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## M E M O R A N D U M

### 备忘录

**To:** Our Friends and Clients

**致:** 我们的朋友和客户

**From:** Han Kun Law Offices

**自:** 汉坤律师事务所

**Date:** July 8, 2013

**日期:** 2013年7月8日

**Re:** Legal Analysis on Recent Rulings related to VIE Structure

**关于:** 与VIE架构有关的近期案件的法律分析

It has recently been widely reported that several PRC judicial, arbitral and administrative decisions on cases involving VIEs indicate the PRC government's negative attitude towards the use of VIE arrangements in China. This memorandum will analyze these cases and decisions, distinguish between these cases and a typical VIE structure, and illustrate how these decisions may impact use of VIE arrangements in China.

近期，多家媒体报道了中国法院、仲裁机构和行政机关对一些涉及 VIE 协议的案件的判决、裁决或决定，认为它们反映了中国对 VIE 结构在中国的使用持否定态度。本备忘录将分析这些案件与典型 VIE 结构的差别以及这些判决、裁决或决定可能会对 VIE 结构在中国的使用产生的影响。

#### **1. Summary of recent judicial judgments, arbitration awards and administrative decisions concerning the VIE structure**

近期涉及 VIE 架构的法院判决、仲裁裁决及行政决定的简述

##### **1.1 Arbitration awards of CIETAC Shanghai in two related cases involving an online game operating company using the VIE structure**

贸仲上海分会在两起涉及同一网络游戏运营公司的 VIE 结构的案件中的仲裁裁决

According to an article published in China Business Law Journal, a tribunal of the China International Economic and Trade Arbitration Commission ("CIETAC") Shanghai ruled in 2010 and 2011 in two related cases involving the VIE arrangement of an online game operating company, stating that the VIE agreements were void on the grounds that such arrangement

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violated the mandatory provisions of administrative regulations prohibiting foreign investors from investing in the online game operation business, and constituted “concealing illegal intentions with a lawful form”.

根据《商法》月刊发表的一篇文章，中国国际经济贸易仲裁委员会（“贸仲”）上海分会某仲裁庭于 2010 年和 2011 年期间，在两起涉及同一家网络游戏运营公司的 VIE 结构的案件中，以该 VIE 结构违反了禁止外国投资者投资网络游戏运营业务的行政法规的强制性规定，以及构成了“以合法形式掩盖非法目的”为由，裁决该案涉及的 VIE 协议无效。

1.2 Judgment of the PRC Supreme Court in the dispute between Chinachem Financial Services and China Small and Medium Enterprises Investment Co., Ltd. over ownership of shares in Minsheng Bank  
最高院就华懋金融服务有限公司和中国中小企业投资有限公司之间关于民生银行股份所有权争议的判决

It was reported that the Supreme People’s Court of the PRC (the “**Supreme Court**”) in late 2012 made a ruling on a dispute between Chinachem Financial Services (“**Chinachem**”), a Hong Kong investor, and China Small and Medium Enterprises Investment Co., Ltd. (“**SME Company**”), a PRC firm who held shares of Minsheng Bank, a financial institution established in China, on behalf of Chinachem. In 1995, Chinachem entered into a series of agreements with SME Company, including entrustment agreements and loan agreements. According to the loan agreements (the “**Minsheng Loan Agreements**”), Chinachem provided loans to SME Company for subscribing to shares in Minsheng Bank and the interests of the loans shall equal the dividends obtained from Minsheng Bank. Through the entrustment agreements (the “**Minsheng Entrustment Agreements**”), Chinachem authorized SME Company to act on its behalf as its proxy with respect to the shares in Minsheng Bank, including holding the shares in Minsheng Bank on behalf of Chinachem, managing and exercising all the rights and interests associated with these shares, and filling in a director position on the board of Minsheng Bank, while SME Company undertook to exercise the voting rights associated with these shares following the instructions of Chinachem. Chinachem soon had a dispute with SME Company over the ownership of the Minsheng Bank shares and the related dividends. The dispute ended up in PRC courts for 12 years until a recent ruling by the Supreme Court. The Supreme Court ruled, among other things, that the agreements between Chinachem and SME Company were invalid on the ground that these agreements established an entrustment relationship, which circumvented the PRC laws and regulations on foreign investment in the financial industry and constituted “concealing illegal intentions with a lawful form.”

据报道，2012 年底，中华人民共和国最高人民法院（“**最高院**”）对华懋金融服务有限公司（“**华懋**”）与中国中小企业投资有限公司（“**中小企业投资公司**”）的争议作出了判决。华懋是一家香港投资者，而中

小企业投资公司是一家中国大陆公司，代华懋持有中国大陆金融机构民生银行的股份。1995年，华懋与中小企业投资公司签署了一系列协议，包括委托协议以及借款协议。根据借款协议（“民生借款协议”），华懋为中小企业投资公司提供借款，用于认购民生银行的股份，借款的利息等于民生银行的股份红利。根据委托协议（“民生委托协议”），华懋委托中小企业投资公司作为其全权代表，管理和行使其在民生银行中的股份的所有权利和利益，担任民生银行的董事，而中小企业投资公司承诺根据华懋的指示行使该等股份的投票权。协议签署后不久，华懋与中小企业投资公司便就民生银行股份的所有权及红利产生了争议。这项争议在中国大陆的法院持续了12年之久，最近才由最高院作出终审判决。最高院认为华懋与中小企业投资公司签署的协议在双方之间设立了委托关系，该委托关系规避了中国法律法规对外商投资金融领域的规定，构成了“以合法形式掩盖非法目的”，因此判决华懋与中小企业投资公司签署的协议无效。

### 1.3 Anti-monopoly Approval on Wal-Mart's acquisition of shares in Yihaodian 关于沃尔玛收购1号店股权的反垄断审查决定

On August 14, 2012, the Anti-monopoly Bureau of Chinese Ministry of Commerce (the “**Anti-monopoly Bureau**”) released its announcement concerning the anti-monopoly approval of Wal-Mart Stores, Inc.'s (“**Wal-Mart**”) proposed acquisition of Newheight Holdings Ltd., a company that owns Yihaodian (collectively “**Yihaodian**”), an e-commerce business in China, on the condition that, after the closing of the transaction, Wal-Mart must not engage in the value-added telecommunications business then operated by Yihaodian through its VIE structure. The reason given by the Anti-monopoly Bureau in its published decision for such condition was that “if the post-merger entity enters the value-added telecommunications market via Yihaodian's online store, it will be able to rapidly expand its business by relying on its comprehensive competitive advantages in both the existing offline retail market and the online retail business, gain a dominant position in the value-added telecommunications market, and substantively enhance its bargaining power against users of online platforms, and therefore may have the effects of excluding or restraining competition in China's value-added telecommunications market.”

2012年8月14日，中国商务部反垄断局（“**反垄断局**”）公布了对沃尔玛公司（“**沃尔玛**”）收购纽海控股有限公司股份的交易的反垄断审查结果。纽海控股有限公司拥有电子商务平台1号店（“**1号店**”）。反垄断局附条件批准了该交易，其附加的限制性条件包括在交易交割后，沃尔玛不得通过VIE架构从事1号店当时运营的增值电信业务。反垄断局在其公布的决定中对于附加此项限制性条件给出的理由是“如果收购后的实体通过1号店的网上商城进入增值电信市场，将有能力依托现有实体零售市场以及网上零售业务的综合竞争优势迅速扩展业务，在增值

电信市场取得优势地位，实质性增强其对网络平台用户的议价权，从而在中国增值电信业务市场可能具有排除或限制竞争效果”。

## 2. Key distinctions between a typical VIE arrangement and the above cases 典型 VIE 架构与上述案例的关键差别

### 2.1 CIETAC Shanghai Cases 贸仲上海案

According to publicly available information, the agreements entered into by the parties in the two CIETAC Shanghai Cases are typical VIE agreements and the domestic company involved in these two cases was mainly engaged in online game operation. Although the PRC's foreign investment regime restricts or prohibits foreign investment in quite some industries, online game operation is one of few industries where there are rules specifically prohibiting foreign investors from controlling and participating in the business indirectly through contractual or technical support arrangements. By contrast, there are no such specific rules for most other industries where foreign investment is restricted or prohibited.

根据公开可获得的信息，两起贸仲上海的仲裁案件中，各方签署的协议应当为典型的 VIE 协议，涉及的内资公司主要从事网络游戏运营业务。虽然中国外商投资相关法规限制或者禁止外商投资相当数量的产业，但网络游戏运营行业是极少数有规章明确禁止外国投资者通过签署相关协议或者提供技术支持等间接方式控制或者参与的行业之一。相反，在大多数限制或者禁止外商投资的其他领域，并不存在类似的明确规定。

Even for VIE arrangements used in online game operating industry, the impact of the aforementioned rules prohibiting indirect control in online game businesses remains uncertain. Such a prohibition is stipulated in a circular (the “**Circular 13**”) promulgated by the General Administration of Press and Publication (the “**GAPP**”), the National Copyright Administration, and the National Office of Combating Pornography and Illegal Publications, which are all ministries and commissions under the PRC State Council.

即使就网络游戏行业的 VIE 结构而言，上述禁止外商间接控制或参与网络游戏运营的规定对于 VIE 结构的影响也存在不确定性。该项禁止规定在由国务院部委新闻出版总署、国家版权局和全国扫黄打非工作小组办公室联合发布的一份通知（“**13 号文**”）之中。

- Firstly, under the PRC Contract Law, a contract will be held void under a few circumstances, including “concealing illegal intentions with a lawful form” or violation of mandatory provisions of the laws, which refer to laws promulgated by the National People's Congress or its Standing Committee, and administrative regulations, which refer to administrative regulations issued by the State Council. A judicial interpretation issued

by the Supreme Court emphasized that all courts shall only rely on laws and administrative regulations to declare a contract invalid, and must not make such judgments based on rules formulated by ministries and commissions under the PRC State Council<sup>\*</sup>. Therefore, a contract should not be held invalid purely because of its violation of the Circular 13. Although the arbitral awards of the two CIETAC Shanghai cases are not publicly available, it is said that Circular 13 was one of the most significant reasons affecting the arbitration tribunal's decisions, but the arbitration tribunal, being fully aware that the Circular 13 is neither a law nor an administrative regulation, did not specifically refer to the Circular 13 in its awards. The arbitration tribunal seems to reach the decision by not adequately deliberating or differentiate whether the VIE agreements were held void on the ground of violating the mandatory provisions of administrative regulations prohibiting foreign investors from investing in the online game operation business, or on the ground of constituting "concealing illegal intentions with a lawful form". Compared with violation of the mandatory provisions of laws and administrative regulations, "concealing illegal intentions with a lawful form" is a quite vague concept under the PRC Contract Law with no clear legislative or judicial interpretations on its scope.

首先，根据中国《合同法》，合同仅在一些特定情况下才应被认定为无效，包括“以合法形式掩盖非法目的”或违反法律、行政法规的强制性规定。就违反法律、行政法规的强制性规定而言，法律指全国人大及其常委会颁布的法律，行政法规指国务院颁布的行政法规。最高院颁布的一项司法解释亦强调，各级法院认定合同无效时，应依据法律和行政法规，不得以国务院部委制定的部门规章为依据<sup>†</sup>。因此，合同不应仅仅因为违反 13 号文而被认定为无效。虽然贸仲上海的这两起仲裁案件的裁决书无法从公开渠道获悉，但据透露，13 号文是影响仲裁庭作出无效裁决的最重要原因之一。不过，仲裁庭也充分知晓 13 号文并非法律或行政法规，因此并未在裁决书中直接引用 13 号文。仲裁庭似乎并没有充分阐述或区分 VIE 协议是因为违反了禁止外商投资网络游戏运营业务的行政法规的强制性规定无效，还是因为构成“以合法形式掩盖非法目的”而无效。相较于违反法律、行政法规的强制性规定，“以合法形式掩盖非法目的”在中国《合同法》项下的含义更为模糊，并无立法或司法解释对其范围进行明确界定。

- Secondly, from administrative regulatory respect, the GAPP is one of the regulators of the online game industry and the foreign investment in such industry. The other primary regulators, including the Ministry of

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<sup>\*</sup> According to the judicial interpretations of the Supreme Court, if violation of rules formulated by ministries and commissions results in damaging public interest, the courts may refer to damaging public interests, which is another circumstance provided under the PRC Contract Law that contracts may be held invalid.

<sup>†</sup> 根据最高院的司法解释，如果对部门规章的违反产生了损害社会公共利益的结果，法院可援引损害社会公共利益这一条款，该条款是中国《合同法》项下可认定合同无效的另一情形。

Culture, the Ministry of Industry and Information Technology and the Ministry of Commerce, did not join the GAPP in promulgating the Circular 13, nor have they issued any similar rules in this respect. Therefore, it remains unclear just how the Circular 13 will be implemented or enforced. In Particular, the GAPP's authority in the online game industry is to approve the publication of online games before their launch on the Internet, while the Ministry of Culture is authorized to administer and regulate the overall online game industry, including investigation of online games launched on the Internet without the prior GAPP approval.

其次，从行政监管角度而言，新闻出版总署是网络游戏行业 and 外商投资该行业的监管部门之一。其他的主要监管者，包括文化部、工业和信息化部及商务部，并未参与发布 13 号文，也未在此方面发布过其他类似文件。因此，13 号文将如何实施和执行尚存在不确定性。尤其值得注意的是，新闻出版总署在网络游戏行业的职权主要在网络游戏上线前的出版审批，而文化部负责整体管理和监管网络游戏行业，包括对已上线的未经新闻出版总署审批的网络游戏的查处。

## 2.2 Minsheng Bank Case

### 民生银行案

Although some press linked the Minsheng Bank case to the VIE structure, it should be noted that there are some significant distinctions between the agreements in the Minsheng Bank case and those in a typical VIE structure.

虽然部分报道将民生银行案与 VIE 架构联系在一起，但实际上民生银行案中签署的协议与典型的 VIE 协议存在显著差别。

- Firstly, it was reported that the Minsheng Entrustment Agreements expressly provided that Chinachem authorized SME Company to invest in Minsheng Bank and hold the subscribed shares on behalf of Chinachem, which we understand should be one of the main reasons for the Supreme Court to deem the relationship between Chinachem and SME Company as an entrustment relationship. However, in a typical VIE arrangement, there is no such provision in any VIE agreement. Although there is a power of attorney or voting right entrustment agreement in a typical VIE arrangement, these documents typically provide that the registered shareholders of the domestic companies, i.e. the VIEs, authorize a wholly foreign-owned enterprise (the “WFOE”) to act on behalf of the registered shareholders as their proxy to exercise all rights associated with the equity interests held by the registered shareholders, such as the voting rights. Neither the power of attorney/voting right entrustment agreement nor any of the other typical VIE agreements expressly provide that registered shareholders are holding equity interests in the VIEs on behalf of the WFOEs. Instead,

these VIE agreements provide that the registered shareholders, as owners of the equity interests of the VIEs, agree to grant rights associated with their equity interests to the WFOEs. Under PRC law, shareholders have the right to dispose their equity interests and are not prohibited from authorizing other persons to exercise their shareholders' rights.

首先，据报道，民生委托协议明确规定了华懋授权中小企业投资公司投资民生银行，并代表华懋持有认购的股份，我们理解这应是最高院认定华懋与中小企业投资公司之间的关系为委托关系的主要原因之一。然而，在典型的 VIE 协议中并没有类似规定。虽然典型的 VIE 合同中也有授权委托书或者委托投票协议，但这些文件约定的是内资公司(即 VIE 公司)的登记股东授权外商独资企业(“WFOE”)作为其全权代表，代表其行使所有与其持有的股权相关的权利，包括投票权。这些文件或者任何其他典型的 VIE 协议均不会约定登记股东代表 WFOE 持有股东权益；相反，这些 VIE 协议约定了登记股东作为 VIE 公司股权的持有者，同意将与股权相关的权利授予 WFOE。在中国法下，股东有权处置其持有的股权，没有法规禁止他们授权他人行使其股东权利。

- Secondly, publicly available information shows that Chinachem in the Minsheng Bank case expected to receive economic benefits in the form of loan interests as provided under the Minsheng Loan Agreements. Although there are loan agreements in some VIE arrangements in connection with the loans from the WFOEs to the shareholders of the VIEs, the loans are not used to transfer economic interests from the VIEs to the WFOEs. In a typical VIE arrangement, the WFOE provides various services, such as technical services, consultation, intellectual property licensing, training services and procurement to the VIE, and the VIE pays service fees or royalties to the WFOE under the business cooperation agreements, technology service agreements and/or licensing agreements. These transactions are designed to give the WFOE the right to receive the economic benefits from the VIE through provision of services, which are not prohibited under PRC law.

其次，公开可获得的信息显示，民生银行案中的华懋期望通过民生借款协议项下的借款利息的形式获得经济利益。虽然在某些 VIE 架构中也存在由 WFOE 向 VIE 公司的股东提供借款的借款协议，但该等借款的目的并不在于从 VIE 公司向 WFOE 转移经济利益。在典型的 VIE 架构下，WFOE 根据业务合作协议、技术服务协议和/或许可协议向 VIE 公司提供各种服务，包括技术服务、咨询、知识产权许可、培训服务、采购等等，而 VIE 公司向 WFOE 支付服务费或许可费。这些交易的设计是为令 WFOE 有权通过提供服务的方式从 VIE 公司处获得经济利益，而提供服务并不被中国法律所禁止。

In addition, a typical VIE structure is also different from the arrangement in the Minsheng Bank case in the following respects, though one cannot tell from

the publicly available information whether the Supreme Court took into consideration these factors in making its judgment.

此外，典型的 VIE 架构与民生银行案中的安排还在以下几个方面存在不同，尽管从公开可获得的信息并不能确定最高院是否在作出判决的过程中考虑过这些因素。

- Firstly, in the Minsheng Bank case, the signing party to all the agreements was Chinachem, an offshore company, while in a typical VIE structure, a WFOE is set up in mainland China to sign VIE agreements with the VIE and its registered shareholders. Although both Chinachem and the WFOE are ultimately owned by offshore investors, the WFOE is a PRC company duly authorized by the PRC governmental authorities to conduct businesses in China in accordance with its approved business scopes, while as an offshore company, Chinachem's ability to conduct business in China is quite limited and subject to more approval requirements. For example, under a typical VIE structure, the WFOE is paid for services provided to the VIE and these services are within their approved business scope. In the Minsheng Bank case, Chinachem expected to be paid through the interests of loans, but it is not known whether such arrangement had satisfied the required foreign exchange approval or registration procedures, including the procedures for foreign currency loans provided by Chinachem to SME Company.

首先，在民生银行案中，协议的签署方为境外公司华懋，而在典型的 VIE 架构中会在中国大陆设立一家 WFOE 与 VIE 公司及其股东签署 VIE 协议。虽然华懋与 WFOE 最终都由境外投资人拥有，WFOE 是中国政府机关依法批准成立的中国公司，有权在中国从事批准的经营范围内的业务，而华懋是一家境外公司，在中国从事业务的能力相当有限且需要取得更多的政府批准。例如，在 VIE 架构下，WFOE 向 VIE 公司提供有偿服务，并且该等服务是在其批准的经营范围之内。而在民生银行案中，华懋期望通过借款利息获得收益，但无法知晓华懋向中小企业投资公司提供外汇借款等安排是否满足了必要的外汇管理审批或登记程序。

- Secondly, in the Minsheng Bank Case, the agreements were signed only between Chinachem and SME Company without involving Minsheng Bank and its other shareholders, while in a typical VIE structure, the VIE and all its shareholders sign the relevant agreements, either to undertake obligations or acknowledge the obligations undertaken by each other shareholder. Participation of the VIE and all its shareholders in the VIE structure reduces the risk that the agreements being held invalid on the ground that the WFOE and a shareholder of the VIE colluding with each other to damage interests of the VIE or its other shareholders.

其次，在民生银行案中，协议仅由华懋及中小企业投资公司签署，并未涉及民生银行及民生银行的其他股东，而在典型的 VIE 架构中，



VIE 公司及其所有股东都会签署相关的协议，或承担义务，或承认其他股东应承担义务。VIE 公司和其所有股东均参与到 VIE 安排中将减少协议因被认定为属于 WFOE 和 VIE 公司的某一名股东恶意串通损害 VIE 公司或 VIE 公司的其他股东的利益从而被认定为无效的风险。

- Thirdly, in a typical VIE structure, there is an equity pledge agreement between the WFOE and the registered shareholder who pledges all its equity interests in the VIE to the WFOE to secure the relevant obligations of the VIE and/or such shareholder to the WFOE. Upon registration with the relevant governmental authorities, the pledge becomes effective and if there is any breach of the secured obligations, the WFOE may have additional protection from the exercise of the pledge. In the Minsheng Bank case, although there was agreement on the pledge of the shares of Minsheng Bank in the agreements signed by the parties, the pledge was not registered. Besides, the pledge of the shares of Minsheng Bank to Chinachem, as an offshore company, is subject to additional foreign exchange approvals/registrations, which seems to have not been obtained in the Minsheng Bank case.

最后，在典型的 VIE 架构中，WFOE 与登记股东将签署股权质押协议，登记股东将其持有的 VIE 公司的全部股权质押给 WFOE，以担保 VIE 公司和/或该股东对 WFOE 承担的相关义务。质押在相关的政府机构登记时生效。在发生违反被担保义务的情况下，WFOE 可以通过行使质权获得额外的保护。在民生银行案中，虽然在双方签署的协议中有质押民生银行股份的约定，但该质押并未进行登记。另外，将民生银行的股份质押给华懋这样一家境外公司，还需要完成额外的外汇审批和登记。在民生银行案中，该等外汇审批和登记很可能并未完成。

### 2.3 Wal-Mart Case

#### 沃尔玛案

Although the conditional approval of the Anti-monopoly Bureau prohibited Wal-Mart from operating value-added telecommunication business through the VIE structure, the published decision was based on competition concern and did not draw any conclusion on the legality or validity of the VIE structure involved in this case.

尽管反垄断局在其作出的附限制条件的批准决定中禁止沃尔玛通过 VIE 架构经营增值电信业务，该等决定仅从竞争法角度出发，并未对该案例中 VIE 架构的合法性或有效性做出任何结论。

### 3. **Some relevant PRC legal principles**

#### **相关的中国法律原则**

### 3.1 Judicial judgments and arbitration awards are NOT binding precedents

#### 法院判决和仲裁裁决对后续案件没有约束力

Mainland China adopts a statute law system, under which judicial judgments are not binding when the courts decide subsequent cases with similar issues or facts. In mainland China, all cases are adjudicated in accordance with written statutes and the judicial interpretations officially promulgated by the Supreme Court. In addition, the Supreme Court also publishes some guiding cases from time to time for all courts' reference and such guiding cases should be taken into consideration by the courts when deciding similar cases, while no other cases have such effects. Therefore, the Supreme Court's decision in the Minsheng Bank case will not be binding precedent or have any reference effect on subsequent similar cases unless and until the Minsheng Bank case is published by the Supreme Court as a guiding case in the future. As for CIETAC Shanghai's awards, arbitration awards are confidential and have no binding or reference effect at all.

中国大陆属成文法体系，任何判决对于各级法院在以后审判类似的案件并不具有约束力。在中国大陆，所有案件应根据成文法以及最高院颁布的司法解释判决。另外，最高院会不时发布一些指导性案例供各级法院参考，各级法院在判决类似案件应当参照这些指导性案例。因此，除非并且直到将来最高院将民生银行案公布为指导性案例时，最高院对于民生银行案的判决并不是具有约束力的先例，各级法院在审判时也不会参照该判决。至于贸仲上海案中的裁决，仲裁裁决具有保密性，且不具有任何约束力或供其他案件参照的效力。

### 3.2 Contract Law Principles

#### 合同法原则

Both the CIETAC Shanghai cases and the Minsheng Bank case refer to “concealing illegal intentions with a lawful form,” which is provided under Article 52 of the PRC Contract Law, as one of the grounds for declaring contracts invalid. There is no clear legislative or judicial interpretation on what constitutes “illegal intentions.” The interpretation of such provision may be subject to the discretion of courts and arbitration tribunals, which may interpret it more narrowly or broadly. However, when deciding the validity of contracts, the courts and arbitration tribunals shall also respect and follow the general principles set forth in Section One (General Rules) of the PRC Contract Law, including the principle of freedom of contracts. As a fundamental and significant rule of the PRC Contract Law, the parties have the right to enter into contracts in accordance with their own wishes and no person may illegally interfere with such right. Such principle has also been emphasized by the Supreme Court.

贸仲上海案和民生银行案中均适用了“以合法形式掩盖非法目的”这一条款。“以合法形式掩盖非法目的”是《合同法》第五十二条规定的宣

告合同无效的理由之一。目前尚未有立法或司法解释明确哪些情况会构成“非法目的”。法院和仲裁机构在解释该规定时根据其自由裁量权可能做出或严或宽的解释。但是，在判定合同的效力时，法院和仲裁机构也应当遵循《合同法》第一章（“一般规定”）中规定的各项原则，包括合同自由原则。作为《合同法》的一项基本和重要的原则，当事人有权根据自己的意愿订立合同，任何人不得非法干涉。最高院也强调过该原则的重要性。

#### 4. Impact on VIE arrangements 对 VIE 安排的影响

As the PRC authorities have been silent on the VIE structure since its adoption, their attitudes remain unclear, and it is hard to predict what their attitudes will be or what actions they may take in future towards the currently widely used VIE structure. Although it was reported that the recent cases indicated PRC government's negative attitude, in light of the distinctions between the referenced cases and a typical VIE arrangement, and the PRC legal principals as analyzed above, it cannot be concluded that such cases would have an immediate and adverse impact on the typically adopted VIE structures. In addition, the following factors should also not be ignored.

鉴于中国政府机关自 VIE 架构最初开始使用后就一直保持沉默，其对 VIE 架构的态度尚不明确，也很难预测将来它们对目前已被广泛使用的 VIE 架构的会有何种态度或采取何种行动。虽然有报道称近期的案件显示了中国政府对 VIE 架构持否定态度，但从上文分析的这些案件和典型的 VIE 安排的区别以及中国相关法律原则，还不能得出这些案件将对典型的 VIE 架构产生直接负面影响的结论。并且，以下因素也不可忽略。

- The VIE arrangements have already been adopted by many Chinese companies listed in the United States, Hong Kong and other stock exchanges. Any generally applicable decision on the legality or validity of the VIE agreements or VIE structure will have significant impacts worldwide. Under such circumstances, the attitude of legislative, administrative and judicial authorities in mainland China tend to be cautious and conservative. We have not become aware of any regulatory or legislative actions taken by the PRC governmental authorities on the existing VIE structure of publicly listed companies, nor have we observed any proposal to make new laws or regulations regulating the VIE structure in any publicly available annual legislation plan of the PRC.

VIE 安排已被许多在美国、香港和其他证券市场上市的中国企业所广泛采用。任何具有普遍适用性的对 VIE 协议或 VIE 架构的合法性或有效性的决定将在世界范围内产生重要影响。在这种情况下，中国大陆的立法、行政和司法机关的态度显得趋向谨慎和保守。我们尚未发现中国相关政府部门对现有上市公司的 VIE 架构采取任何立

法或监管行为，亦未在任何可公开获得的中国年度立法计划中发现针对 VIE 架构监管制定新的法律法规的提案。

- It has been reported that China plans to launch an international board in Shanghai Stock Exchange (“SIB”) to attract large foreign companies, including leading overseas-incorporated China-based companies that are listed on the Hong Kong, United States and other offshore stock exchanges, to list their shares in Shanghai. Although the SIB has not been officially established yet, and there is no clear timetable for its establishment, the China Securities Regulatory Commission (the “CSRC”) and the Shanghai Stock Exchange have conducted some research and solicited candidates for listing on the SIB. Many offshore listed companies with VIE structure have been informally invited to submit their applications for listing on the future SIB. Presumably, the CSRC may not have seen the VIE structure as a substantial obstacle for listing on the SIB, which is under the regulation and supervision of PRC law.

曾有报道称，中国拟在上海证券交易所开设国际板，以吸引大型外国公司，包括在香港、美国和其他境外证券交易所上市的设立于海外的优质中国公司在上海上市。虽然国际板尚未设立且其设立也未出台明确的时间表，中国证券监督管理委员会（“证监会”）和上海证券交易所已经开展过一些调研咨询工作，并已邀请过一些潜在的国际板上市申请人。许多采用 VIE 架构的境外上市公司曾被非正式邀请在未来设立的国际板递交上市申请。从上述事实，也许可以推测出证监会并未将 VIE 架构视为在受到中国法律监管的国际板上市的一项重大障碍。

- Under PRC law, one of the conditions for an IPO in mainland China is that the issuer must not have committed any significant illegal acts within three years prior to its application for the IPO. In June 2012, Beijing Eastdawn Information Technology Co., Ltd. (“Eastdawn”), a company engaged in a certain industry that is restricted to foreign investment, passed the review of Public Offering Review Committee of Growth Enterprise Board, an organization established by the CSRC to review and verify applications for public offerings, on a review meeting for IPO in mainland China. Eastdawn initially intended to go public outside of China and had set up an offshore holding structure and adopted the VIE arrangement for the purposes of listing outside of China. When Eastdawn subsequently decided to go public in mainland China, it re-organized its offshore holding structure to an onshore structure by eliminating the original VIE arrangement in November 2010. Eastdawn then applied for IPO in mainland China and passed the review of Public Offering Review Committee of Growth Enterprise Board within three years following termination of the VIE agreements. This

fact may suggest that the existence of VIE structure in industries restricted to foreign investment before the IPO does not constitute a significant illegal act, at least in the CSRC's IPO approval process.

根据中国法律，在中国大陆首次公开发行股票的条件之一是发行人在申请首次公开发行前三年内不得有任何重大违法行为。2012年6月，一家业务范围包括某些外资限制行业业务的公司——北京东方道迩信息技术股份有限公司（“东方道迩”）的上市申请通过了证监会创业板发行审核委员会会议的审核。东方道迩最初拟在海外上市，并为此搭建了境外持股架构和VIE架构，其后来决定在中国大陆上市，并在2010年11月完成了重组，通过取消VIE架构将海外持股架构重组为境内架构。东方道迩随即在中国大陆提交了上市申请，并在VIE协议终止后三年之内获得了证监会创业板发行审核委员会会议的审核通过。这一事实可能反映出，至少在对首次公开发行的审核程序中，证监会并未将曾经在限制外商投资领域搭建VIE架构视为一项重大违法行为。

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Please note that this memorandum has been rendered only with respect to the laws and regulations of the PRC (for the purpose of interpretation in this Memo only, the PRC shall not include Hong Kong, Taiwan or Macau) in force as of the date of this memorandum, and that we have made no investigations in any other jurisdiction. This memorandum is to be furnished for reference purposes and does not constitute our legal opinions.

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We hope this memorandum is helpful. Should you have any further questions or require further instructions, please feel free to contact us.

希望本备忘录对您有所帮助。若您有任何进一步的问题或指示，请随时与我们联系。