dispute the intent of a company should be determined pursuant to its shareholder resolution.

Based on the logic of the Supreme Court reflected in the Case, once a receiver is appointed in respect of a non-PRC debtor pursuant to the ruling or order of a non-PRC court, the receiver could make relevant material resolutions on behalf of the debtor (for example, changing its board members and appointing or removing its senor officers) pursuant to the articles of association of the debtor and the laws of the jurisdiction of its incorporation and effect registrations with respect to the resulting changes, thereby actually controlling the debtor. Then the debtor under the control of the receiver may appoint, remove or replace the legal representative, directors, supervisors and senior officers of its investees (such as a PRC WFOE affiliate) by adopting relevant shareholder resolutions. In this way, the control over and management of the core operating entity in the PRC as an affiliate of the debtor may eventually be affected substantially.

4. Certain Implications of Judicial Receivership

(1) Much attention will be paid to the compatibility of legal systems.

A receiver would certainly exercise his powers by taking all actions permitted by law in order to perform and fulfill the duties assigned to him to the maximum extent possible. Since nowadays the Chinese economy has more and more influence on the other economies, the openness and compatibility of the PRC legal system would certainly be improved, and as a result, more and more unique legal mechanisms or concepts in the laws of the other jurisdictions would be linked with the Chinese legal system in a new way in the course of collision between such legal systems, and new functions and meanings would very likely be assigned to some ordinary legal mechanisms or concepts in the PRC laws in the course of such collision and linkage.

(2) The legal battles between the parties concerned would be prolonged.

For the PRC affiliates (in particular, the core operating entities) of an offshore company or a company listed in another jurisdiction, the situation that certain judicial documents issued in the other jurisdictions (especially, interlocutory orders and interlocutory rulings) are difficult to be directly recognized and enforced by the PRC courts is no longer a reliable leverage. Although the PRC courts do not recognize the force and effect within the PRC territory of the orders of appointment of receiver issued by the courts in the other jurisdictions, the receiver of a non-PRC company could control and influence its PRC affiliates indirectly through one or more intermediaries. Once those PRC affiliates are in a dangerous position of being out of control by their PRC actual controller, their PRC actual controller would very likely lose the favorable position in the legal battles taking place in the PRC and other jurisdictions and have to make substantial concessions.

However, in case of a threatened change of control over those PRC affiliates, their PRC actual controller would not be in a position where it could do nothing to fight back. Based on a few substantial disputes between the overseas receivers of non-PRC companies and their PRC affiliates (or the actual controllers thereof) successfully handled by Jun He in the past few years, the orders of appointment of receiver issued by the non-PRC courts, the governing law applied, and the *Company Law* and even *Labor Law* applicable in China may provide some means or opportunities for procedural intervention, defense and counterattack, and of course,

generally speaking, the earlier such intervention and defense are made, the better position those PRC affiliates (or the actual controllers thereof) would be in.

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