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Guide to foreign investment in the PRC  
**2015**



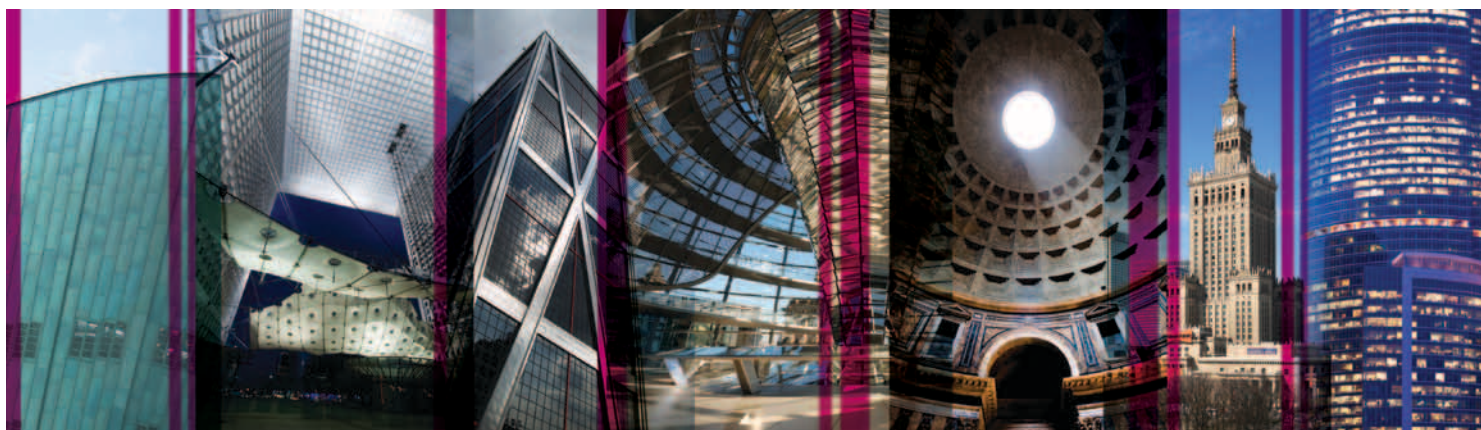


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# About Linklaters

Linklaters is a leading global law firm, supporting clients in achieving their strategies wherever they do business. We use our expertise and resources to help clients pursue opportunities and manage risk across emerging and developed markets around the world.



Our global approach and commitment to excellence ensure the highest standards of quality and service across all our relationships. We bring discipline, teamwork and agility to help our clients navigate important business challenges successfully.

Linklaters' depth of experience in helping global organisations successfully invest in the PRC, alongside its extensive knowledge of the local market, provides an excellent foundation for this Guide to Foreign Investment in the PRC.

Frequently, the PRC legal framework and its underlying policy is intertwined with various aspects of China's social and political environment, which must be carefully navigated to achieve a successful investment in the PRC.

This Guide examines the key legal and regulatory considerations for foreign businesses in their evaluation of possible investment opportunities.

We hope that you find this Guide useful and informative.

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<sup>^</sup> Office of best friend firm TT&A

# Key Contacts

Our China practice is one of the largest of the international law firms with over 230 lawyers, half of whom speak Chinese, operating in an integrated team.

Specialising in M&A and strategic investment both in and out of China, private equity, capital markets, banking, projects and dispute resolution, our clients tell us we are 'first choice when the terrain is most difficult and complex'.

We have full execution capability at the most senior level in each of our PRC offices: Beijing, Shanghai and Hong Kong, complemented by the systems and infrastructure of a global law firm with 29 offices in 20 countries.

Please do not hesitate to contact any of our China team.



For more information about how we can help you, please contact any of the following partners:



**Fang Jian**

(Corporate/M&A/Financial Regulation)  
National Managing Partner, Beijing/Shanghai  
Tel: (+86) 10 6535 0658/(+86) 21 2891 1858  
[jian.fang@linklaters.com](mailto:jian.fang@linklaters.com)



**Betty Yap**

(M&A/Private Equity)  
Head of China Practice, Hong Kong  
Tel: (+852) 2842 4896  
[betty.yap@linklaters.com](mailto:betty.yap@linklaters.com)



**Kevin Cheung**

(Corporate /M&A/IPO)  
Partner, Beijing  
Tel: (+86) 10 6535 0677  
[kevin.cheung@linklaters.com](mailto:kevin.cheung@linklaters.com)



**PH Chik**

(Corporate/Capital Markets/Regulatory Compliance)  
Partner, Beijing  
Tel: (+86) 10 6535 0633  
[ph.chik@linklaters.com](mailto:ph.chik@linklaters.com)



**Annabella Fu van Bijnen**

(Corporate/M&A/Financial Regulation)  
Partner, Beijing  
Tel: (+86) 10 6535 0660  
[annabella.fu@linklaters.com](mailto:annabella.fu@linklaters.com)



**Richard Gu**

(Corporate/M&A)  
Senior Consultant, Shanghai  
Tel: (+86) 21 2891 1839  
[richard.gu@linklaters.com](mailto:richard.gu@linklaters.com)



**Xiaohui Ji**

(Banking & Projects)  
Partner, Beijing  
Tel: +86 10 6535 0621  
[xiaohui.ji@linklaters.com](mailto:xiaohui.ji@linklaters.com)



**Gilbert Li**

(Corporate/M&A/IPO)  
Partner, Shanghai  
Tel: (+86) 21 2891 1857  
[gilbert.li@linklaters.com](mailto:gilbert.li@linklaters.com)



**Chin Chong Liew**

(Capital Markets)  
Partner, Hong Kong  
Tel: +852 2842 4857  
[chin-chong.liew@linklaters.com](mailto:chin-chong.liew@linklaters.com)



**William Liu**

(Capital Markets)  
Partner, Hong Kong  
Tel: (+852) 2901 5257  
[william.liu@linklaters.com](mailto:william.liu@linklaters.com)



**Matthew Middleditch**

(Corporate /M&A)  
Partner, Hong Kong  
Tel: (+852) 2901 5352  
[matthew.middleditch@linklaters.com](mailto:matthew.middleditch@linklaters.com)



**Judie Ng Shortell**

(M&A/Private Equity)  
Partner, Beijing  
Tel: (+86) 10 6535 0653  
[judie.ngshortell@linklaters.com](mailto:judie.ngshortell@linklaters.com)



**Simon Poh**

(Corporate/M&A)  
Partner, Shanghai  
Tel: (+86) 21 2891 1828  
[simon.poh@linklaters.com](mailto:simon.poh@linklaters.com)



**Fay Zhou**

(Competition/ Antitrust)  
Partner, Beijing  
Tel: +86 10 6535 0686  
[fay.zhou@linklaters.com](mailto:fay.zhou@linklaters.com)

**Beijing**

Level 25, China World Office 1,  
No. 1 Jian Guo Men Wai Avenue,  
Beijing 100004, PRC

中华人民共和国北京市100004朝阳区  
建国门外大街1号国贸写字楼1座25层

Tel: (+86) 10 6505 8590  
Fax: (+86) 10 6505 8582

**Shanghai**

29th Floor Mirae Asset Tower,  
166 Lujiazui Ring Road, Pudong New  
Area, Shanghai 200120, PRC

中华人民共和国上海市200120浦东新区  
陆家嘴环路166号未来资产大厦29楼

Tel: (+86) 21 2891 1888  
Fax: (+86) 21 2891 1818

**Hong Kong**

10th Floor, Alexandra House,  
18 Chater Road,  
Hong Kong

香港遮打道18號歷山大廈10樓  
Tel: (+852) 2842 4888  
Fax: (+852) 2810 8133

# Section one.

## Introduction

The economy of the People's Republic of China (the "PRC") has grown rapidly since the PRC Government began to encourage the creation of a market economy in the late 1970s. In recent years, the PRC has seen strong economic growth, recording a GDP increase of approximately 8.74%<sup>1</sup> on average from 2008 to 2014. An increasingly open market and burgeoning private sector have all contributed to making the PRC an attractive proposition for foreign investors.





Since joining the World Trade Organisation (the “**WTO**”) in December 2001, the PRC has sought to become integrated in the world economy and, as a result, many areas have become increasingly open to foreign investment, especially in the services sector.

The Chinese legal system has also been the subject of major reform as the PRC seeks to adapt to its changing economic circumstances. Legal reform has, to some extent, been reactionary, leading to situations where some laws are confusing or contradictory. However, recent changes have been underpinned by the desire to harmonise the legal structure and enhance predictability. This, together with the increasing recognition of commonly accepted business practices, has made the legal landscape far easier to navigate. Continued reform should see increased foreign investment, as the PRC makes further strides in its conversion to a market economy.

This Guide examines the key legal and regulatory considerations for foreign businesses in their evaluation of possible investment opportunities in the PRC. Frequently, the PRC legal framework and its underlying policy are intertwined with various aspects of China's social and political environment, all of which must be carefully navigated to achieve a successful investment in the PRC. On 19 January 2015, a consultation draft of a proposed new foreign investment law (the “Foreign Investment Law”) was published.<sup>2</sup> Though it will need to go through many rounds of revision and multiple readings before becoming law, once passed, the new Foreign Investment Law is expected to change many applicable laws, rules and regulations and significantly affect the positions expressed and rules quoted in this Guide.



# 8.74%

In recent years, the PRC has seen remarkable economic growth, recording a GDP increase of 8.74% in average from 2008 to 2014.





# Section two.

## Foreign Investment Environment

There are four categories of activity and industry for foreign investment purposes: encouraged, permitted, restricted and prohibited.

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## Investment Sectors

The first step in assessing the viability of an investment in the PRC is to determine whether the industry in question is open to foreign investment and, if so:

- > the maximum level of foreign ownership permitted;
- > the type and level of government approvals required and their implications on timing and process; and
- > whether any restrictions exist on the scope of activities of foreign funded enterprises as compared with domestic PRC funded enterprises.

There are four categories of activity and industry for foreign investment purposes: encouraged, permitted, restricted and prohibited.

The *Foreign Investment Industrial Guidance Catalogue* (the “**Catalogue**”) sets out the types of activities and industries falling within each of the encouraged, restricted and prohibited categories. It establishes a detailed framework for foreign investment and reflects market access and other commitments made by the PRC Government on its accession to the WTO. The Catalogue also specifies whether a PRC partner is required and, if so, whether the PRC partner must have either a majority or relative majority (ie greater than any foreign partner) interest.<sup>3</sup> Please refer to Appendix for examples of industries falling within each category. If an industry does not fall within one of the encouraged, restricted or prohibited categories, it falls within the permitted category. The latest version of the Catalogue, which came into effect in April 2015<sup>4</sup>, further relaxes restrictions on foreign investment and encourages foreign investment in more services and high-value manufacturing sectors.

Foreign investment in industries falling within the encouraged or permitted categories will, in general, be subject to a lesser degree of scrutiny from the PRC Government than those in the restricted category, although approval is generally still required for all foreign investment within the PRC, with certain exceptions available in the pilot free trade zones of Shanghai, Tianjin, Guangdong and Fujian (“**FTZs**”). The PRC Government has issued a “Negative List” which applies to investments within each FTZ, with foreign investment in industries that are not on the list generally only requiring a filing with the FTZ authorities, and not foreign investment approval from MOFCOM or NDRC. See Appendix two for a summary of the industries included in the Negative List. In addition, from 1 March 2015, under the “national treatment” principle, eligible Hong Kong and Macau service providers will, subject to certain exceptions, be able to invest in the service industries in Guangdong free of any conditions, restrictions or qualifications which are not also imposed on domestic investors.<sup>5</sup> These developments are set to change the general position with regard to regulation of foreign investment in the PRC (see page 15).

Foreign investment in industries within the restricted category is usually subject to stringent entrance requirements and high-level governmental approval, which may be more difficult to obtain. Foreign investment is not permitted in industries falling within the prohibited category.

Mainland China has entered into the *Closer Economic Partnership Arrangement* and supplemental agreements (the “**CEPA**”) with the Hong Kong Special Administrative Region and the Macau Special Administrative Region, and the *Economic Cooperation Framework Agreement* (the “**ECFA**”) with Taiwan, which grant Hong Kong, Macau and Taiwan investors respectively more favourable treatment when investing in certain industries in the PRC, including industries falling within the prohibited category of the Catalogue.



## Investment Structures

The next step for a foreign investor is to select the investment structure for its investment in the PRC. A foreign investor can:

- > establish a representative office in the PRC to engage in “non-profit making business” in the PRC (see page 24); or
- > set up a new enterprise in the PRC (either a wholly owned subsidiary or a joint venture); or
- > acquire an already-established PRC business or company or an interest in such entity (see page 30).

Where a foreign investor wishes to set up a new enterprise in the PRC or to acquire an existing PRC enterprise, the following principal enterprise forms are available (“foreign investment enterprises” (“**FIE**”)):

- > Equity Joint Venture (“**EJV**”) – a limited liability company with at least one foreign investor and one domestic investor (see page 20);
- > Cooperative Joint Venture (“**CJV**”) – a limited liability company or unincorporated venture with at least one foreign investor and one domestic investor (see page 20);
- > Wholly Foreign Owned Enterprise (“**WFOE**”) – a limited liability company which is wholly owned by foreign investors (see page 21);
- > Foreign-Invested Company Limited by Shares (“**FICLS**”)<sup>6</sup> – a limited liability company whose registered capital is divided into shares (see page 21);
- > Foreign-Invested Investment Company (“**Holding Company**”)<sup>7</sup> – either a WFOE or an EJV set up specifically for the purpose of directly investing in other entities, as opposed to undertaking manufacturing or operational activities itself (see page 22).

Other possible business vehicles include foreign invested partnerships (see page 24) and branch offices of non-PRC enterprises and/or contractual arrangements (see page 25).

## Approval Authorities and Key Legislation

### Approval Authorities

Foreign investment in the PRC is governed by an approvals-based system. The approvals and procedures for the establishment of a new FIE and the rules for the acquisition of an existing PRC company or FIE differ from those governing the establishment or acquisition of a business by PRC investors.

The main governmental approval authorities for foreign investment are the National Development and Reform Commission (“**NDRC**”) and the Ministry of Commerce (“**MOFCOM**”). Foreign investment projects generally require the approval of, or filings with, the NDRC, and the approval of MOFCOM, and for those in the SFTZ and not on the Negative List, filing with the SFTZ authorities instead. These approvals are obtained at different levels of the PRC Government depending on the applicable category and the size of the project.

Some industries also have an industry-specific regulator whose approval is required for any foreign investment. For example, the China Banking Regulatory Commission (“**CBRC**”) is the banking industry regulator, the China Insurance Regulatory Commission (“**CIRC**”) the insurance industry regulator and the China Securities Regulatory Commission (“**CSRC**”) the securities industry regulator.

Further governmental authorities which may be involved in the approval, registration or filing process include:

- > State Administration for Industry and Commerce (“**SAIC**”), which is the company registration authority and approves the issue and change of business licences of PRC companies;
- > State Administration of Foreign Exchange (“**SAFE**”), which administers the PRC’s foreign exchange control system and whose approval is required in relation to certain transactions involving foreign currency; and
- > State-owned Assets Supervision and Administration Commission of the State Council (“**SASAC**”) or the Ministry of Finance (“**MOF**”), where a state-owned entity is involved.

## Key Legislation

Besides the general law such as the *PRC Company Law*, the key legislation regulating foreign investment in the PRC includes:

- > The Catalogue, setting out the types of activities and industries falling within each of the encouraged, restricted and prohibited categories;
- > The *PRC Wholly Foreign Owned Enterprise Law* and its implementing rules, which govern the establishment and operation of WFOEs;
- > The *PRC Sino-foreign Equity Joint Venture Law* and its implementing regulations, the main rules governing the establishment and operation of EJV;
- > The *PRC Sino-foreign Cooperative Joint Venture Law* and its implementing rules, the main rules regulating the establishment and operation of CJVs;
- > The *Provisional Regulations on Several Issues Concerning the Establishment of Foreign-Invested Companies Limited by Shares*<sup>8</sup>, the primary regulations on the establishment of FICLSs;
- > The *Provisions on the Establishment of Investment Companies by Foreign Investors and the Supplementary Provisions on the Establishment of Investment Companies by Foreign Investors*, which govern the establishment and operation of Holding Companies;
- > The *PRC Partnership Enterprise Law*, which governs the establishment and regulation of foreign-invested partnerships;
- > The *PRC Administration of Resident Representative Offices of Foreign Enterprises Law* and its implementing rules, which govern the establishment and operation of representative offices;
- > Separate rules for representative offices of foreign enterprises in specific industries, such as *Measures on the Administration of Foreign Insurance Institutions' Representative Offices in China*, *Measures on the Administration of Foreign-funded Financial Institutions' Representative Offices in China*, *Measures on the Management of Resident Representative Offices in China of Foreign Securities Institutions*, *Regulations on the Administration of Foreign Law Firms' Representative Offices in China* and *Measures on the Administration of the Examination and Approval of Permanent Representative Offices of Foreign Air Transport Enterprises*;
- > Rules on foreign investment in specific industries, such as the *PRC Regulations on the Administration of Foreign-Funded Banks* and its implementing rules, which govern the establishment and operation of foreign-invested banks; the *Provisions on the Administration of Foreign-invested Construction Engineering Service Enterprises*, which govern the establishment and operation of construction engineering service enterprises with foreign investment; and the *Measures for the Administration of Foreign Investment in the Commercial Sector*, which regulate investment in commercial sectors; and
- > *Procedures for the Administration of Strategic Investment in Listed Companies by Foreign Investors* and *Measures on the Administration of Acquisition of Listed Companies*, the main rules regulating foreign investment in shares of listed companies.

In addition, the *Regulation on Foreign Investors Merging with or Acquiring Domestic Enterprises* (the “**M&A Regulation**”) issued by MOFCOM, SASAC, SAIC, CSRC, SAFE and the State Administration of Taxation, together with the *Foreign-Invested Enterprises Equity Transfer Provisions* issued by MOFCOM and SAIC, provides the framework for acquisitions of PRC shares or assets by foreign investors. Together with the M&A Regulation, the PRC Government has also issued legislation such as the *State-owned Equity Transfer Tentative Administrative Regulations* (issued by SASAC and MOF) dealing with the transfer of state-owned enterprises.

Depending upon the industry, foreign investment in the PRC may also be subject to other special foreign investment regulations issued by MOFCOM or other industry regulators regulating foreign investment, for example, in the following sectors: telecom, civil aviation, mining, retail and wholesale, logistics, road transportation, direct selling, foreign trade, hospital, leasing, franchising, advertising, venture capital and auctioning.



## Foreign Exchange Control

The currency of the PRC is the Renminbi (the “**RMB**”), which is subject to foreign exchange control and is currently not freely convertible into foreign exchange. SAFE is the regulatory authority which administers all matters relating to the foreign exchange regime.<sup>9</sup>

SAFE-approved banks are authorised to buy and sell foreign exchange from/to their customers, including buying and selling RMB against hard currencies, such as the US dollar, Euro, Japanese yen and Hong Kong dollar. They include both PRC and foreign banks. Anyone in the PRC who requires RMB-forex conversion services, including FIEs, representative offices and foreign expatriates, must use one of these SAFE-approved banks.

Since the establishment of the RMB trade settlement pilot scheme in 2009, which allowed cross-border settlement in RMB for the first time, there have been significant developments in the “internationalisation” of the RMB, now globally ranked as the second most used currency in trade finance. For example, an FIE is now able to pay RMB dividends outside of the PRC to its foreign shareholders and foreign investors can now make capital contributions to FIEs in the PRC using offshore RMB.

The currency of the PRC is **Renminbi** (the “RMB”), which is subject to foreign exchange control and is not freely convertible into foreign exchange at this time

# Section three.

## Choosing Your Business Vehicle

An outline of the principal forms of business vehicles used by foreign investors investing in the PRC is set out below. Please also refer to Appendix three for a comparative table.

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## Equity Joint Ventures

EJVs can only be incorporated as independent legal persons in the form of limited liability companies.<sup>10</sup> For each EJV, there must be at least one foreign partner and one domestic partner. The liability of each partner to the EJV is limited to the amount of capital it agrees to contribute to the EJV's registered capital, whilst the EJV itself is liable for its debts to the extent of all its assets. However, unlike in many common law jurisdictions, investors will hold equity interests in an EJV, expressed as a percentage of registered capital, rather than shares.

In an EJV, the highest decision-making body is the board of directors, and not the shareholders. Minority investors, irrespective of their relative interests, will have a right of veto over certain major board decisions where unanimous approval is required by law. These decisions include mergers, divisions, termination and dissolution, changes in registered capital and amendments to the articles of association.

EJVs, as well as other entities such as CJVs and WFOEs, are subject to specific ratio requirements for "registered capital to total investment amount" (see page 29).<sup>11</sup> Approval to exceed these ratios may be applied for, but approval will only be granted in exceptional circumstances. The same ratio requirements also apply to CJVs and WFOEs.<sup>12</sup>

The main advantage of an EJV structure is certainty, as the regulatory framework for EJVs is older and more well-established than that of other business vehicles. EJVs were the first investment vehicle available after the PRC started to open up to foreign investment in 1979. In addition, EJVs are usually the vehicle of choice for domestic partners and regulators due to their relatively long history and "plain vanilla" nature. For these reasons, EJVs have in the past been the most commonly used foreign investment vehicle in the PRC.

The benefit of certainty, however, needs to be balanced against the relative inflexibility of the EJV structure, in particular, the requirement that profits can only be distributed in proportion to capital contributions.<sup>13</sup> Minority shareholders in EJVs benefit from certain statutory protections. For instance, unanimous board approval must be obtained for changes to capital or amendments to the articles of association, and in the event that a party intends to sell its equity interest, the other party has a statutory right of first refusal to purchase the interest.

Since 1 March 2014, EJVs are no longer required to have a minimum registered capital although a minimum registered capital may, however, still be imposed by other applicable industry specific rules and regulations or otherwise required by the authorities. In practice, an EJV needs to have capital to satisfy the needs of the business.

## Cooperative Joint Ventures

With a CJV, investors have the option of establishing an entity with a separate legal personality and limited liability (similar to an EJV) or a "partnership-type" structure with no separate legal personality and unlimited liability.<sup>14</sup>

- > CJVs with separate legal personality are established as limited liability companies. The liability of each party is limited to the amount of capital it agrees to contribute to the registered capital of the CJV and the cooperative conditions it agrees to provide to the CJV.<sup>15</sup> As with an EJV, an investor holds equity interests in a CJV rather than shares;
- > CJVs without separate legal status are less common than EJVs and have generally only been used in certain sectors such as oil exploration and mining. The structure is similar in form to a partnership in that the parties to the joint venture are subject to unlimited liability for the debts of the joint venture.<sup>16</sup> No separate business entity is created since the joint venture is merely a contractual arrangement.

Similar to EJVs, the highest decision-making body is the board of directors and minority investors will also benefit from similar protections given that unanimous approval is required in the case of mergers, divisions, termination and dissolution, changes in registered capital and amendments to the articles of association.

CJVs generally offer more flexibility than EJVs. Unlike EJVs, allocation of profits does not have to be in proportion to the parties' capital contributions and early recovery by the foreign party of its investment (as discussed below) is permitted (subject to the fulfilment of certain conditions).<sup>17</sup> The regulatory framework for CJVs is, however, not as well-established or as detailed as that for EJVs. Any gaps in the regulatory framework (and there are many) will need to be covered in the joint venture contract, often by reference to the EJV position.



One advantage of CJVs over EJV is that the foreign investor in a CJV may recover its investment ahead of the domestic partner during the term of the CJV, subject to approval from MOFCOM and the finance and tax authorities.<sup>18</sup> The methods used in practice include distribution of funds represented by the amount of a CJV's accumulated depreciation and amortisation expenses and distribution of profits to the foreign investor in priority to the domestic partner. If the foreign investor seeks to recover any of its investment ahead of the domestic partner, then it must first agree with the domestic partner that the domestic partner is entitled to receive ownership of all the CJV's fixed assets after the CJV's operating term expires, without compensation to the foreign investor. Early recovery of investment is only permitted when a CJV's distributable profits are positive and after all losses have been made up with corresponding profits. From a legal perspective, recovery of investment is not treated as involving a reduction in the registered capital of the CJV, but the foreign investor is required to undertake to assume joint and several liability for the CJV's debts to the extent of the amount of the investment recovered.

Since 1 March 2014, CJVs are no longer required to have a minimum registered capital, although a minimum registered capital may, however, still be imposed by applicable industry specific rules and regulations or otherwise required by the authorities. In practice, a CJV needs to have sufficient registered capital to satisfy the needs of its business.

## Wholly Foreign Owned Enterprises

WFOEs usually take the form of limited liability companies. However, they can also take other liability forms recognised under PRC law, subject to approval, but these are relatively rare. Where a WFOE is structured as a limited liability company, the liability of each investor in respect of the WFOE is limited to the amount of capital it agrees to contribute.<sup>19</sup>

WFOEs cannot be used for certain industries where the level of foreign investment is capped and a domestic partner is required. A joint venture entity must be used instead, for instance, in the case of a business carrying on the manufacturing of rail transportation equipment and construction and operation of nuclear power stations.<sup>20</sup>

One of the principal advantages of a WFOE is that it enables a foreign investor (or multiple foreign investors) to have complete freedom to implement the operational, investment and management strategies of its foreign parent, without having to take into consideration the interests, needs and agenda of a domestic partner. This makes WFOEs easier to manage. In addition, it is easier for foreign investors to protect their know-how and technology as there are no domestic partners who have access to it.

The disadvantages of a WFOE are generally practical ones. A foreign investor will not have the assistance of a domestic partner when obtaining government approvals, premises and land, and cannot benefit from the existing sales and distribution channels of a domestic partner. However, many foreign investors using WFOEs have found that doing business in the PRC is becoming less difficult over time and is less dependent on local connections.

Since 1 March 2014, WFOEs are no longer required to have a minimum registered capital, although a minimum registered capital may still be imposed by other applicable industry rules and regulations or otherwise required by the authorities. In practice, a WFOE needs to have sufficient capital to satisfy the needs of its business.

## Foreign-Invested Companies Limited by Shares

An FICLS is a limited liability company whose registered capital is divided into shares.<sup>21</sup> This is different to the more traditional forms of FIE, such as WFOEs, EJV or CJVs, where investors do not technically own "shares" but instead enjoy "equity interests", expressed as a percentage of the registered capital.

In an EJV or CJV where the board of directors is the highest decision-making body rather than the shareholders, minority investors, irrespective of their interests, will have a right of veto over certain major board decisions where unanimous approval is required by law. These decisions include mergers, divisions, termination and dissolution, changes in registered capital and amendments to the articles of association.<sup>22</sup>

In contrast, in an FICLS, the law does not require any decision to have the unanimous consent of shareholders. Only certain resolutions, such as amendments to the articles of association, mergers, divisions or dissolution of the FICLS, require a two-thirds majority of voting rights of the shareholders present at the shareholders' meeting. Other decisions can be adopted by simple majority. FICLSs therefore have more management flexibility than traditional FIEs as, subject to any higher voting thresholds incorporated into an FICLS' articles of association, the majority shareholder will have decision-making power provided that it holds over two-thirds of the issued shares in the FICLS. Minority shareholders in a listed FICLS enjoy additional protections at law, such as independent shareholder approval of related party transactions.

In addition, FICLSs are able to raise finance through a stock market listing. A traditional FIE must be converted into an FICLS in order to undertake such fund-raising activities.

Since 1 March 2014, FICLS are no longer required to have a minimum registered capital, although a minimum registered capital may still be imposed by other applicable industry rules and regulations or otherwise required by the authorities. In practice, an FICLS needs to have sufficient capital to satisfy the needs of its business. Promoters (founding shareholders) are prohibited from transferring their shares for one year after the establishment of an FICLS.<sup>23</sup> Transfers of promoters' shares after that time are subject to MOFCOM approval (with the exception of transfers of shares in an FICLS established in an FTZ), with the level of approval depending on the capitalisation and industry of the FICLS.<sup>24</sup>

## Holding Companies

Foreign investors may set up holding companies in the PRC to hold their investments in FIEs, although there are specific qualification requirements. These requirements can be onerous for both foreign and domestic investors. For example, a foreign investor must:

- > have a total asset value of no less than USD400m in the preceding year and must have previously established an FIE to which it has already paid up more than USD10m in registered capital; or
- > have already established no less than 10 FIEs and paid up (in aggregate) more than USD30m in registered capital.<sup>25</sup>

A Holding Company is strictly an investment and services company and is not permitted to engage in manufacturing operations.<sup>26</sup> Specifically, a Holding Company may engage in:

- > Investments – it may invest in areas where foreign investment is encouraged or permitted and in listed companies as a foreign strategic investor;
- > Services – it may provide its PRC subsidiaries with services required for their business operations; and
- > Trading – it may engage in trading activities, such as distributing products produced by its PRC subsidiaries in domestic or foreign markets.<sup>27</sup>

Subject to the satisfaction of certain criteria, a Holding Company can acquire the status of “regional headquarters” (“**RHQ**”). In order to acquire RHQ status, a Holding Company is normally required to have no less than USD100m of paid-up registered capital and have established a research and development institution. On obtaining RHQ status, a Holding Company may engage in additional permitted activities such as logistics services, establishing finance companies (with the approval of CBRC), undertaking outsourcing businesses, overseas project contracting businesses and overseas investment (with MOFCOM approval).<sup>28</sup>

Whilst a Holding Company is restricted in its operations, and faces high start-up costs with a minimum registered capital of USD30m,<sup>29</sup> a Holding Company does allow for the centralised coordination of marketing, distribution, training, finance and other administrative functions in a manner which is hard to achieve where the on-going cooperation of separate companies is required. It also allows for greater levels of debt finance than other investment options (see page 29).





## Foreign-Invested Domestic Companies

Since FIEs with foreign equity interests of 25% or more may enjoy certain benefits (eg tax benefits) which are unavailable to those with lower foreign equity levels, the approval certificate, business licence and foreign exchange registration certificate of a foreign-invested domestic company (an “**FIDC**”) are required to specify that its foreign equity is less than 25%.<sup>30</sup> The approval and registration procedures for FIDCs are, however, the same as those for other FIEs.

## Foreign-Invested Partnerships

A foreign-invested partnership (“**FIP**”) is a general or limited partnership with at least one foreign partner. Generally the formation of an FIP only requires the registration with SAIC. However, if the FIP is to engage in any project which is subject to government approval, such approval must first be obtained.

FIPs are subject to the same foreign investment industrial policies as other types of foreign investment vehicles. FIPs cannot be formed in industries where foreign investment is prohibited or foreign ownership is limited.

FIPs generally offer more flexibility than FIEs. Like CJVs, allocation of profit does not need to be in proportion to partners’ capital contributions. Partnership interest can be transferred without the consent of the other partners as long as this is expressly provided in the partnership agreement. An FIP also provides increased flexibility for governance structure, with partners permitted to structure their governance arrangements in their partnership agreement with relatively few constraints.

However, unlike FIEs, liability can be unlimited. For a general partnership, all partners will bear unlimited liability. In a limited partnership, partners can have limited liability, although there must be at least one general partner with unlimited liability.

FIPs do not have a minimum capital requirement.

## Representative Offices

Foreign entities may first wish to test the waters in the PRC with a representative office before embarking on the expense and administrative effort of setting up an FIE. Representative offices of foreign entities are not permitted to engage in revenue-generating business activities and can generally only engage in the following activities:

- > market research, presentation and promotion of activities relating to the products or services of the foreign parent; and
- > liaison activities relating to the sale of products or provision of services by the foreign parent as relating to purchases of goods or investments within the PRC.

A representative office must engage a local “foreign enterprise service corporation”, or any other entity designated by the PRC Government, to hire its local personnel. The complication for the foreign investor (apart from the cost involved) is that technically it does not directly employ any PRC staff, and so it is reliant on the service company to effect dismissals of PRC “employees”. Direct recruitment of PRC employees by the representative office is prohibited.

There is no minimum capital requirement for foreign investors to satisfy in order to set up a representative office.



## Branch Offices and Contractual Cooperation Management Contracts

Other means by which a foreign investor can enter the PRC market include:

- > **Branch offices:** Foreign investors may establish branch offices in the PRC to engage in business activities, but currently there are only regulations permitting foreign banks and insurance companies to do so. A branch office will not be recognised as a separate legal person from the foreign parent, which means that the foreign parent will be liable for all debts and liabilities incurred by the branch office in the PRC. Branch offices may conduct business in the PRC.
- > **Cooperation:** Foreign investors who do not wish to set up a presence in the PRC may choose to cooperate with a Chinese party either through a manufacturing contract or a processing/trade arrangement. Such relationships need to be carefully managed with special consideration given to IP issues and any necessary approvals.

## Section four.

# Setting up a New Business Vehicle

Establishing new FIEs used to be the traditional form of foreign investment in the PRC, and is still used where conducting business through a relatively clean vehicle is important to investors. FIEs can be established either to develop a new business, or to acquire the assets of an existing PRC business, operating these assets in the name of the new FIE.

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This section outlines some of the key steps and issues involved in the establishment and financing of limited liability companies FIEs (EJV, CJV, WFOE, FICLS), which follow a relatively settled path. Approval of a new FIE is as much an examination of its corporate form and governance structure as it is of the specific project or business for which the FIE is set up. There are distinct procedures and requirements in the banking and other regulated industries, where the approval of foreign investment falls within the jurisdiction of the industry regulator and MOFCOM has no substantive role.

## Project Application Report

The submission of a project application report is the first stage in the regulatory process for a new project. Approval needs to be sought from, or a filing made with, one of various levels of NDRC, depending on the size and sector of the project. The only categories of project requiring NDRC approval are those in the encouraged category of the Catalogue and requiring Chinese majority control, those in the restricted category of the Catalogue, and those specifically listed as requiring approval (such approval applies to both foreign and domestic investors) under NDRC rules. All other projects require only a filing to be made with NDRC.<sup>31</sup> NDRC will undertake a substantive examination of the project and the investors, and the project's impact on the use of resources, the environment, the economy and society.<sup>32</sup>

Similar procedures to those described above apply where the expansion of the production capacity of an existing project is being contemplated. Expansion of existing capacity is often an integral part of the introduction of foreign investment to an existing project in the PRC.

For a joint venture project, submission of a project proposal prepared by the Chinese investor is often a pre-requisite for the local NDRC to consent to submit the project application report. The main purpose of a project proposal is to present the case for the need for, and possibility of, a joint venture project. It is usually prepared after the joint venture parties have held preliminary talks and have achieved a basic agreement on the proposal.

## Name Reservation

All newly established FIEs require their proposed names to be reserved with SAIC. The name reservation is valid for six months (and can be extended for another six months subject to further approval) and will typically contain details such as the location, a unique industry trade name and the form of business organisation. The reserved name must be set out in the joint venture contract and the articles of association.

## Business Scope, Joint Venture Contract and Articles of Association

Formal approval of the establishment of an FIE is issued by MOFCOM or its local counterpart. In the case of a joint venture company, obtaining approval from MOFCOM requires investors to have agreed on and submitted to MOFCOM the joint venture contract and the articles of association (which mirror the joint venture contract and contain more detailed provisions with respect to the day-to-day management of the FIE). It is important that an FIE is established with the appropriate business scope, as companies in the PRC cannot engage in revenue-generating activities outside their business scope. Any change to the business scope will also require approval from the relevant authorities.

## Formal Establishment of an FIE

The issue of a business licence by SAIC marks the formal establishment of an FIE. SAIC is the official registry for PRC-registered entities and corporate information, such as shareholders details, share capital and the names of directors, must be filed with SAIC.

After an FIE is registered with SAIC and obtains its business licence, it will have the status of a legal entity in the PRC and may contract on its own behalf.

After obtaining its business licence, an FIE will typically deal with certain formalities and obtain certain licences necessary for its day-to-day operations, including registrations and licences relating to the enterprise code, foreign exchange, customs, statistics and tax matters.

## Financing

### Equity Financing

Equity is still the most usual method of financing an FIE. There are prescribed limits for the minimum ratios of an FIE's registered capital (share capital) to debt of between 7:3 and 1:2 although these minimum ratios do not apply to Holding Companies. In respect of Holding Companies, the minimum ratio of registered capital to debt is between 1:4 and 1:6. Other than Holding Companies, whose contributions to registered capital must be made in cash<sup>33</sup> and unless otherwise required by law, capital contributions of FIEs may be made in the form of cash, equipment, machinery, plant, buildings, land use rights, intellectual property rights and/or proprietary technology, provided that any such contributions must belong to the contributing partner and must be free from any encumbrances.<sup>34</sup>

The following forms of non-cash assets may not, however, be contributed as registered capital: labour, ability to obtain credit, name of a natural person, goodwill, franchise rights or any asset over which a security interest has been created.<sup>35</sup>

In-kind contributions are required to be valued by a valuation firm. If state-owned assets are to be contributed to an FIE, they must be valued by a valuation firm which is competent to conduct state-owned asset valuations and the results of the valuation must be filed with the competent state-owned assets authority.

The registered capital may be contributed by the parties to the FIE either in a lump sum or in instalments.

### Debt Financing

There are restrictions on the amount that certain FIEs may borrow. FIEs (other than Holding Companies) technically cannot borrow an amount exceeding the difference between the approved total investment amount (registered capital plus debt) and the approved registered capital. However, in practice, only foreign currency borrowing from non PRC entities is subject to these regulatory restrictions whereas borrowings in RMB are generally not.



## Section five.

# Buying a Business in the PRC – Mergers & Acquisitions

As the market in the PRC continues to open up, more and more international investors are moving away from investing capital in WFOEs or joint ventures with domestic partners, towards directly acquiring businesses from domestic owners.

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This section considers some of the features of private acquisitions in the PRC and in particular some of the differences between acquisition structures in the PRC and those with which international investors may be more familiar. It is not comprehensive, and is intended merely to highlight issues.

An acquisition of an equity interest in a domestic entity will result in the entity becoming an FIE. Whether a foreign investor is acquiring an interest in an existing FIE, or an existing domestic enterprise or acquiring PRC assets, it will need to comply with the foreign investment laws and regulations, including the Catalogue and the M&A Regulation.

## Governmental Approvals

In general, the acquisition of a PRC company or assets by a foreign entity will need the approval of at least one governmental authority. This approval will be a substantive one and the relevant approval authority may require amendments to the transaction documents. In addition, in certain regulated industries, such as the financial sector, the foreign investor may be required to meet certain investor qualifications.

In any acquisition, the approvals required for that particular industry will need to be identified both as a matter of practice and law. Usually, MOFCOM will be the approval authority for an acquisition of PRC companies or assets by a foreign purchaser. In some industries there may be a need for approval by an industry specific regulator or specific requirements may form part of the approval process. In some industries, approvals may be required from a number of authorities. It is not safe to assume that approval of a transaction by one authority means that every other authority will approve it. In others, the only substantive approval required may be from MOFCOM or its local commissions or bureaux, depending on the size of investment and type of industry.

The financial sector (including banks, insurance companies, securities firms and fund management companies) is somewhat different. The main approval authorities for the financial sector are CSRC, CIRC or CBRC, as opposed to MOFCOM. For foreign acquisitions in PRC securities companies or fund management companies, MOFCOM still acts as an approval authority, but it only conducts a procedural approval and the substantive examination and approval are conducted by CSRC.

Other approvals or registrations are also commonly required from SAFE (foreign exchange issues) and SAIC (corporate registrations). Such approvals or registrations are normally more procedural in nature, as they are obtained after substantive examination of the project by MOFCOM and other approval authorities has taken place.

In addition, some of the target's permits or licences may need to be re-issued to reflect the foreign ownership of the target (even if the target's business remains the same), requiring further involvement of regulators.

Additionally, an advance filing to central MOFCOM is required if an acquisition which results in control passing to a foreign entity involves a key industry, has an impact on the economic safety of the PRC or results in a transfer of the controlling interest of a domestic enterprise that owns any famous or traditional brands.

In particular, certain acquisitions by foreign investors of PRC enterprises or PRC assets may be subject to review on the grounds of national security.<sup>36</sup> The national security review does not apply to acquisitions of PRC financial institutions by foreign investors, however, which will be subject to their own specific set of rules (see page 37).

## Buying Shares in a Listed PRC Company

Acquisitions of shares in listed PRC companies are subject to the *Measures for the Administration of Strategic Investment in Listed Companies by Foreign Investors* ("**Strategic Investor Measures**") and the revised *Measures for the Administration of Acquisition of Listed Companies* (the "**Takeover Code**"). The Takeover Code expressly states that foreign investors will be required to comply with the Takeover Code and any other relevant provisions relating to acquisitions of listed companies or interests in shares in listed companies in the PRC.

It is beyond the scope of this guide to cover the Strategic Investor Measures, the Takeover Code or acquisitions of shares in listed PRC companies in detail. However, in brief:

- > Foreign investors are permitted to acquire certain types of shares in PRC companies limited by shares without the need for approvals from any PRC authority. These are shares publicly traded on an overseas stock exchange (such as H-shares publicly traded on the Hong Kong Stock Exchange) and B-shares publicly traded on the

Shanghai or Shenzhen stock exchanges;

- > Foreign investors are permitted to acquire A-shares in a listed company provided that they satisfy certain qualification requirements set out in the Strategic Investor Measures. The acquisition must also comply with the following requirements:
  - the A-shares can only be acquired by a foreign investor through transfer by agreement, placing of new shares or other methods prescribed by laws and regulations;<sup>37</sup>
  - the strategic investment can be made in phases but the shares acquired by the foreign strategic investor upon completion of its initial investment cannot be less than 10% of the total number of shares in issue;<sup>38</sup>
  - the acquired A-shares will be subject to a three year lock-up;<sup>39</sup>
  - the foreign strategic investor must comply with any applicable foreign shareholding limit as prescribed in the relevant laws and regulations and obtain MOFCOM approval;<sup>40</sup> and
  - where the strategic investment involves shareholders of state-owned shares, the relevant provisions on the administration of state-owned assets must be complied with;<sup>41</sup>
- > Qualified Foreign Institutional Investors (also known as QFIIs) and Renminbi Qualified Foreign Institutional Investors (also known as RQFIIs), licensed by CSRC, may acquire A-shares publicly traded on the Shanghai or Shenzhen stock exchange;
- > The launch in October 2014 of Shanghai–Hong Kong Stock Connect<sup>42</sup> enables investors on the Shanghai and Hong Kong stock exchanges, through their local securities brokers, to place orders to trade eligible shares listed on the stock exchanges of the two sides. A similar programme for the Shenzhen and Hong Kong stock exchanges is under discussion by the authorities;
- > Subject to certain exemptions, the Takeover Code requires a party that acquires shares which would result in its shareholding (taken together with any person acting in concert with it) exceeding 30% of the issued share capital to make a mandatory offer for the remaining shares;
- > The Takeover Code also sets out the offer timetable and mechanics for offers, circumstances in which an offer may be withdrawn or revised, prohibited conduct during an offer period, detailed requirements relating to the content of takeover documents and their submission to CSRC and rules on price, payment and the disclosure of interests in shares.
- > Hong Kong and Macau individual residents who meet certain criteria can open securities trading accounts to trade A-shares directly.

## Structuring an Acquisition

### Onshore versus Offshore Transactions

A foreign investor considering an acquisition in the PRC may consider using its existing presence in the PRC (if it has one) to make the acquisition. This will normally simplify and shorten the acquisition process, as these investments are generally subject to less scrutiny than new investment. An investment by a Holding Company, a foreign-invested venture capital company or an FIP primarily engaging in investment business will still, however, be regulated as a foreign investment or foreign acquisition, and the Holding Company, venture capital company or FIP primarily engaging in investment business will be treated as a foreign investor for the purposes of their investment activities in the PRC. If the PRC assets or companies are held by an offshore entity and the investor acquires that offshore entity, then, except in relation to anti-trust and national security issues, there will often be no need for any approvals from within the PRC.

International investors very often invest in the PRC through a special purpose vehicle incorporated in a jurisdiction such as Mauritius, though this may not always be feasible in the financial sector and other regulated industries (where the qualifications of the investing entity are subject to scrutiny). Tax issues will impact on the choice of jurisdiction, but investors should also consider whether approvals in the offshore jurisdiction would be required for the entity to invest in a particular sector in the PRC, as well as whether their structure facilitates a subsequent exit through the sale or listing of the offshore entity.

All newly established FIEs require their proposed names to be reserved with SAIC

## Asset versus Equity Acquisitions

Equity acquisitions are currently more common than asset acquisitions in the PRC for the following reasons:

- > the procedures for asset purchases from a domestic company are generally more complicated than those for share or equity purchases;
- > the tax burden in relation to asset purchases is generally more onerous than that of share or equity purchases; and
- > the regulatory and procedural requirements for a business acquisition are potentially more complex than those for either a transfer of equity interests in a PRC entity or a transfer of shares in the offshore holding entity, given that there is an additional requirement to notify and obtain confirmation from creditors that they do not object to the transfer.<sup>43</sup> Employees of the target are not automatically transferred to the transferee of the business, which means that any employment contracts would have to be terminated and new contracts entered into with the transferee.

Transfers of equity interests to non-shareholders in a PRC private limited liability company are generally subject to the following restrictions under the PRC Company Law:

- > the other existing investors have rights of first refusal over the interests to be transferred (unless the articles of association of the company provide otherwise);<sup>44</sup>
- > the consent of more than half of the other existing investors is required (unless the articles of association of the company provide otherwise) provided that the investors who do not consent to such transfer purchase the equity interests available for sale. If such investors do not purchase the equity interests, they will be deemed to have consented to such transfer.<sup>45</sup>

PRC law also grants certain consent rights to the existing investors in the case of any transfer of equity interests in an FIE, including the following:

- > In the case of an EJV, all of the other existing investors need to give their consent to any transfer of equity interests in the EJV before the transfer may take place (dissenting investors will have to purchase the equity interests being transferred);<sup>46</sup>
- > Prior to any acquisition of equity in the EJV, a resolution of the board of directors of the EJV approving the transfer is required in order to obtain MOFCOM approval.<sup>47</sup>

## State-owned versus Private Enterprises

Most privately owned businesses lack the scale and reach of their state-owned counterparts; however, the regulatory and political processes involved in investing in a private enterprise are comparatively easier than those for investing in a state-owned enterprise.

Because of concerns over the transfer of state-owned assets at an undervalue, a transaction involving equity or assets to be transferred by a state-owned entity to a foreign or privately owned entity requires approval by and filing or notification to the competent state-owned assets authority, which may be SASAC or MOF (the latter is in charge of the administration of state-owned assets for financial institutions). This procedure requires the subject matter of the transaction to be valued by a qualified PRC valuation firm in order to ensure that the price to be paid fairly reflects the value of the assets being transferred.

Where the equity or assets are state-owned, the process will be subject to specific requirements set out in the *Enterprise State-owned Asset Valuation Interim Provisions*, which are overseen by SASAC. A state-approved valuer will need to be appointed, only certain valuation methodologies may be used and the price must be no less than 90% of the valuation result unless special approval is granted.<sup>48</sup> The valuation will also need to be filed with SASAC or its local branch.<sup>49</sup> The valuation requirements do not, however, apply to the purchase of shares in a listed company from a state-owned shareholder (such transactions are instead benchmarked to the average trading price of the shares), though the state-owned assets approval or filing procedures will still apply.<sup>50</sup> Equity or assets of state-owned financial institutions generally fall under MOF's jurisdiction.

To transfer state-owned assets, a transferor is generally required to conduct the transfer by way of auction or a bidding process.<sup>51</sup> PRC law sets out certain requirements for the conduct of such process.



## Purchase Price and Payment Flows

Government authorities have historically preferred fixed price transactions involving a fixed amount of foreign currency to be paid into the PRC within a specified time. Consideration needs to be given to closing mechanics and arrangements to meet government requirements and expectations. Also, PRC law limits the scope of any non-cash elements which can be used by a foreign investor to pay for its investments. The issue is complicated further by the requirement that where a domestic enterprise is converted into an FIE as a result of an acquisition of equity by a foreign investor, the entire purchase price must be paid within a maximum of one year after completion.<sup>52</sup> Whilst escrow or retention arrangements are relatively common for M&A transactions in the PRC, their usefulness as a price adjustment mechanism is therefore limited.

## Other Issues

### Employees

Unless there are redundancy plans, normally no particular approval or consultation process is required in relation to the employees of the target business. However, an employee resettlement plan must be submitted for approval in the case of a transaction involving foreign investment in the equity of a domestic enterprise, or the acquisition of domestic PRC assets by a foreign investor or FIE.<sup>53</sup>

On transfer of a business, employees are not automatically transferred to the acquirer. Instead, the employment contracts with the original employer must be terminated and new contracts entered into by the acquiring entity. This would give rise to compensation issues on termination. The period of services of an employee with the original employer must be recognised by the acquiring entity unless severance pay is made to the employee by the original employer in respect of termination of his or her employment.<sup>54</sup>

### Anti-trust and Merger Control

The PRC *Anti-Monopoly Law* (the “**AML**”) introduced a comprehensive merger control regime in the PRC. Since its inception in 2008, the PRC’s merger control regime has evolved to become one of the world’s most established competition law regimes, alongside the US and EU systems.

#### Transactions covered by the AML

The AML applies to all “concentrations of undertakings”. This concept includes (i) mergers of undertakings; (ii) an undertaking’s acquisition of control over any other undertaking by way of acquisition of equity interests or assets; and (iii) an undertaking’s acquisition of control, or decisive influence, over any other undertaking by way of contract or any other means. Although not being expressly provided for under PRC law, in practice, joint ventures are considered by MOFCOM as a form of concentration of undertakings and are also subject to MOFCOM review under the AML.

#### Notification thresholds and stand still requirements

According to the *Provisions of the State Council on Notification Thresholds for Concentrations of Undertakings*, concentrations of undertakings are subject to mandatory notification requirements if in the last financial year:

- > the combined aggregate worldwide turnover of all undertakings to the concentration was more than RMB10bn and the turnover within the PRC of each of at least two of the undertakings to the concentration was over RMB0.4bn; or
- > the combined aggregate PRC turnover of all the undertakings to the concentration was more than RMB2bn and the PRC turnover of each of at least two undertakings to the concentration was over RMB0.4bn.

Any concentration of undertakings that fulfils the above thresholds must be notified to MOFCOM and the parties must not implement the transaction until MOFCOM has issued its final decision to clear the concentration. Undertakings that implement a concentration before the clearance has been granted by MOFCOM, or fail to notify when the above thresholds are met, can be subject to an order to cease the implementation of the concentration and/or to take actions (such as the disposal of shares or assets) necessary to restore the situation to what it was prior to the concentration, and a fine may be payable of up to RMB500,000.

### Concentrations below the thresholds

Concentrations below the thresholds do not have to be notified to MOFCOM. However, if the concentration is likely to have the effect of eliminating or restricting market competition, it may still be investigated by MOFCOM and prohibited.

### The notification procedure

For concentrations subject to mandatory notification requirements, the merger review process under the AML is divided into two phases. The initial or Phase I review must be completed within 30 days after a complete notification has been filed.<sup>55</sup> Within this time period, MOFCOM will have to decide either to allow the concentration or to launch an in-depth or Phase II review. If a Phase II review is initiated, MOFCOM has another 90 days, which may be extended by a further 60 days, to issue its final decision on the case.<sup>56</sup> Under MOFCOM's practice, these time periods are measured in calendar days.

The Phase I review will commence only when MOFCOM decides that it has received a complete notification and informs the notifying parties in writing that it has formally accepted the notification. Since the AML came into force, experience has shown that it can take weeks or several months from the initial submission of a notification for MOFCOM to formally accept it. In most cases, MOFCOM will ask several rounds of questions before formally accepting the notification, requiring the parties to submit additional data and information.

As with other merger control authorities, MOFCOM has a pre-notification consultation procedure. Parties to a concentration can use this procedure to consult with MOFCOM on issues such as whether a filing should be made, what information is required by MOFCOM, how the relevant markets should be defined, and similar issues. In practice, this is used infrequently.

MOFCOM adopts a simple case review procedure, under which parties to a transaction may choose to file certain qualifying cases, such as where the parties have low market share or pure foreign-to-foreign transactions with no effect in China, as "simple cases". If simple case notification is accepted by MOFCOM, the case will be published on its website for 10 days, during which time third parties may challenge the simple case designation. If no challenge is brought within this 10-day period, the case may be eligible for (but is not guaranteed) fast-track review by MOFCOM.

### Substantive review

The substantive test under the AML is whether a concentration "has or is likely to have the effect of precluding or restricting competition".<sup>57</sup> If this is found to be the case the concentration is to be prohibited unless the parties are able to prove that the concentration provides pro competitive effects that clearly outweigh the adverse impact, or that the concentration conforms to the requirements of social and public interest.<sup>58</sup>

### Remedies

Clearance decisions can be issued with 'conditions' attached to them. Other than the substantive competition issues (for example, the parties are direct competitors, operating in closely related markets or having strong market positions) arising from the proposed transaction, industry policy and/or foreign investment policy may also be an important factor in MOFCOM's decision to impose remedies.

Either MOFCOM may require or notifying parties may suggest remedies to avoid the concentration being prohibited. Protracted discussions on remedies with MOFCOM may risk a more time consuming process and a Phase II or even more extended investigation, which will delay completion and cause a longer period of uncertainty for the transactions involved. As of 31 December 2014, twenty-four transactions have been cleared with conditions (including either structural remedies or behavioural remedies or a mix of both) and two transactions have been prohibited (the Coca-Cola / Huiyuan deal in 2009 and P3 Alliance in 2014).

### Enforcement since the AML came into force

According to the most recent published information from MOFCOM, by the end of 2014, MOFCOM had issued clearances for 985 cases, of which 961 cases were cleared unconditionally.

## National Security Review

Certain acquisitions by foreign investors of PRC enterprises or PRC assets may be subject to review on the grounds of national security by a Ministerial Committee jointly headed up by NDRC and MOFCOM together with the relevant ministries for the particular industry in question:

- > acquisitions of a controlling interest in a PRC enterprise within a sensitive sector, such as key agriculture, key energy and resources, key infrastructure, key transport systems, key technology and critical equipment manufacturing sectors, which may affect national security; or
- > acquisitions by a foreign investor of any stake in a PRC military or military supportive enterprise, any enterprise located in the surrounding area of important or sensitive military facilities and any other enterprise which is of importance to national defence security.

The national security review will assess the impact of the acquisition on (i) national defence, productivity, supply capabilities, (ii) operational stability of the PRC economy, (iii) social order and (iv) research and development of the PRC's technologies key to national security. The national security review requirement does not apply to acquisitions of PRC financial institutions by foreign investors, which will be the subject of separate regulations yet to be published.

## Restrictive Covenants

There are fewer restrictions on the type of non-compete obligations which can be imposed on PRC entities than in other jurisdictions. However, as a matter of employment law, any restrictions on individuals must be reasonable and, under the *PRC Labour Contract Law*, the employee must be compensated if the restrictions are to survive termination of employment.

## Taxes on Transfer of Shares

PRC stamp duty is payable on the sale of shares in listed companies listed on a PRC stock exchange at the rate of 0.1% and on the sale and purchase of equity interests, or shares, in non-listed companies at a rate of 0.05%. PRC stamp duty is not payable on the transfer of shares in companies listed on an overseas stock exchange provided that the transfer is not executed or received in the PRC.

# Section six.

## Directors and Governance

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## Board of Directors

The board of directors of an FIE is the body that is responsible for the overall governance and management of the company. However, in a 'traditional' form of FIE such as an EJV or CJV, the board of directors is also the highest decision-making authority of the company and exercises powers and functions which would normally be reserved for shareholders in other jurisdictions, ie there is no separate shareholders' meeting to which the board of directors is responsible.<sup>59</sup>

The corporate structure of an FICLS or WFOE is subject to the PRC Company Law, under which the board of directors is responsible to the shareholders' meeting of the FICLS or the shareholders' committee of the WFOE, as the case may be. Accordingly, the shareholders' meeting or committee is the highest decision-making authority and makes decisions on major issues affecting the company, such as amendments to the articles of association and increases or reductions of capital.

An FIE established in the form of a limited liability company is required to establish a board of directors of between three to 13 members,<sup>60</sup> save that a WFOE (i) with a comparatively small number of shareholders, or (ii) which is comparatively small in scale, may consider having one executive director instead of a board of directors.<sup>61</sup> An FICLS must establish a board of between directors of five to 19 members.<sup>62</sup>

The term of office for a director of an EJV must not be more than four years, and for a director of a CJV, WFOE or FICLS three years, all renewable upon re-election.<sup>63</sup>

## Directors' Duties

PRC law does not have a concept of 'fiduciary' duties as they are generally understood in common law jurisdictions.

The duties expressly owed by a director of a company under the PRC Company Law are the duty of loyalty and the duty of diligence.<sup>64</sup> The duty of loyalty is not expressly defined, but is generally understood to require a director to perform his or her position so as to avoid conflicts of interest and to protect and act in the best interests of, and for the benefit of, the company. The duty of diligence is also not expressly defined, but is generally understood to require a director to exercise due care and to protect the interests of the company.

Directors are also expressly prohibited from certain acts which may cause them to act contrary to their duties of loyalty and diligence to the company.

Although these duties appear somewhat similar to the fiduciary duties of a director under common law, they are not exactly the same and should not be equated.

## Board of Supervisors

FIEs are generally required to establish a supervisory board, which cannot have less than three members. FIEs (other than FICLSs) with a comparatively small number of shareholders, or which are comparatively small in scale, may have one to two supervisors rather than a supervisory board.<sup>65</sup>

The members of the supervisory board must include representatives of the shareholders and an appropriate proportion of representatives of the company's employees (not less than one-third of the total number of members on the supervisory board with the specific proportion being provided for in the company's articles of association). Directors and senior management personnel may not concurrently serve as supervisors.<sup>66</sup>

The supervisory board is a body that supervises the board of directors and may exercise functions and powers that include:

- > examining the company's financial affairs;
- > supervising the acts of the directors and senior management in the performance of their duties to the company; and
- > proposing the dismissal of directors and senior management who have violated any laws, administrative regulations, the company's articles of association or shareholders' resolutions.<sup>67</sup>

## Senior Management

Senior management in FIEs are important as they are in charge of the day-to-day operations and management of the company and have rights and functions which are specifically provided for by law. An FIE must have a manager (or managers) who is engaged, or dismissed, by the board of directors. The manager (or managers) is accountable to the board of directors and exercises functions and powers that include:

- > being in charge of the production, operation and management of the company;
- > organising the implementation of the company's annual business and investment plans;
- > proposing the engagement or dismissal of the company's deputy manager (or deputy managers) and personnel in charge of financial affairs; and
- > engaging or dismissing other management personnel, other than those to be engaged or dismissed by the board of directors.<sup>68</sup>

To the extent that the functions and powers of the manager (or managers) are otherwise provided for in the company's articles of association, the articles will prevail.<sup>69</sup> The manager (or managers), if not a director(s), is required to attend meetings of the board of directors as a non-voting attendee(s).<sup>70</sup>

## Legal Representative

The legal representative of a company holds a special position within the company and is the officer with the legal power to represent, and enter into binding obligations on behalf of, the company. A legal representative's acts, when concluding a contract, are binding on the entity, even where made beyond his or her authority, unless the counterparty knew, or should have known, that the legal representative was exceeding his or her powers when entering into the contract. The chairman of the board of directors, executive director (where there is no board of directors) or general manager of the company can be the legal representative.<sup>71</sup>

## Liability of Directors and Officers

### Penalties

A director, supervisor or senior manager who violates any laws, administrative regulations or the provisions of the company's articles of association during the performance of his or her duties which results in losses to the company will be held liable for damages.<sup>72</sup> There is, however, no clear guidance in the PRC as to how the amount of compensation will be determined.

A director or senior manager in breach of his or her duties may be subject to civil liabilities (including requirement to pay damages, return of assets, etc.),<sup>73</sup> as well as fines and administrative or criminal punishment.

In relation to companies limited by shares, collective responsibility may fall upon all the directors if a specific board resolution to approve a matter was passed in violation of laws, administrative regulations or the articles of association of the company, causing serious losses to the company. A director will only be released from any such liabilities if the director is proven to have expressed his opposition to the resolution when it was put to the vote, and such opposition was recorded in the minutes of the board meeting.<sup>74</sup>

While there is no equivalent provision under PRC law for limited liability companies, the court or an arbitration tribunal is likely to determine the allocation of liability between responsible parties using the same principles.

### Claimant

If a director or senior manager violates the laws and administrative regulations or the provisions of the articles of association in the performance of his or her duties, both the company and the shareholders are entitled to bring a claim for a breach of duty.<sup>75</sup>

### Directors'/Senior Management Liability Insurance

It may be possible for a director or senior manager to manage his or her risk of exposure by obtaining an indemnity from the company. In addition, a listed company's directors or senior manager may also request that the company put in place liability insurance.<sup>76</sup>

Directors' liability insurance in the PRC typically covers liability incurred by a director to third parties in the course of acting in the capacity of a director in respect of which the director is unable to obtain reimbursement from the company. It does not cover insider trading, bribery or any criminal offences committed by the director, or death, disease or personal injury directly or indirectly resulting from the acts of the director.





# Section seven.

## The Business

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## Exchange Controls and Remittance of Profits

When an FIE is established, it must register with SAFE after its business licence is issued.

Under the *Regulations for the Administration of Domestic Foreign Exchange Accounts*, an FIE must maintain separate foreign exchange bank accounts for current account items and capital account items.

In general, current account foreign exchange can be transferred freely into and out of the PRC,<sup>77</sup> while capital account foreign exchange is highly restricted in its transfer into and out of the PRC and any such transfers require SAFE approval, though in recent years, many SAFE approval requirements have been replaced by registration requirements in SAFE's foreign exchange system as China moves towards internationalisation of the RMB. Current account items include transactions that recur in the course of international receipts and payments and which do not have the transfer of capital as their objective, for example, revenue and expenditure from international trade in goods and services.<sup>78</sup> Capital account items are transactions arising from the inflow and outflow of capital, for example, direct investments, loans and securities investments.<sup>79</sup>

Remittance of profits from the PRC to outside the PRC by an FIE is not subject to the prior approval of SAFE. Tax filings and allocations to statutory funds must be completed before any profits can be distributed, however, and where the profits being remitted exceed USD50,000, an FIE will need to present the necessary supporting documents to the foreign exchange bank.<sup>80</sup> A summary of the process and documents required for the remittance of foreign exchange dividends is set out in Appendix four.

The same requirement, where applicable, applies also to the remittance of RMB dividends.

## Human Resources

### Foreign Employees

Foreign employees require an Employment Permit and a Residence Permit if they are employed by an employer in the PRC, including the branch or representative office of a foreign company.<sup>81</sup>

In addition, an employer is generally required to prove that a 'special need' exists before employing a foreign national (defined as the requirement to fill a position for which there is a temporary shortage of suitable local candidates).<sup>82</sup> The foreign employee must not have a criminal record, be at least 18 years old and in good health, have a valid passport or other travel document, and have the necessary professional skills required for the relevant position.<sup>83</sup>

The procedure for employment of a foreigner by an FIE is as follows:<sup>84</sup>

- > the employer must complete the Application Form for the Employment of Foreigners and submit this to the Labour Bureau of the relevant region, together with the employee's résumé, a letter of intention of employment, an explanation for the employment, the professional qualifications of the prospective employee, the employee's medical certificate of health and any other relevant documents required by regulations;
- > after the appropriate documents are examined and approved and comments by the Labour Bureau considered, an Employment Licence will be issued;
- > the employee must submit the Employment Licence and an invitation letter from his or her employer to his or her local PRC embassy to apply for a work visa to enter the PRC; and
- > within 15 days after the employee enters the PRC, the employer and the employee must go to the Labour Bureau, with the Employment Licence, an employment contract (with a maximum five-year term) and the employee's passport, to complete a Foreigner Employment Registration Form and receive an Employment Permit. This Employment Permit authorises the employee to work only in the area specified in the Employment Permit and to apply for a Residence Permit.

A foreigner employed by a PRC legal entity in the PRC is protected by PRC employment legislation, although his employment contract may not be recognised if he does not hold a valid Employment Permit.<sup>85</sup> A foreigner who is not directly employed by a PRC legal entity (for example, under a secondment arrangement instead) although not subject to PRC employment legislation, enjoys certain minimum protections such as a minimum

wage, standard working hours, standards of hygiene and rest, and leave provisions in accordance with the State standards (see below). However, a foreign employee must be based within the geographic area specified in his or her Employment Permit.<sup>86</sup>

Once the foreign employee has commenced work, his or her Employment Permit must be inspected annually. If the inspection deadline expires without an inspection taking place, the Employment Permit will be immediately revoked.<sup>87</sup> The Employment Permit will also be revoked if the employee's Residence Permit is revoked due to any violation of PRC law or if the employment contract is terminated.<sup>88</sup>

### Local Employees

A foreign incorporated company employing PRC nationals to engage in business in the PRC must do so through a local presence (see Section 3). Employing PRC nationals directly will expose the foreign employer to tax residency and other compliance risks.

In contrast, FIEs may recruit and hire local employees directly. Some FIEs choose to outsource employment of PRC nationals (via a labour dispatch arrangement) or outsource the relevant human resource functions (such as payroll and social insurance contributions) to a local employment agency to deal more efficiently with various aspects of local employment law. As of 1 July 2013, the outsourcing of employment is limited to staff in temporary, ancillary or replaceable positions only and the number of dispatched staff cannot exceed 10% of a company's total workforce, although labour dispatch arrangements entered into prior to 28 December 2012 will continue in effect until expiry.

Contracts with local employees are subject to PRC employment legislation, which provides that all employers and employees must execute employment contracts defining the parties' rights and obligations, including the term, nature of the job, safety and working conditions, remuneration, discipline, and conditions for termination and breach of contract.

Representative offices are subject to different rules than FIEs. All local employees hired by representative offices must be indirectly employed via a local "foreign enterprise service corporation" or any other entity designated by the PRC government.<sup>89</sup> Typically, the foreign enterprise services corporation receives a management fee from the representative office for each employee as well as payment of any salary and benefits and then on-pays the employee's salary and benefits. Direct employment of PRC nationals by representative offices is prohibited.

Under PRC employment legislation, mandatory working conditions for PRC employees include the following:

- > **Minimum wage:** There is a minimum wage requirement, which is determined at a municipal or provincial level.
- > **Employee contributions:** Employers must deduct and withhold employee personal income tax, social security, housing fund and related payments from an employee's wages and are responsible for making these payments.
- > **Reduction of wages:** Employers may reduce workers' wages only in limited circumstances provided for at law, or in the relevant employment contract and rules and policies of the employer (in certain circumstances). Employers may only delay wage payment in particular circumstances, such as during an event of force majeure or cash flow difficulties (with consent from the employees' trade union).
- > **Leave:** An employee is entitled to statutory paid annual leave proportionate to his total work life. In addition, employees may also be entitled under relevant provisions to paid leave in special circumstances such as marriage and maternity..
- > **Overtime:** The standard working week is five eight-hour days.<sup>90</sup> Overtime may not generally exceed one hour per day although, under special circumstances, this may be longer (but in any event no more than three hours per day and 36 hours per month). Overtime on a normal working day must be paid at a rate not lower than 150% of the worker's wage. Overtime on a designated day off (if time off is not given in lieu) must be paid at a rate not lower than 200% of the worker's wage. Overtime for statutory holidays must be paid at a rate not lower than 300% of the worker's wage.<sup>91</sup>
- > **Occupational health and safety:** Employers must have in place occupational health and safety programmes in the workplace, and conduct regular physical examinations for employees in hazardous occupations. Employees between the ages of 16 and 18 are also protected under special occupational health and safety measures, which include special procedures for hiring minors.



## Trade Unions

All employees in the PRC are entitled to join a trade union. If there are 25 or more trade union members in an entity, a trade union standing committee must be established within that entity.<sup>92</sup> Where the number of trade union members is less than 25, the members may elect to establish a trade union standing committee, either independently or together with the trade union members employed by another entity.<sup>93</sup>

The powers of trade unions under PRC law include the following:<sup>94</sup>

- > to assist employees in entering into employment contracts;
- > to negotiate and execute collective agreements;
- > to intervene in the case of any inappropriate disciplinary actions against employees;
- > to negotiate with employers on behalf of employees in the case of any violation of employees' lawful rights;
- > to supervise the design and construction of employee safety and hygiene facilities;
- > to participate in the mediation of labour disputes; and
- > to assist employers in the administration of employee benefits.

In addition to the above, the trade union representative of an EJV has the right to attend the sections of board meetings during which labour issues are discussed, although they do not have any voting rights in relation to any board decisions to be made. This is not expressly required in the case of other types of FIEs.

## Pensions and Social Security

Social insurance is a mandatory, non-profit social security system established by law in the PRC.<sup>95</sup> Employers and PRC employees must participate in the PRC social insurance system for unemployment, old age pensions, medical treatment, work-related injuries and maternity care and in the housing fund system. In respect of non-PRC employees, the corresponding local rules have yet to be passed in several cities.

## Termination and Redundancies

**Termination:** An employee may be dismissed without notice only in certain circumstances, such as a serious violation of workplace rules or if the employee is convicted for a criminal offence ("**Summary Dismissal**").<sup>96</sup>

An employee may be dismissed upon 30 days' notice or paying the employee one month's salary in lieu of notice, should the employee:<sup>97</sup>

- > be unable to take up his original duties or any new duties upon returning from non-work related medical treatment for illness or injury;
- > be unqualified for the position and remain unqualified even after receiving training or a transfer to another position; or
- > be unable to agree with the employer, after mutual consultation, to vary the employment contract when the purpose for which the employee was originally hired has significantly changed or no longer exists.

**Unfair dismissal:** In the PRC, except for circumstances leading to Summary Dismissal, it is illegal to dismiss an employee:<sup>98</sup>

- > who is engaged in operations that expose him or her to occupational diseases and has not gone through a health check-up before leaving his or her position, or is suspected of having contracted an occupational disease and is undergoing diagnosis or is under medical observation;
- > who is pregnant, on maternity leave or in her breast-feeding period;
- > who is undergoing a set period of treatment for a disease or non-work related injuries;
- > who is suffering from an occupational disease or work related injury;
- > who has been working for the employer for a consecutive period of not less than 15 full years and is less than five years away from his or her statutory retirement age; or
- > under any other circumstances provided by law or administrative regulations.

**Redundancy:** An employer may dismiss employees after complying with the prescribed requirements and procedures, if it falls into any of the following categories:<sup>99</sup>

- > the employer is restructured pursuant to the stipulations of the Enterprise Bankruptcy Law;



- > the employer encounters serious difficulties in production and operation;
- > the employer undergoes a change of production or operating mode or a major technical transformation, and redundancies are still required despite having made changes to its labour contracts; or
- > there are other major changes in the objective economic circumstances under which the employment contract was concluded, rendering the employment contract unable to be performed;

and (in each case) the employer is proposing to make redundant more than 20 employees, or one-tenth or more of its total workforce.

An employer is required to prioritise retaining personnel who:<sup>100</sup>

- > have entered into relatively long fixed-term labour contracts with the employer;
- > have entered into labour contracts without a fixed term with the employer; or
- > personnel who are the only members of their family to be employed and who provide for elderly people or minors within the family.

## Intellectual Property Rights, Technology and Trade Secrets

Intellectual property rights are protected under PRC law, for example, the *Trademark Law*, the *Copyright Law* and the *Patent Law*. Other forms of intellectual property and proprietary rights, such as trade secrets, are also provided for under PRC law.

In order to meet its obligations for accession to the World Trade Organisation, the PRC government has revised most of its intellectual property laws to ensure their consistency with international treaties and norms.

It would nonetheless be advisable for a foreign investor to adopt a rigorous approach towards the protection and enforcement of its intellectual property and proprietary rights in the PRC, especially since the enforcement of such rights can in practice be fraught with difficulties.

Some best practices that may be worth adopting include:

- > ensuring that all intellectual property rights belonging to the foreign investor are accurately and promptly registered with the relevant PRC authorities, if applicable;
- > incorporating anti-counterfeiting technologies (such as inks, labels and foils on the external packaging of products);
- > developing a corporate intellectual property protection strategy; and
- > conducting regular training sessions to raise employees' awareness of the importance of protecting intellectual property rights.

It should be noted that all intellectual property rights developed by an FIE's full-time employees, under the FIE's specific instructions and during the course of their employment with the FIE, will vest in the FIE. Furthermore, all intellectual property rights which are developed (and only to the extent so developed) based on intellectual property rights licensed by a foreign investor to the FIE will also vest in the FIE.

## Real Estate

There is a fundamental distinction between "rights of ownership in land" and "rights to use land" in the PRC.

Land in the PRC is owned either by the State (state-owned land) or by rural collectives (collectively-owned land). Land in urban areas is owned by the State, while land in suburban and rural areas is generally owned by rural collectives.

The right to use land, however, can be held privately. Land use rights are divided into two main types, each with very different attributes, namely "granted land use rights" and "allocated land use rights". Both granted and allocated land use rights are held in respect of state-owned land only. Collectively-owned land must generally first be requisitioned by the State and converted into state-owned land before the formal right to use such land can be obtained for construction projects.

An FIE may acquire land use rights in one of the following ways:

**Allocation of Land Use Rights:** Allocated land is generally only allocated to state-owned enterprises for industrial or public use, although it might be possible for land to be allocated to private enterprises in some localities. Land may be allocated to FIEs for construction in certain sectors, principally for large infrastructure projects. There are

certain restrictions on the uses of allocated land, for example, a mortgage or disposal of the right to use of allocated land is subject to the approval by the land authorities.<sup>101</sup> Allocated land use rights usually do not have a term limit.

**Grant of Land Use Rights:** This involves obtaining a grant of land use rights from the State or a local land authority for a fixed term by entering into a land grant contract. Upon payment of a grant premium and completing the registration procedures, a land use rights certificate will be issued. The land user has to pay an annual land use charge.<sup>102</sup> Granted land use rights may be mortgaged<sup>103</sup> and are transferable.

**Purchase from existing land users:** Granted land use rights can be purchased from existing holders of such rights. A contract for the assignment of land use rights has to be entered into to effect the assignment of rights and then registered with the local land authority. Conditions attaching to the original grant will be transferred to the assignee.

Allocated land use rights cannot generally be assigned unless converted into granted land use rights.

**Lease:** An FIE can also enter into a lease with a holder of granted land use rights, under which the FIE pays rent to the land use rights holder. Allocated land cannot be leased.

**Contribution by the Chinese Party to a Joint Venture:** In many Sino-foreign joint ventures, land use rights are often the main, if not the sole, asset that the Chinese party injects into the joint venture company as a capital contribution.<sup>104</sup> Granted land use rights can be contributed by the Chinese party to the FIE. However, it is unclear whether allocated land use rights can, in practice, be contributed to an FIE without first being converted into granted land use rights. Practices may vary from one locality to another.

## Taxes, Grants and Incentives

FIEs must pay income tax on income obtained from production, business operations and other sources. Foreign enterprises without a separate legal presence in the PRC such as a representative office have to pay income tax on the income they obtain from production, business operations and other sources, where such income is derived from inside the PRC (a cost-plus method is often used to determine the chargeable income of a representative office). The enterprise income tax (“**EIT**”) rate which is applicable in the majority of cases is 25%.

In addition to EIT, foreign investors should be aware that business tax is levied on revenue at rates of between 3% and 5% (exclusive of surcharges which vary from place to place) for certain services provided inside the PRC, including insurance, construction, transfer of property and assignment of various intellectual property rights. Business tax in the services sectors is in the process of being replaced by value added tax under a pilot programme commencing with certain areas and services. Entertainment services are taxed at a rate of between 5% and 20%.

Besides the taxes mentioned above, there are a number of other taxes that may be imposed on an FIE in relation to specific transactions. Different scenarios may lead to different tax implications and specialist advice should always be sought on the tax implications of a transaction.



# Section eight.

## Other Legal Issues

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Language and Governing Law  
Dispute Resolution

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## Language and Governing Law

The requirement for transactions to be approved has consequences for both the language and governing law of investment agreements:

- > All documents to be submitted to the relevant authorities for approval are required to be in Chinese.<sup>105</sup> Usually for foreign investment transactions, documents are drafted in both Chinese and English. However, the authorities are normally reluctant to approve contracts where the English language version prevails. Accordingly it is normal to provide that, at the very least, the English and Chinese language versions are of equal status;
- > Running documents in both English and Chinese will add to the cost of any transaction and may affect timing;
- > The sale and purchase or subscription agreement and joint venture contract (and certain other contracts) must be governed by Chinese law.<sup>106</sup>

## Dispute Resolution

There are three principal ways to resolve a commercial dispute:

- > negotiation;
- > arbitration; and
- > litigation.

Whilst it is impossible to always avoid disputes, good planning is essential when considering investing in the PRC. Contract terms should be clear, with specified timelines and adequate exit strategies where appropriate. Parties should ensure that they agree how to resolve a dispute at the earliest possible stage by including specific dispute resolution clauses. Failure to do so could lead to unnecessary time and costs being exhausted in selecting a suitable process before the dispute itself is determined.

### Negotiation

Negotiation is the simplest and usually the best method of dispute resolution. As with any jurisdiction, negotiation is the least expensive process and can help maintain the working relationship of the parties involved.

The perceived uncertainty in the PRC legal system has meant that negotiation has traditionally been a popular choice for foreign investors. Mediation is also popular as parties are often encouraged to pursue this route before formal adjudication. A signed mediation agreement approved by a PRC court or arbitral tribunal is enforceable as it were a judgment of a court and thus enforcement proceedings are not necessary.<sup>107</sup>

### Arbitration

Arbitration is widely employed by foreign investors due to increased certainty surrounding the process and the private nature of the hearings. Arbitration is only available if the parties include a clear and unambiguous arbitration clause or have entered into a separate arbitration agreement after the dispute arose.<sup>108</sup>

The parties will usually need to decide between referring the dispute to a foreign arbitration commission or to the China International Economic and Trade Arbitration Commission (“**CIETAC**”).

Foreign investors often prefer to commence arbitration outside the PRC. As the PRC is a party to the New York Convention,<sup>109</sup> there is a legal basis for enforcing foreign arbitration awards.

CIETAC was established primarily with the intention of arbitrating foreign-related disputes, although its jurisdiction has now grown to include commercial disputes generally.<sup>110</sup> CIETAC has a panel of arbitrators, but the parties to an arbitration may select arbitrators outside that panel by mutual agreement.<sup>111</sup> A CIETAC award is usually final and can only give rise to a right to appeal in very limited circumstances.<sup>112</sup>

### Litigation

Provided that the parties do not submit to the exclusive jurisdiction of a particular court, litigation does not need to be limited to one court or one jurisdiction,<sup>113</sup> so the parties have a degree of flexibility. However, some domestic parties may insist on the exclusive jurisdiction of the PRC courts. If this is not the case, the parties will need to decide whether to pursue litigation through the PRC courts or foreign courts.







The quality and reliability of PRC courts differs from location to location and there are concerns that courts are vulnerable to external pressures and local protectionism (although this is less of a concern in Beijing and Shanghai). Moreover, traditionally complex commercial disputes have not been pursued through the PRC courts which explains or evidences a reluctance on the part of foreign investors to pursue litigation through the Chinese courts. Nevertheless, the PRC remains committed to legal reform and significant progress has been made.

The advantage of referring a dispute to a PRC court in the first instance is that as compared with a foreign judgment, a favourable PRC court judgment will be easier to enforce directly against the defendant company and its assets. The PRC legal system is also relatively straightforward and so can result in (by international standards at least) quicker litigation and lower costs. These advantages are balanced against the concerns referred to above.

Obtaining a judgment from a foreign court in an established jurisdiction can overcome the shortcomings, perceived or real, of the PRC courts. However, obtaining a foreign judgment is only a feasible option where the defendant has assets outside of the PRC and it is not necessary to enforce the judgment against the defendant company in the PRC. Enforcing a foreign judgment in a PRC court can be a complicated process. In effect, it is only possible to enforce a foreign award where:<sup>114</sup>

- > a treaty exists concerning the enforcement of judgments between the PRC and the relevant foreign jurisdiction (however, most developed countries do not have a bilateral treaty with the PRC); or
- > it can be established that a judgment of a PRC court would be enforced in that foreign jurisdiction.

The requirement of reciprocity is particularly difficult to satisfy and, because of this, few foreign judgments appear to have been enforced in the PRC.

As with any jurisdiction, **negotiation is the least expensive process** and can help maintain the working relationship of the parties involved







# Glossary

English abbreviation	English name	Chinese name
AML	PRC Anti-Monopoly Law	中华人民共和国反垄断法
Catalogue	Foreign Investment Industrial Guidance Catalogue	外商投资产业指导目录
CBRC	China Banking Regulatory Commission	中国银行监督管理委员会
CEPA	Closer Economic Partnership Arrangement	内地与香港关于建立更紧密经贸关系的安排 内地与澳门关于建立更紧密经贸关系的安排
CIETAC	China International Economic and Trade Arbitration Commission	中国国际经济贸易仲裁委员会
CIRC	China Insurance Regulatory Commission	中国保险监督管理委员会
CJV	Sino-foreign Cooperative Joint Venture	中外合作经营企业
CSRC	China Securities Regulatory Commission	中国证券监督管理委员会
ECFA	Economic Cooperation Framework Agreement	海峡两岸经济合作框架协议
EIT	Enterprise Income Tax	企业所得税
EJV	Sino-foreign Equity Joint Venture	中外合资经营企业
FICLS	Foreign Invested Company Limited by Shares	外商投资股份有限公司
FIDC	Foreign Invested Domestic Company	外商投资境内公司
FIE	Foreign Invested Enterprise	外商投资企业
FIP	Foreign Invested Partnership	外商投资合伙企业
Holding Company	Foreign-Invested Investment Company	外商投资投资性公司
MOF	Ministry of Finance	中华人民共和国财政部
MOFCOM	Ministry of Commerce	中华人民共和国商务部
NDRC	National Development and Reform Commission	中华人民共和国发展和改革委员会
PRC	People's Republic of China	中华人民共和国
RHQ	Regional Headquarters	跨国公司地区总部
RMB	Renminbi	人民币
SAFE	State Administration of Foreign Exchange	中华人民共和国外汇管理局
SAIC	State Administration for Industry and Commerce	中华人民共和国工商行政管理总局
SASAC	State-owned Assets Supervision and Administration Commission of the State Council	中华人民共和国国务院国有资产监督管理委员会
WFOE	Wholly Foreign Owned Enterprise	外商独资企业
WTO	World Trade Organisation	世界贸易组织

## Appendix one.

# Foreign Investment by Industry

The table<sup>115</sup> below sets out some of the industries in which foreign investment is encouraged, restricted or prohibited by the Catalogue. It reflects the current Catalogue (effective January 2012).

Potential investors should always check the latest Catalogue. Industries that do not fall within any of the above three categories are generally deemed permitted industries.

Industry Classification	Example Types of Industry
Encouraged	<p>There are 12 classes of industries within the encouraged category, each covering a wide range of areas including:</p> <ul style="list-style-type: none"> <li>&gt; Electronic design automation and industrial design</li> <li>&gt; Researching and developing the Internet of Things</li> <li>&gt; Risk exploration and development of oil and natural gas (limited to EJV or CJV)</li> <li>&gt; Exploration and development of coal mine methane (limited to EJV or CJV)</li> <li>&gt; Development and manufacturing of certain non-alcoholic beverages</li> <li>&gt; Manufacturing of certain chemical products</li> <li>&gt; High and new technology development</li> <li>&gt; Manufacture of automotive engines</li> <li>&gt; Air transportation (PRC shareholding must be no less than 51%)</li> <li>&gt; Development and application of new technology in producing agricultural crops</li> <li>&gt; Energy-saving technology development and services</li> <li>&gt; Environmental pollution treatment and survey</li> <li>&gt; Production of natural food additives and food ingredients</li> <li>&gt; Manufacture of agricultural machinery</li> <li>&gt; Manufacture of certain electronic equipment</li> <li>&gt; Modern logistics</li> <li>&gt; Certain out-sourcing services</li> <li>&gt; Construction and operation of branch lines, local railways and their bridges, tunnels and ferry facilities</li> </ul>
Restricted	<p>There are 14 classes of restricted industries which encompass, for example, the following areas:</p> <ul style="list-style-type: none"> <li>&gt; Wholesale of finished oil products and construction and operation of petrol stations (PRC shareholding must be no less than 51% in case of a petrol station chain which has 30 or more branches established by the same foreign investor and distributes different varieties and brands of finished oil from two or more suppliers)</li> <li>&gt; Futures companies (PRC shareholding must be no less than 51%)</li> <li>&gt; Banks, financial companies and trust companies</li> <li>&gt; Passenger carriage by railway (PRC shareholding must be no less than 51%)</li> <li>&gt; Transportation by water (PRC shareholding must be no less than 51%)</li> <li>&gt; Telecommunications companies (total foreign ownership is prohibited; thresholds for foreign shareholdings depend on the nature of the telecommunication business)</li> <li>&gt; Radio and TV programmes production and movie making (limited to CJV)</li> <li>&gt; Pre-school and ordinary senior high school education institutions (limited to CJV, the principal must be a Chinese national and at least half the members of the board of governors must be appointed by the Chinese party)</li> <li>&gt; Insurance companies (foreign shareholding in a life insurance company may not exceed 50%)</li> <li>&gt; Securities companies (the initial business scope is limited to the underwriting of A-Shares, and the underwriting and trading of B-Shares, H-Shares and government and corporate bonds; foreign shareholding may not exceed 49%)</li> <li>&gt; Securities investment fund management companies (foreign shareholding may not exceed 49%)</li> </ul>
Prohibited	<p>There are 13 classes of prohibited industries, including such areas as:</p> <ul style="list-style-type: none"> <li>&gt; Exploration and mining of certain kinds of ores</li> <li>&gt; News agencies</li> <li>&gt; Publishing and production of audio-visual products</li> <li>&gt; Publishing of books, newspapers and periodicals</li> <li>&gt; Postal companies, domestic mail courier services</li> <li>&gt; Air traffic control companies</li> <li>&gt; Weapons production</li> <li>&gt; Gaming and gambling (including horse racing courses)</li> <li>&gt; Construction and operation of villas and golf courses</li> </ul>



Appendix two.

## Negative List in the Free Trade Zones

There are currently 14 classes of industries included in the Negative List (which will be amended from time to time), where foreign investment is still subject to prior approval, each covering a wide range of areas either categorised as restricted (hence subject to prior approval, with specific restrictions in certain industries) or prohibited, including:

Industry Classification	Example Investment Areas
Agriculture, forestry, husbandry and fishery	<ul style="list-style-type: none"> <li>&gt; Breeding of new crops, seeds production (restricted; PRC shareholding must be more than 50%)</li> <li>&gt; Research and development of genetically modified organisms (prohibited)</li> </ul>
Mining	<ul style="list-style-type: none"> <li>&gt; Exploration, mining and beneficiation of rare earth metals prohibited</li> <li>&gt; Oil and natural or shale gas exploitation (only EJV and CJVs permitted)</li> <li>&gt; Pyrites exploitation and ore dressing/beneficiating operations and ludwigite exploitation (restricted)</li> </ul>
Manufacturing	<ul style="list-style-type: none"> <li>&gt; Manufacture, design and maintenance of commercial aircraft (controlled by Chinese party)</li> <li>&gt; Manufacture, design and maintenance of general purpose aircraft (only EJV or CJVs permitted)</li> <li>&gt; Ship manufacture, design and maintenance (controlled by Chinese party)</li> <li>&gt; Design and manufacturing of civil satellites (controlled by Chinese party)</li> </ul>
Electricity, heating, gas and water production and supply	<ul style="list-style-type: none"> <li>&gt; Construction and operation of nuclear power stations (controlled by Chinese party)</li> <li>&gt; Construction and operation of urban heat-supply, gas supply, water supply and sewerage networks in cities with more than 500,000 residents (controlled by Chinese party)</li> </ul>
Construction	<ul style="list-style-type: none"> <li>&gt; Construction and operation of railway networks (controlled by Chinese party)</li> </ul>
Wholesale and retail	<ul style="list-style-type: none"> <li>&gt; Purchase of grain and wholesale of grain (restricted)</li> <li>&gt; Wholesale and distribution of tobacco (restricted)</li> <li>&gt; Operation and management of grain reserves (must be undertaken by China Grain Reserves Corporation)</li> </ul>
Transport, warehouse and postal service	<ul style="list-style-type: none"> <li>&gt; Railway passenger transport companies (controlled by Chinese party)</li> <li>&gt; Domestic courier business of delivering letters, investment in postal service companies (prohibited)</li> </ul>
Information transmission, software and information technology (IT) service	<ul style="list-style-type: none"> <li>&gt; Telecommunication infrastructure (maximum foreign participation of 49%)</li> <li>&gt; Radio, TV and satellite transmission and Internet data center service (prohibited)</li> </ul>
Financial services	<ul style="list-style-type: none"> <li>&gt; Foreign investment in banking financial institutions must meet related requirements</li> <li>&gt; Insurance companies (restricted, maximum foreign participation in insurance group companies and life insurance companies of 50%), and insurance asset management companies must have at least 75% shareholding held by PRC insurance companies</li> <li>&gt; Investment in securities companies (restricted; generally foreign participation limited to 49%)</li> <li>&gt; Finance leasing companies (foreign investor and total assets must meet certain criteria)</li> </ul>
Scientific research and technology services	<ul style="list-style-type: none"> <li>&gt; Development and application of technologies in respect of human stem cells or gene technologies in diagnosis and medical treatment (prohibited)</li> <li>&gt; Surveying companies (controlled by Chinese party), mapping companies (prohibited)</li> </ul>
Management of water conservancy, environment and public facilities	<ul style="list-style-type: none"> <li>&gt; Construction and operation of nature reserves and internationally important wetland (prohibited)</li> <li>&gt; Exploitation of wildlife animals and plants originating from China and protected by the State (prohibited)</li> </ul>
Education	<ul style="list-style-type: none"> <li>&gt; Pre-school and ordinary senior high school education institutions restricted (limited to CJVs), the principal must be a Chinese national residing in China, and at least half of the members of the board of governors must be appointed by the Chinese party</li> </ul>
Health and social activities	<ul style="list-style-type: none"> <li>&gt; Medical institutions (limited to EJV or CJVs)</li> </ul>
Culture, sports and entertainment	<ul style="list-style-type: none"> <li>&gt; News agencies (prohibited)</li> <li>&gt; Production of TV programmes and films (prohibited; CJVs permitted for soap operas and cartoons, subject to approval)</li> <li>&gt; Construction and operation of large-scale theme parks (restricted)</li> </ul>

# Appendix three.

## Comparison of the Principal Forms of FIEs in the PRC

	<b>Equity Joint Venture ("EJV")</b>	<b>Cooperative Joint Venture ("CJV")</b>	<b>Wholly Foreign Owned Enterprise ("WFOE")</b>	<b>Foreign-Invested Company Limited by Shares ("FICLS")</b>	<b>Foreign-Invested Investment Company ("Holding Company")</b>
<b>Parties</b>	At least one foreign and one domestic investor	Same as EJV	One or more foreign investor(s)	At least two promoters, including at least one foreign party	Can be structured as a WFOE or EJV
<b>Foreign Ownership Share</b>	> Generally ≥25%	> Same as EJV	> 100%	> Same as EJV	> Generally ≥25% and up to 100%
<b>Liability Position</b>	<ul style="list-style-type: none"> <li>&gt; Limited liability vehicle, so liability of investors is limited to agreed capital contributions</li> <li>&gt; Liability of the EJV entity is limited to extent of its assets</li> </ul>	<ul style="list-style-type: none"> <li>&gt; Legal person CJVs – same as EJV</li> <li>&gt; Non-legal person CJVs – parties bear unlimited liability for debts of the CJV</li> </ul>	> Same as EJV	> Same as EJV	> Same as EJV
<b>Government Approval Procedure</b>	<ul style="list-style-type: none"> <li>&gt; Usually central MOFCOM<sup>116</sup> or relevant local MOFCOM branch approval but dual approvals involving industry-specific regulator as well as MOFCOM required in certain industries (for example securities and fund management, telecoms services). Exceptions apply to FIEs established in an FTZ in certain industries<sup>117</sup></li> <li>&gt; NDRC approval for "encouraged" or "restricted" projects which exceed certain monetary thresholds; filing required in other cases<sup>118</sup></li> <li>&gt; as from 1 March 2015 all requirements for the establishment of foreign invested enterprises in most service industries in Guangdong are to be harmonised with those applicable to domestic investors, other than in the financial services, culture and telecommunications sectors</li> <li>&gt; Registration carried out with the SAIC or its local counterparts</li> </ul>	> Same as EJV	> Same as EJV	> Same as EJV	> Central or local MOFCOM approval
<b>Maximum Term</b>	<ul style="list-style-type: none"> <li>&gt; Generally 30 years</li> <li>&gt; 50 years in the case of "encouraged" projects (corresponds to maximum term of industrial land use rights)</li> </ul>	> Same as EJV, except cannot be extended if foreign party has recovered all its investment (see page 21)	> Same as EJV	> Same as EJV	<ul style="list-style-type: none"> <li>&gt; The law does not specify one single fixed term – depends on the nature of projects for which it was established</li> <li>&gt; Generally 50 years (can be extended on application)</li> </ul>

	Equity Joint Venture ("EJV")	Cooperative Joint Venture ("CJV")	Wholly Foreign Owned Enterprise ("WFOE")	Foreign-Invested Company Limited by Shares ("FICLS")	Foreign-Invested Investment Company ("Holding Company")
Minimum capital requirement	> Equity-total investment ratio: <sup>119</sup> unless specifically approved, the equity-total investment ratio may not exceed permitted ratios; basically, for a project with total investment of more than USD30m, at least 1/3 must be equity; for above USD10m up to and including USD30m, 40%; for above USD3m up to and including USD10m, 50%; for up to and including USD3m, 70%	> Same as EJV	> Same as EJV	> Equity-total investment ratios (see EJV) may apply but unclear	> USD30m, exclusive of capital contributions already paid into existing subsidiaries > Must be made in foreign currency cash, Renminbi profits obtained in the PRC or Renminbi income lawfully received from such activities as transfer of equity interest or liquidation
Profit Distribution	> Profits must be distributed in proportion to equity interests held	> Profits can be (but need not be) distributed in accordance with the parties' respective equity interests > Foreign investor may elect for early recovery of capital contribution through, for example, distribution of profits in consideration for waiver of claims to residual assets	> Profits can be (but need not be) distributed in accordance with the parties' respective equity interests	> Profits distributed in accordance with shareholding percentage unless the articles stipulate otherwise	> Depends on whether it is an EJV or WFOE
Transferability of Equity Interest	> Requires approval of other parties, board approval and approval of original approval authority > The other parties have a pre-emptive right to purchase the interest offered and must consent in writing to the transfer to the transferee	> Same as EJV	> Same as EJV except that the other parties' pre-emptive right may be carved out in articles of association	> Promoters subject to one year lockup and MOFCOM approval required for disposal	> Depends on whether it is an EJV or WFOE
Residual Interest Upon Liquidation	> Proportional to equity interests unless otherwise agreed in the joint venture contract or articles of association	> Same as EJV unless foreign investor has made early recovery of its registered capital, in which case residual interest in fixed assets of CJV (after payment of all its debts) belongs to domestic party	> Same as EJV and depends on number of foreign investors	> Same as EJV	> Same as EJV
Voting Procedures	> Unanimous board approval required for amendments to articles of association, termination and dissolution, increase or reduction of registered capital and merger or division of the EJV > Approval of resolutions on other matters will be subject to approval requirements set out in the articles of association, usually a simple majority voting > Quorum is two-thirds of all directors	> Same as EJV and in addition, resolutions approving the following matters also require unanimous approval of the directors attending the meeting: - The mortgage of assets of the CJV; and - Contracting out of operations and management of the CJV to a third party during the term, > All resolutions must require approval of more than half of all the directors of the CJV	> No specified items subject to unanimous voting > No specific procedures on voting	> Each shareholder attending a shareholders' general meeting has votes equal to the number of shares that it holds > Amendments to articles of association require approval of more than two-thirds of the voting rights of the shareholders attending > Board resolutions must be adopted by more than half of all directors	> Same as EJV/WFOE depending on structure adopted but provision of certain services by a Holding Company to its investee companies requires the investee to pass an unanimous board resolution

# Appendix four.

## Process for the Remittance of Dividends in excess of US\$50,000

### 1. FIE submits documents to the Foreign Exchange Bank

- > Written application.
- > Completed tax filing form bearing the tax authority's chop.
- > Board resolution approving the dividend distribution.
- > Other documents as requested by SAFE.



### 2. Foreign Exchange Bank verifies authenticity of documents and that the FIE has met its annual SAFE reporting requirement



### 3. Foreign Exchange Bank completes Remittance Procedure

- > When the remittance is made, Bank keeps originals/copies of the remittance documents for its records as appropriate.



### 4. Foreign Exchange Bank reports to the local SAFE

- > Upon completing the remittance, Bank records the transaction on the online system of SAFE.







# Footnotes

1. Data sourced from the U.S. Congressional Research Service and the National Bureau of Statistics of China.
2. The Foreign Investment Law of the People's Republic of China (Draft for Comments) (中华人民共和国外国投资法 (草案征求意见稿)).
3. According to Article 8 of the *Provisions on Directing Foreign Investment* (《指导外商投资方向规定》), if a majority interest is required, the domestic parties must hold at least a 51% interest; if a "relative" majority interest is required, the cumulative interest of the domestic parties must be greater than any one foreign investor.
4. The Foreign Investment Guidance Catalogue (2015) (《外商投资产业指导目录 (2015修订)》).
5. Article 1 to 4 of the Decision of the Standing Committee of the National People's Congress on Authorizing the State Council to Temporarily Adjust the Administrative Approvals under the Relevant Laws in the China (Guangdong) Pilot Free Trade Zone, the China (Tianjin) Pilot Free Trade Zone, the China (Fujian) Pilot Free Trade Zone and the Expanded Area of China (Shanghai) Pilot Free Trade Zone (《全国人民代表大会常务委员会关于授权国务院在中国 (广东) 自由贸易试验区、中国 (天津) 自由贸易试验区、中国 (福建) 自由贸易试验区以及中国 (上海) 自由贸易试验区扩展区域暂时调整有关法律规定的行政审批的决定.》), Agreement between the Mainland and Hong Kong on Achieving the Basic Liberalization of Trade in Services in Guangdong Province under the Framework of the Mainland and Hong Kong Closer Economic Partnership Arrangement (《内地与香港关于建立更紧密经贸关系的安排》关于内地在广东与香港基本实现服务贸易自由化的协议)) and Agreement between the Mainland and Macau on Achieving the Basic Liberalization of Trade in Services in Guangdong Province under the Framework of the Mainland and Macau Closer Economic Partnership Arrangement (《内地与澳门关于建立更紧密经贸关系的安排》关于内地在广东与澳门基本实现服务贸易自由化的协议)).
6. Also known as a Foreign-Invested Joint Stock Company.
7. Also referred to as an "investment-type company" or "a company with an investment nature".
8. Some of the provisions of the *PRC Company Law* (《公司法》), last revised on 28 December 2013, appear to contradict the provisions of the *Provisional Regulations on Several Issues Concerning the Establishment of Foreign-Invested Companies Limited by Shares* (《关于设立外商投资股份有限公司若干问题的暂行规定》).
9. The principal rules for the foreign exchange control system are detailed in the *Regulations of the People's Republic of China on the Administration of Foreign Exchange* (《外汇管理条例》) which came into effect on 1 April 1996 and were subsequently amended on 14 January 1997 and 1 August 2008.
10. Article 4 of the *PRC Sino-foreign Equity Joint Venture Law* (《中外合资经营企业法》) and Article 16 of the Implementing Regulations of the *PRC Sino-foreign Equity Joint Venture Law* (《中外合资经营企业法实施条例》).
11. Article 3 of the *Provisional Regulations of SAIC for the Proportion of Registered Capital to Total Investment of Sino-foreign Joint Venture Enterprises* (《国家工商行政管理局关于中外合资经营企业注册资本与投资总额比例的暂行规定》). Total investment amount of an FIE means the aggregate amount of funds required to be injected to the FIE in order to achieve the scale of operation contemplated under its constitutional documents.
12. Article 6 of the *Provisional Regulations of SAIC for the Proportion of Registered Capital to Total Investment of Sino-foreign Joint Venture Enterprises* (《国家工商行政管理局关于中外合资经营企业注册资本与投资总额比例的暂行规定》).
13. Article 76 of the *Implementing Regulations of the PRC Sino-foreign Equity Joint Venture Law* (《中外合资经营企业法实施条例》).
14. Article 4 of the *Implementing Rules of the PRC Sino-foreign Cooperative Joint Venture Law* (《中外合作经营企业法实施细则》).
15. *Ibid.* Article 14.
16. *Ibid.* Article 50.
17. *Ibid.* Article 44.
18. *Ibid.* Article 44.
19. Article 18 of the *Implementing Rules of the PRC Wholly Foreign Owned Enterprise Law* (《外资企业法实施细则》).
20. Article 3 of the *PRC Wholly Foreign Owned Enterprise Law* (《外资企业法》) and Article 4 of the *Implementing Rules of the PRC Wholly Foreign Owned Enterprise Law* (《外资企业法实施细则》).
21. Article 2 of the *Provisional Regulations on Several Issues Concerning the Establishment of Foreign-Invested Companies Limited by Shares* (《关于设立外商投资股份有限公司若干问题的暂行规定》).
22. Article 33 of the *Implementing Regulations of the PRC Sino-foreign Equity Joint Venture Law* (《中外合资经营企业法实施条例》) and Article 29 of the *Implementing Rules of the PRC Sino-foreign Cooperative Joint Venture Law* (《中外合作经营企业法实施细则》).
23. Article 141 of the *PRC Company Law* (《公司法》).
24. Articles 1 and 2 of the *Notice of the Ministry of Commerce on the Decentralization of Matters in relation to the Foreign-Invested Joint Stock Companies, Changes of Enterprises and Approvals* (《商务部关于下放外商投资股份公司、企业变更、审批事项的通知》), and Articles 1 and 3 of the *Notice of the Ministry of Commerce on the Decentralization of Approvals in relation to Foreign Investment* (《商务部关于下放外商投资审批权限有关问题的通知》).
25. Article 3 of the *Provisions on the Establishment of Investment Companies by Foreign Investors* (《关于外商投资举办投资性公司的规定》).
26. *Ibid.* Article 28.
27. *Ibid.* Articles 10 and 15.
28. *Ibid.* Article 22.
29. *Ibid.* Article 9.
30. Article 2 of the *Circular on Matters Concerning Enhancing the Administration of Approval, Registration, Foreign Exchange and Taxation of Foreign-Invested Enterprises* (《关于加强外商投资企业审批、登记、外汇及税收管理有关问题的通知》) which became effective on 1 January 2003.
31. Paragraph 11 of the *State Council Notice Releasing the Catalogue of Investment Projects Requiring Approval by the Government* (2014 version) (国务院关于印发政府核准的投资项目目录 (2014年本) 的通知).
32. Article 8 of the Administrative Measures for Approval and Record-filing of Foreign Investment Projects (《外商投资项目核准和备案管理办法》).
33. Article 7 of the *Provisions on the Establishment of Investment Type Companies by Foreign Investors* (《关于外商投资举办投资性公司的规定》) (Decree 22 of 2004) as amended by the *Supplemental Provisions on the Establishment of Investment Type Companies by Foreign Investors* (《关于外商投资举办投资性公司的补充规定》) (Decree 3 of 2006).
34. Article 27 of the *PRC Company Law* (《公司法》), Article 8 of the Rules of the Supreme People's Court on Several Questions relating to the Application of the PRC Company (《最高人民法院关于适用〈中华人民共和国公司法〉若干问题的规定 (三)》).
35. Article 5 of the Administrative Provisions on the Registration of Companies' Registered Capital (《公司注册资本登记管理规定》).
36. *The Circular of the General Office of the State Council on Establishing a Security Review System for Mergers and Acquisitions of Onshore Enterprises by Foreign Investors* (《国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知》), effective from 5 March 2011.
37. Articles 7 and 8 of the *Procedures for the Administration of Strategic Investment in Listed Companies by Foreign Investors* (《外国投资者对上市公司战略投资管理办法》).
38. *Ibid.* Article 5.
39. *Ibid.*
40. *Ibid.* Articles 3 & 5.
41. *Ibid.* Article 5.
42. Following from the joint announcement by the Hong Kong Securities and Futures Commission and the China Securities Regulatory Commission on 10 April 2014 and the subsequent signing of a four party agreement on 4 September 2014 by the Stock Exchange of Hong Kong Limited, Hong Kong Securities Clearing Company Limited, wholly-owned subsidiaries of Hong Kong Exchanges and Clearing Limited, the Shanghai Stock Exchange and China Securities Depository and Clearing Corporation Limited.
43. Article 23 of the *Regulation on Foreign Investors Merging with or Acquiring Domestic Enterprises* (《关于外国投资者并购境内企业的规定》).
44. Article 72 of the *PRC Company Law* (《公司法》).
45. *Ibid.*
46. Article 4 of the *PRC Sino-foreign Equity Joint Venture Law* (《中华人民共和国中外合资经营企业法》) and Article 20 of the *Implementing Regulations of the PRC Sino-foreign Equity Joint Venture Law* (《中华人民共和国中外合资经营企业法实施条例》).
47. Article 21 of the *Implementing Regulations of the PRC Sino-foreign Equity Joint Venture Law* (《中华人民共和国中外合资经营企业法实施条例》).
48. Article 22 of the *Enterprise State-owned Asset Valuation Interim Provisions* (《企业国有资产评估管理暂行办法》).
49. *Ibid.* Article 4.
50. Articles 8, 9, 12 and 14 of the *Transfer by State-owned Shareholders of Shares in Listed Companies Interim Provisions* (《国有股东转让所持上市公司股份管理暂行办法》).

51. Article 17 of the *Interim Measures for the Management of Transfer of the State-owned Property Right of Enterprises* (《企业国有产权转让管理暂行办法》), effective from 1 February 2004.
52. Article 16 of the *Regulation on Foreign Investors Merging with or Acquiring Domestic Enterprises* (《关于外国投资者并购境内企业的规定》).
53. *Ibid.* Articles 21 & 23.
54. Article 5 of the *Fourth Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trial of Labour Disputes* (《最高人民法院于审理劳动争议案件适用法律若干问题的解释(四)》).
55. *Ibid.* Article 25 of the *PRC Anti-Monopoly Law* (《中华人民共和国反垄断法》).
56. *Ibid.* Article 26.
57. *Ibid.* Article 3.
58. *Ibid.* Article 28.
59. Article 6 of the *PRC Sino-foreign Equity Joint Venture Law* (《中华人民共和国中外合资经营企业法》) and Article 30 of the *Implementing Regulations of the PRC Sino-foreign Equity Joint Venture Law* (《中华人民共和国中外合资经营企业法实施条例》).
60. Article 44 of the *PRC Company Law* (《公司法》).
61. *Ibid.* Article 50.
62. *Ibid.* Article 108.
63. Article 31 of the *Implementing Regulations of the PRC Sino-foreign Equity Joint Venture Law* (《中华人民共和国中外合资经营企业法实施条例》). Articles 45 and 108 of the *PRC Company Law* (《公司法》). Article 27 of the *Implementing Rules of the PRC Sino-foreign Cooperative Joint Venture Law* (《中华人民共和国中外合作经营企业法实施细则》).
64. Article 147 of the *PRC Company Law* (《公司法》).
65. *Ibid.* Article 51.
66. *Ibid.*
67. *Ibid.* Article 53.
68. *Ibid.* Article 49.
69. *Ibid.*
70. *Ibid.*
71. *Ibid.* Article 13.
72. *Ibid.* Article 149.
73. *Ibid.* Articles 151 and 152.
74. *Ibid.* Article 112.
75. *Ibid.* Article 151.
76. Article 39 of the *Governance Guidelines for Listed Companies* (《上市公司治理准则》).
77. Article 5 of *Regulations on Administration of Foreign Exchange of the PRC* (《中华人民共和国外汇管理条例》).
78. *Ibid.* Article 52(3).
79. *Ibid.* Article 52(4).
80. Article 5 (1) of the *Notice on Further Improving and Adjusting Foreign Exchange Control Policies under Capital Accounts* (《关于进一步改进和调整资本项目外汇管理政策的通知》).
81. Article 8 of the *Administrative Regulations on Employment of Foreigners in the PRC* (《外国人在中国就业管理规定》).
82. *Ibid.* Article 6.
83. *Ibid.* Article 7.
84. *Ibid.* Articles 11 to 18.
85. Article 14 of the *Fourth Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trial of Labour Disputes* (《最高人民法院于审理劳动争议案件适用法律若干问题的解释(四)》).
86. Article 24 of the *Administrative Regulations on Employment of Foreigners in the PRC* (《外国人在中国就业管理规定》).
87. *Ibid.* Article 27.
88. *Ibid.* Article 25.
89. Article 11 of the *Provisional Regulations on Administration of Representative Office of Foreign Enterprises* (《关于管理外国企业常驻代表机构的暂行规定》).
90. Article 3 of the *Regulations on Working Time of Employees* (《关于职工工作时间的规定》).
91. Article 44 of the *PRC Labour Law* (《中华人民共和国劳动法》).
92. Article 10 of the *Trade Union Law of the PRC* (《中华人民共和国工会法》).
93. *Ibid.*
94. Article 6 of the *Trade Union Law of the PRC* (《中华人民共和国工会法》).
95. Article 2 of the *Provisional Regulations on Payment of Social Security Fee* (《社会保险费征缴暂行条例》).
96. Article 25 of the *PRC Labour Law* (《中华人民共和国劳动法》).
97. Article 40 of the *PRC Labour Contract Law* (《中华人民共和国劳动合同法》).
98. *Ibid.* Article 42.
99. *Ibid.* Article 41.
100. *Ibid.*
101. Article 56 of the *Land Administrative Law of the PRC* (《中华人民共和国土地管理法》).
102. Articles 44 and 49 of the *Implementing Regulations of the Sino-foreign Equity Joint Venture Law of the PRC* (《中外合资经营企业法实施条例》).
103. Article 48 of the *Urban Land Administrative Law of the PRC* (《中华人民共和国城市房地产管理法》).
104. Article 5 of the *Sino-foreign Equity Joint Venture Law of the PRC* (《中华人民共和国中外合资经营企业法》).
105. Article 53 of the *M&A Regulations* (《关于外国投资者并购境内企业的规定》).
106. Articles 22 and 24 of the *M&A Regulations* (《关于外国投资者并购境内企业的规定》).
107. Article 97 of the *PRC Civil Procedure Law* (《中华人民共和国民事诉讼法》).
108. Article 4 of the *Arbitration Law of the PRC* (《中华人民共和国仲裁法》).
109. New York Convention refers to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958* (《承认及执行外国仲裁裁决公约(1958年)》, 简称纽约公约).
110. Article 3 of *China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (2012)* (《中国国际经济贸易仲裁委员会仲裁规则(2012)》).
111. *Ibid.* Article 24(2).
112. *Ibid.* Article 47.
113. Article 34 of the *Civil Procedure Law of the PRC* (《中华人民共和国民事诉讼法》).
114. *Ibid.* Article 260.
115. This table does not take into account the special arrangements under CEPA or ECFA, the "negative list" investment categories in an FTZ, or any other bilateral or multilateral arrangements.
116. Formerly known as the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") before it was merged with the State Economic and Trade Commission to form MOFCOM. However, these reforms may not yet have been implemented at the lower levels so, in some cities, local MOFCOMs are still called by their old names such as Commissions of Foreign Trade and Economic Cooperation.
117. A number of factors will determine which MOFCOM entity has authority to approve the project, including the total investment amount and the categorisation of the project under the Catalogue, which classifies various industry sectors according to whether foreign investment is "encouraged", "restricted" or "prohibited". Sectors not expressly referred to in the Catalogue are by definition in the "permitted" category. The *Directing of Foreign Investment Provisions* are the regulations which explain the categorisation principles and approval thresholds. See Appendix One.
118. Paragraph 1 of the *State Council Notice Releasing the Catalogue of Investment Projects Requiring Approval by the Government (2014 version)* (国务院关于发布政府核准的投资项目目录(2014年本)的通知).
119. The ratio of registered capital to total investment.

[linklaters.com](http://linklaters.com)

**Linklaters LLP**

One Silk Street  
London  
EC2Y 8HQ

Tel: (+44) 20 7456 2000

Fax: (+44) 20 7456 2222

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