THE ANALYSIS OF LEGAL STATUS OF THE ANONYMOUS FOREIGN SHAREHOLDER IN FOREIGN INVESTED ENTERPRISES IN CHINA

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Abstract:
This article points out that the anonymous shareholder in foreign invested enterprises in China should not be identified as foreign shareholder and that the substantive relationship between the anonymous shareholder and the nominal shareholder should be defined as a relationship between an obligee and an obligor. Furthermore, it argues that the judiciary should not change the administrative functions of administrative state bodies and that judgements rendered by the judiciary should consider how the relevant administrative bodies might feasibility recognise and enforce the law. This article suggests that a pre-establishment national treatment plus a negative list system should be implemented as a core system of foreign investment access in China and that the boundary between executive and judicial power should be clearly defined.

The Foreign Investment Law of the People's Republic of China (hereafter referred to as the Foreign Investment Law) was promulgated on 15 March 2019. It came into effect on 1 January 2020, together with the Regulation for Implementing the Foreign Investment Law of the People's Republic of China (hereinafter referred to as Regulation for Implementing Foreign Investment Law). Pursuant to its legal regime, China uses a 'national treatment and negative list system' in industries that involve enterprises receiving foreign investments. To regulate foreign investments, the relevant laws and regulations have been frequently amended and modified. Nevertheless, many issues relating to anonymous shareholders remain.

Many foreign investors make anonymous investments because it is more convenient to them. The legal issues regarding such anonymous investments are only addressed lightly by the Law of the PRC on Chinese-foreign Equity Joint Ventures, the Law of the PRC on Chinese-foreign Contractual Joint Ventures, the Law of the PRC on Foreign Capital Enterprises (hereinafter referred to as the Original Three Laws on Foreign Investment), and by the Company Law of the PRC (hereinafter referred to as the Company Law) and so on. This means that the related legal issues are very controversial in both academia and judicial practices. There remains many uncertainties regarding the ascertainment of the identity of anonymous foreign shareholders, as limitations on foreign investment are further lifted and supportive policies are granted.

Definition of anonymous shareholders

Under chapter one of the Company Law, Companies should be equipped with a register which states the names and addresses of their shareholders, the shareholders' capital contributions, a verification of their contribution certificates and so on. Companies should also register this information with the competent authority.[1] In reality, however, anonymous shareholders are a fact in many businesses.

Anonymous investment refers to a legal situation where a beneficiary investor contributes capital to a business, yet the company's articles of association, register of shareholders, and registration record do not display their name, but that of a nominee shareholder. Prior to this an investment agreement is always concluded between the anonymous beneficiary shareholder and the nominee shareholder who, although a proxy, is designated as the entrusted shareholder in judicial practices.

As far as the legal effects of such entrusted shareholding are concerned they are usually declared valid under the Judicial Interpretation of the Company Law Number Three by the Supreme

[1]The register can manifest itself in different forms, including but not limited to articles of association, business licence, register of shareholder and so on, which applies to limited liability companies and joint stock limited companies. See Chapter one of the Company Law of PRC.

Court of the People's Republic of China (hereinafter referred to as the 'Judicial Interpretation of the Company Law Number Three'). This protects the lawful rights and interests of the actual beneficiary investor.

The identification of an anonymous shareholder should be based on principles and standards that differentiate between the insider and the outsider, which include the following provisions: (1) Regarding the internal relationship between the anonymous shareholder and the nominee shareholder, where the shareholding entrustment cannot be declared invalid, the anonymous shareholder may make claims against the nominee shareholder according to the shareholding entrustment. Thus the rights and interests of the anonymous shareholder are treated as those of the primary obligee. (2) Where the anonymous shareholder requires its status to be disclosed, the shares should be transferred pursuant to Article 71 of the Company Law as follows: (a) There is evidence of contribution of investment; (b) Consent can be obtained from more than half of the total number of the shareholders.

Such intricate legal relationships characterise the bonds between anonymous beneficial shareholders, their nominee shareholder, and third parties with regards to foreign-funded companies. However, in comparison with enterprises with domestic funding, the identification of anonymous foreign shareholders is even more complicated and involves foreign investment access, foreign exchange control and so on, which significantly increase the risks of disputes.

The foreign exchange management regime

Broadly, foreign exchange management means the currency and finance authorities or other organs authorised by a government to manage and impose control over revenue and spending, trading, lending, transfers, international settlements, rates, and markets related to foreign-currency exchange. More specifically, it refers to some restrictions placed on the exchange of domestic and foreign currency, which embody an international trade policy. The latter frequently includes the restrictions imposed on international clearing and foreign exchange trading.[2]

There are three kinds of foreign exchange management. Firstly there are strict foreign exchange controls, which means controls on both current and capital accounts. Such measure are often adopted by economically underdeveloped countries, where foreign exchange funds are in short supply and market mechanisms are unreliable, as they allow governments try to maintain the stability of their foreign currency exchange prices, safeguard the balance of the international payments, and protect the development of their national economy through centralised distribution and utilisation. Secondly, there are partial foreign exchange controls, which in principle, does not place any restriction on current-account foreign exchange trading, but limits foreign exchange trading in the capital account to a certain extent. Thirdly, there are completely free foreign exchange controls, which place no restriction on foreign exchange trading on neither current nor capital accounts. In these countries following such regulations foreign currencies can cross international borders and be converted and circulated freely.[3]

China has seen foreign investments increase on a daily basis. Meanwhile, foreign exchange controls have been adopted for the following significant purposes: (1) to stabilise foreign exchange rates and reduce the foreign exchange risks in foreign economic activities; (2) to prevent speculative capital flows, maintain the stability of the domestic foreign exchange market and protect the safety of the national economy and finance; (3) to increase foreign currency reserve assets, utilise foreign capital effectively, and promote the development of key industries, and so on.[4] China therefore uses partial foreign exchange controls, which manifests themselves in two aspects: on the one hand, restrictions are lifted on non-residents' foreign current-account exchange payments. On the other hand, comparatively

[2] See the Management Regulation on Foreign Exchange of the People' Republic of China (amended 2008).

[3] Yan Xin, 'The impact of the IMF Agreement on the Legislation of Foreign Exchange Control and the Study on China's Countermeasure' (2005), Journal of Dalian Maritime University, 26.

[4] Lu Qin,'Deepening Reform and Opening up on the Administration of Foreign Exchange and Serving the New Development Paradigm'(2021) 3 Hebei Finance 4.

strict limitations are placed upon capital accounts. Since China's economic reform and opening to the outside world in the 1980s and 1990s, these foreign exchange controls have undergone a transformation from strict restrictions to gradual liberalisation.Foreign exchange controls on capital accounts have been prudent and stricter than on current accounts, administrative examination and approval being its main means. Additionally, some access restrictions on foreign investment remain in the current legislation and are one reason why foreign investors choose to invest in the name of anonymous proxies.

An analysis of aspects of foreign investment access

Foreign investment access relates to whether or not foreign investments are allowed to enter a country and the extent of freedom relating to its entry. This often symbolises the extent of a state's openness to the outside world. Laws and administrative measures on foreign investment are implemented by the PRC's government bearing in mind the international economic environment: from strict restrictions on foreign investment, to the amendment of rules in conflict with relevant international rules and the promulgation of the Foreign Investment Law.

Before the Foreign Investment Law took effect, the early pattern of foreign investment access was a strict system of registration and approval for establishment. Although the restrictions on national market access have gradually been removed, the procedures for registration and approval were complex and time-consuming. Foreign investment projects had to be submitted to the development and reform department and foreign economics and trade department at the Ministry of Commerce for approval and record-filing according to the characteristics of the projects.[5] Contracts and articles of association should be approved and kept on record by the foreign economics and trade department. In respect to a restricted foreign investment project with total investment below the limits set by the National Development and Reform Commission and the Ministry of Commerce's 'Catalogue of Industries for Guiding Foreign Investment (2004)'.[6] the corresponding competent government authority of the relevant province, autonomous region, direct-administered municipality, or specially designated city in a state plan should examine and approve it, and report to its competent authority and industry authority at the next administrative level for record-filing. This examination and approval authority for such projects were not to be transferred to a lower administrative level. Foreign investment projects in the gradually opening-up areas in the service trade sector were examined and approved pursuant to the state's relevant provisions.

On 8 October 2016, the Interim Measures for the Administration of Establishment and Modification Registration of Foreign Invested Enterprises were promulgated by the Ministry of Commerce. Under this regulation matters that did not fall within the scope of the special administrative measures for permits became subject to a system of record-filing, rather than the system of examination and approval. Since then the supervision on the aforementioned matters has changed from prior supervision to intermediate and post-supervisions

Since the promulgation of the Foreign Investment Law and Regulation for Implementing Foreign Investment Law, the current regime of foreign investment administration has been restructured, and has adopted the 'pre-establishment national treatment and negative list system'. Pursuant to Article 37 of Regulation for Implementing Foreign Investment Law, 'the registration of foreign invested enterprises shall be subject to the Market Supervision and Administration Department of the State Council and the authorized market supervision and the authorized market supervision and administration department of local people's government and be handled in accordance with the law.' Article 34 reads: 'During the process of performing its functions in accordance with the law, the relevant authority shall not grant

[5]The Ministry of Commerce of the PRC was founded in 2003, and incorporated the functions of the Ministry of Foreign Economics and Trade and those of other government agencies. See website: http://rss.mofcom.gov.cn/aarticle/Nocategory/200502/20050200017543.html.

[6] According to the 'Catalogue of Industries for Guiding Foreign Investment (2004)', projects in the categories of encouragement and permission at the total investment amount of USD $100 million or above and project in the categories of restraint at the total investment amount of USD $50 million or above shall be subject to the approval of the National Development and Reform Commission; project in the categories of encouragement and permission at the total investment amount below USD $100 million and projects in the categories of restraint at the total investment amount below USD $50 million shall be subject to the approval of the local development and reform departments, of which projects in the categories of restraint shall be approved by the provincial development and reform departments. Such authority of approval shall not be delegated to the lower level.

permission and registration if the foreign investor plans to invest into the industry that falls within the scope of the negative list but does not comply with the regulation concerning the negative list. system'. Pursuant to Article 37 of Regulation for Implementing Foreign Investment Law, 'the registration of foreign invested enterprises shall be subject to the Market Supervision and Administration Department of the State Council and the authorized market supervision and administration department of local people's government and be handled in accordance with the law.' Article 34 reads: 'During the process of performing its functions in accordance with the law, the relevant authority shall not grant permission and registration if the foreign investor plans to invest into the industry that falls within the scope of the negative list but does not comply with the regulation concerning the negative list.' Furthermore, Article 28 provides that 'The foreign investor shall not make investments in a prohibited industry of investment that is provided in the negative list. Where foreign investors make an investment in the restricted industry of investment that is provided in the negative list, the investment should comply with the conditions provided in the negative list. The industry outside of the negative list should be administered in accordance with the principle of the consistency between the domestic investment and the foreign investment.' Adding to this is Article 29, according to which: In case of the handling of the approval and record-filing of the investment projects, the relevant regulations should be abided by.' Relevant provisions are made regarding the categories of restricted and prohibited industries in the 'Special Administrative Measures (Negative List) for Foreign Investment Access (2020 Version)'. On 28 December 2020 the 'Catalogue of Industries of Encouraging Foreign Investment (2020 Version)' was released publicly, further expanding the scope for encouraging foreign investment. It especially plays a positive role in producer services and manufacturing.[7]

While the Original Three Laws on Foreign Investment still applied, the prerequisites for establishment and registration were a business licence, approval certificate and filing receipt.[8] However, since the promulgation of the Foreign Investment Law and the Regulation for Implementing Foreign Investment Law, the foreign investment administrative system has changed from a case-by-case approval to a system of a negative list and record-filing. Both domestic and foreign invested enterprises should file their registration information with the market supervision and administration department, which dramatically simplifies their establishment and modification procedures. On the one hand, based on the negative list, the National Development and Reform Commission exercises a project management function, which is to grant approval or record-filing to the foreign invested projects. On the other hand, the Commerce Department is to grant record filing for the establishment and modification of foreign invested industries outside of the scope of negative list, and grant case-by-case approvals for establishing and modifying foreign invested industries that fall within the restricted access. Based on the requirement of industry access, industry-competent authorities should examine and approve the qualifications of the relevant foreign invested enterprises and determine whether an industry licence should be issued or not. Responsibility for handling the establishment, modification, and cancellation of foreign invested enterprises lies with the State Administration for Market Regulation.[9]

Based on the aforementioned systems of national foreign exchange management and foreign capital access, it is significant that:

(1) An important reason why foreign investors make anonymous investments is to circumvent restriction measures on the foreign capital access. At present, these restricted measures still exist in

[7] See 'Catalogue of Industries of Encouraging Foreign Investment (2020 Version)'.

[8] See Liu Dongmei,'The Analysis of the Management of the Foreign Exchange in Foreign Invested Enterprises under the System of Pre-establishment National Treatment plus Negative List' (2021), 5 The International Business Forum 36.

[9] See Regulation for Implementing Foreign Investment Law.

all kinds of complicated administrative provisions, including the administrative regulations-formulated by the State Council, such as the Administrative Regulation on the Foreign Invested Bank, and departmental regulation issued by industry competent departments, such as the Departmental Regulation on the Foreign Invested Telecom Enterprise. The thresholds, including the investment cap, registered capital and qualifications of shareholders, are in urgent need of a clean-up, and their actual implementation remains unknown.

(2) Some foreign investors are unwilling to disclose their relevant information arising out of the concern of possible unfair treatment on the foreign invested enterprises due to their biassed understanding of China's systems and policies. Some therefore choose anonymous investment for the sake of personal and business information confidentiality.

The tackling of anonymous investment disputes in practice

In practice, anonymous foreign investors make investments using two kinds of 'investment agreements'. The first is to circumvent the supervision of laws and regulations and conclude the agreement of shareholding entrustment with the nominal shareholders, because the industry involved is the restricted or prohibited industry. A second type is used for industries outside the scope of the negative policy to make anonymous investment out of the concern of unfair treatment, personal information confidentiality, or for obtaining preferential industry policies and subsidies.

The foreign investors are often required to confirm their legal status as shareholders according to the required investment agreements if there are disputes between both parties, once the dispute has arisen. This has become an important question to be determined by courts. Article 1 of the Provisions on 'Several Issues Concerning the Trial of Dispute Cases Involving Foreign Invested Enterprises Number One' issued by the Supreme Court of People's Republic of China (hereinafter referred to as Provisions on the Trial of Foreign Invested Enterprises Number One), provides for the legal effects of such agreements. It reads:

During the process of the establishment and modification of the foreign invested enterprises, the contract takes effect from the date when it is ratified, where according to laws and administrative regulations the contract should be ratified by the relevant examination and approval authority; the people's court should determine that the contract does not come into effect without the ratification. Where the parties request the confirmation of invalidity of the contract, the people's court doesn't support it.

According to the aforementioned provision, where the contract (or the shareholding agreement) does not obtain the approval of the relevant authority, there is an intermediate state between the validity and invalidity of the contract. As the provision specifies, the contract does not come into effect, but the court will not confirm the invalidity of the contract.[10] This awkward state between validity and invalidity, makes the court fairly passive in cases concerning the identification of the legal status of anonymous shareholders in foreign invested enterprises. Generally speaking, beneficiary shareholders request that courts confirm their identities as shareholders and their percentage of the shares in case of disputes between them and the nominal shareholders.

In a situation where a contract is ratified by the relevant authority it can only be declared null and void on the legal grounds of the violation of mandatory laws or damaging the public interest, which is the handling principle for dealing with a contract's validity or invalidity (or the agreement of the shareholding entrustment). If the contract is not void, some of the parties' requests are supported by courts in practice.

On 14th May 2020, the First Shanghai Intermediate People's Court (hereinafter referred to as the Shanghai Court) announced a judgement in public concerning an appeal

[10] See Mao Haibo, 'The Commentary on the Difficult Legal Problems Arising out of Anonymous Foreign Investment' (2011), 3, The Study on Legal *System, 85. According to the aforementioned provision, where the contract (or the shareholding agreement) does not obtain the approval of the relevant authority, there is an intermediate state between the validity and invalidity of the contract. As the provision specifies, the contract does not come into effect, but the court will not confirm the invalidity of the contract.*

involving the identification of foreign shareholders, the case is as follows. In 2009, the plaintiff Carson and the third parties Chenx and Zhangx planned to start a business together. However, the plaintiff was not able to establish a joint venture with the third parties (who were Chinese citizens) according to the Original Three Laws on Foreign Investment. They decided to establish the Shanghai Junda Company (hereinafter referred to as Junda Company) that was the defendant established in the names of the two third parties. The plaintiff entered into a 'Shareholding Agreement' with the two third parties, providing that the actual contribution ratios were 51% of the plaintiff, 25% of Zhangx, 24% of Chenx, that is to say, the two third parties were holding the plaintiff's shares on entrustment. Thereafter, the plaintiff filed this case with the court involving a shareholding dispute arising between the plaintiff and Zhangx, in which the plaintiff requested the court to confirm the entitlement of 26% of shares entrusted.

One of the main focuses of this case was whether or not a domestic natural person can establish a joint venture with a foreigner. The Shanghai Court ruled in the second instance that the foreign natural person having foreign nationality should be confirmed as an anonymous shareholder and is entitled to recover its equity. It was noted that the newly promulgated Foreign Investment Law had removed the restrictions on cooperation between a Chinese national and a foreigner originally imposed by the Original Three Laws on Foreign Investment, so there is no legal barrier for the anonymous shareholder to be modified as the shareholder of a domestic company.[11]

The other focus was on whether or not there existed legal policy barriers for the company to go through the procedures of the modification of the company. The company would have had to go through the procedures to make modifications in the relevant administrative department, if the anonymous shareholder could obtain a judgement in its favour. That means the judgement should be recognized and enforced by the relevant administrative department.

In this case, the court of the first instance sent a letter to the Commercial Commission of Shanghai for advice as to whether or not consent could be obtained for the modification of the plaintiff as a shareholder and the modification of the defendant, that is Junda Company, as a Chinese-foreign Equity Joint Venture. The reply said that the business scope of the defendant did not fall within the area of the special administrative measures (the negative list) for foreign investment access, hence the plaintiff did not have to go through special examination and approval procedures in the case of the modification of shareholders of the defendant. [12]

In this case study, it can be seen that the plaintiff achieved its goal of starting a business by entrusting its shares to proxy shareholders, thus circumventing the restrictions placed by the Original Three Laws on Foreign Investment. Pursuant to Article 15 of Provisions on the Trial of Foreign Invested Enterprises Number One:

During the process of the establishment and modification of the invested enterprises, the contract takes effect from the date when it is ratified, where according to laws and administrative regulations the contract should be ratified by the relevant examination and approval authority; the people's court should determine that the contract does not come into effect without the ratification. Where the parties request the confirmation of invalidity of the contract, the people's court does not support it

Therefore, Article 15 of Provisions on the Trail of Foreign Invested Enterprises Number One will not necessarily result in the invalidation of entrusted shareholders that circumvent the examination and approval or the record-filing procedures. This makes such shareholding entrustment valid as long as no mandatory laws are breached and as long as the negative list regarding to foreign investment access is not circumvented.

Through this case, it can be seen that the approach of the Shanghai Court is to differentiate between enterprises falling within

[11] See (2020) Hu 01 Min Zhong 3024.

[12] See (2019) Hu 0115 Min Chu 6248.

the scope of the negative list and those outside of it. The prerequisite for confirming the identity of foreign shareholders falling inside the scope of the negative list according to the requirements of the Judicial Interpretation of the Company Law Number Three without the consent from the examination and approval authority. This must be considered a novel interpretation.

According to the judicial trial standards confirmed in the above case, Judge Huangxin published a paper entitled 'Judicial Review Standards on the Identification of Anonymous Foreign Shareholders' in issue 23 of People's Judicature, 2020. Judge Huangxin made the following new suggestions that: (1) the actual investor should make the investment in reality; (2) other shareholders admit the identity of shareholder of the the actual investor[13]; (3) before confirming the identity of a foreign shareholder that falls inside the scope of the negative list, the court or a party should obtain the consent from the examination and approval authority, but the court or the party does not need to obtain consent from the examination and approval authority if the enterprise falls outside of the negative list.[14] Point two here means that in the event of a limited liability company, if the anonymous shareholder (or the actual investor) and the nominal shareholder agree to identifying the anonymous shareholder as the real shareholder of the company, they should obtain the consent of other shareholders of the company because of the preemptive right owned by other shareholders.

The positive significance of these standards is undeniable. Nevertheless, in my opinion, it should be noted that, although shareholding entrustment may not be deemed invalid, the identity of anonymous foreign investors should not be confirmed by people's courts. The approach of confirming anonymous foreign investors' identities through judicial organs complies neither with the current foreign exchange control system nor the purposes for the establishment of foreign invested enterprises discussed above, irrespective of whether the enterprises fall within or beyond the scope of the negative list. The reasons for my above opinion are as follows:

Firstly, this approach will frustrate the increase of foreign exchange reserves. A country's foreign exchange reserves are one of the criteria that determine a country's comprehensive strength, and they play a vital role in adjusting balances of payment, guaranteeing external payments, and resisting financial risks. To encourage the establishment of foreign invested enterprises and lower entry thresholds for foreign capital investment increases foreign exchange reserves. If a court makes judgments to recognize the legal status of the actual foreign investors, which means some foreign investors may establish fake domestic invested enterprises by shareholding entrustment, it will frustrate foreign exchange supervision and an increase of foreign exchange reserves will be harder.

Secondly, it is hard to ascertain the source of capital for foreign invested enterprises. One of the purposes of imposing foreign exchange control is to safeguard the stability of the domestic financial market and to prevent large-scale speculative capital flows. If a court can bypass the administrative procedures to directly recognize the legal status of actual foreign investors, the foreign capital flows in the system of establishment of foreign invested enterprises cannot be supervised. The essence of foreign invested enterprises cannot be achieved without the supervision of the process of capital inflow from abroad. As mentioned above, the negative policy system imposes control over the industries for foreign investment access. The system of examination and approval under the Original Three Laws on Foreign Investment applies to all industries. On 3 September 2016, at the 22nd session the Standing Committee of the 12th National People's Congress deliberated on and adopted a change from the system of examination and approval to a system of record-filing. This change concerned the establishment and modification of the foreign invested enterprises that do not fall within the scope of special administrative measures on foreign investment access. . After the implementation of the Foreign Investment Law, an intermediate and post-supervision system was adopted for the sake of simplifying the establishment and modification

[13] See Article 71 of the Company Law of PRC.

[14] Huangxin, 'Judicial Review Standards on the Identification of Anonymous Foreign Shareholders' (2020) 23 People's Judicature 67.

procedures for foreign invested enterprises and optimising the investment environment However, the administrative mode of the negative list did not mean the removal of the foreign exchange controls. The core functions of the foreign invested enterprise system includes both foreign exchange controls and the examination and approval over some industries and the negative list system. In this case, the Shanghai Court took the place of an administrative organ in performing its functions of screening and supervising foreign capital access by passing a judicial judgement. It is generally believed that this approach will not be harmful, if the prohibited and restricted industries are not involved. That was the reason why Judge Huangxin supported the judgement of the Shanghai Court. However, this view ignores the most significant purpose of China's foreign investment system: attracting foreign investment. No matter how the court made its judgement, it could not change the basic fact that the anonymous shareholder had not invested foreign currency through the normal channels. which frustrated the purpose of introducing foreign currency capital through the foreign exchange system.

To sum up, recognising the validity of an entrusted shareholder through court will lead disguised overseas capital to circumvent China's foreign exchange control system. Therefore, given the foreign exchange controls and supervisions of the source of the capital, courts should not be allowed to make judgements to confirm the validity of shareholder entrustment. This should be left to administrative organs. Besides, this approach impedes the increase of foreign exchange reserves. If the shareholding entrustment is confirmed to be valid in court the problem is whether or not the foreign shareholder is able to use this with the market supervision and administration department to turn the original domestic enterprise into a foreign invested enterprise. Generally speaking, the judgement should not be enforced because it is not conducive to accumulation of foreign capital. The adverse consequences of affirming this in court are:

(1) Firstly, this approach provides foreign investors with a loophole to circumvent the Foreign Investment Law. The approach breaks through the law's systems of foreign investment access and business registration to directly confirm the legal status of the anonymous foreign investor in court. Paragraph 3 of Article 14 of the Provisions on the Trial of Foreign Invested Enterprises Number One stipulates that the prerequisite for confirming anonymous foreign investors and share proportions. It provides that 'the court or the parties have obtained the consent of the examination and approval organ in regard to the modification of the actual investor as shareholder during the litigation'. However, this stipulation is practically unenforceable, because the procedure for foreign investment in China is itself irreversible. That is to say, even after the confirmation of an anonymous foreign investor's legal status, and if the anonymous shareholder wants to become a nominal shareholder, there should be a shares transfer between the anonymous shareholder and the nominal shareholder. Since in most cases, the payment of the transfer price has already been conducted in RMB according to the shareholding entrustment agreement between both parties foreign capital would not enter China.

(2) Secondly, a conflict between justice and administration would arise. The establishment and modification of foreign invested enterprises is an administrative registration procedure. If courts confirm anonymous investors' legal statuses this will lead to a potential conflict

between judicial and administrative authorities. This is a basic fact that cannot be ignored. At present, the view of the State Administration for Market Regulation remains unknown, but in the long term it is detrimental to the establishment of a robust system of foreign invested enterprises. Attempts to confirm the legal status of anonymous investors in court may cause problems since administrative organs would be unable to enforce such judgement. The only criterion for administrative organs to identify whether an enterprise is a foreign invested enterprise is whether its investment capital enters from abroad or not. But for courts the shareholding entrustment question hinges on the free will of both company and investor. The problem would be that the courts' standards and the administrative criterion for foreign invested enterprises are inconsistent and cannot be reconciled judicially. Considering how part of the Provisions on the Trial of Foreign Invested Enterprises Number One is realised at the expense of executive power, it is debatable whether a judicial organ is authorised to modify the regulation of the administrative organ by issuing normative documents.[15]

Therefore, regarding disputes over anonymous foreign shareholding entrustment, I believe that the substantive relationship between both parties should be defined as a relationship between an obligee and obligor. That means the legal status of the anonymous shareholder and the nominal shareholder should be treated as the obligee and the obligor respectively. The anonymous shareholder is entitled to demand a refund of its actual contribution in the target company (such as Junda Company in this paper), the nominal shareholder is obliged to pay back the actual contribution from the anonymous shareholder.

Suggestions on the settlement of the dispute of the anonymous foreign shareholding entrustment

Despite the complexity of the concept of anonymous shareholders, the strictness of China's foreign exchange management system, and the limitations of the relevant laws and regulations currently in practical operation, there are legal loopholes in the field of foreign investment. This includes loopholes in the Original Three Laws on Foreign Investment and the Foreign Investment Law, which arise out of untimely amendments. Given new investment forms and the introduction of new capital, legal disputes in the foreign investment field are emerging one after another. The judicial department has to solve a variety of practical problems by means of judicial interpretation. The important position of administrative regulation has been determined by the characteristics of foreign investment throughout the whole legal regime. The judiciary certainly tends to give parties the right to relief by means of judicial interpretation. But if it thereby changes the administrative functions of the administrative organ, the latter's credibility is affected. If a court cannot obtain recognition and assistance from the relevant registration organs or competent departments in dealing with such cases its judgements are likely to become dead letters.

Thus, I believe that the court shall dismiss anonymous foreign shareholder disputes and instruct both parties to deal with their substantive relationship as obligees and the obligors. Meanwhile, the case handled by the

[15] Xu Kai, 'The Newest Development of China's Foreign Investment Regime and the Analysis of the Dilemma: the Commentary on the Provisions on the Trial of Foreign Invested Enterprises Number One issued by the Supreme Court', (2011) 2 Law Review in the West 105-106.

Shanghai Court highlights two urgent problems that need a solution:

(1) Firstly, we should speed up the clean-up of the original restrictive management measures, perfect the administrative regulations of the competent departments which are inconsistent with the Foreign Investment Law, and realise the equal treatment of foreign and domestic investments. We should implement a foreign investment access system with a pre-establishment national treatment plus a negative list system as its core and effectively eliminate the invisible threshold for foreign capital to enter China. As one of the fundamental principles relating to the treatment of foreigners, the principle of national treatment would mean that one state should treat the foreigners in the same way as it treats its nationals.

(2) Secondly, combined with the changes of China's foreign investment policy and courts' requirements for handling related disputes, the legislature should amend and improve the existing laws promptly, allocate judicial power rationally, and clearly define the boundary between executive and judicial power.

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