DOING BUSINESS IN China

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**Business Structures:**
What types of business structures are permitted?

Foreign companies, enterprises, other organizations and citizens doing business in China can establish, own and carry on business using a variety of business structures. Those structures include:
- Sino-Foreign Equity Joint Venture Enterprise;
- Sino-Foreign Cooperative Joint Venture Enterprise;
- Wholly Foreign-Owned Enterprise;
- Foreign-Invested Joint Stock Companies;
- Representative Office (only liaison function, cannot engaged in direct business transaction).

**Taxation:**
Briefly explain the country’s tax regime including rates and how rates differ based on business structures.

At present, there are 18 types of major taxes in China, including:
- Value Added Tax;
- Consumption Tax;
- Enterprise Income Tax;
- The rate for resident enterprises is 25%.
- The applicable tax rate for the income earned from inside China by non-resident enterprises which hasn't established agencies or offices in China, or which has established agencies or offices in China but whose income has no association with such agencies or offices is 20%.
- The rate on eligible small and low-profit enterprises shall be reduced to 20%.
- The rate on high and new technological enterprises needing special support of the State shall be reduced to 15%.
- Individual Income Tax;
- Resource Tax;
- Urban Land Use Tax;
- Real estate Property Tax;
- Urban Maintenance and Construction Tax;
- Farmland Conversion Tax;
- Land Value-Added Tax;
- Vehicle Purchase Tax;
- Vehicle and Vessel Tax;
- Stamp Tax;
- Deed Tax;
- Tobacco Tax;
- Tariff;
- Tonnage Tax.

**Immigration:**
Summarize immigration laws, including visas available for foreign employees.

Z visa, issued to personnel applying for working in the Mainland China.

**A foreigner who applies for a z visa shall:**
- Fill out an application form;
- Submit his/her passport or other international travel documents;
- Photos that meet relevant requirements;
- Work permit;
- Other supporting documents in accordance with relevant provisions.

Residence permits for working purposes, issued to personnel working in the Mainland China.

**To apply for a residence permit for working purposes, the foreigner shall submit:**
- Passport or other international travel documents;
### Foreign Investment Review and Issues

**Does the government review and approve foreign investments? What factors are considered?**

Foreign investments are subject to review, approval or record-filing procedures under Ministry of Commerce’s authority (MOFCOM).

Foreign investment projects in the Negative List for the Market Entry of Foreign Investment shall be subject to approval.

Projects not in the Negative List for the Market Entry of Foreign Investment shall be subject to the record-filing by the competent investment departments of local governments.

The Negative List of Free Trade Zone is a little different from other areas, subject to the administrative committee of the FTZ.

### Dealing with the Government

**Identify major issues when dealing with local and federal governments.**

Need to know local policies as guidance applied by local government. Preferential policies, including but not limited to: land subsidies, personnel subsidies, preferential tax rate for local taxation etc. Most foreign invested projects rely on local government’s approval.

### Dispute Resolution and Court Systems

**Summarize the court system, including the use of juries and arbitration.**

There are four levels of court in China:

- The primary people’s courts shall have jurisdiction as courts of first instance over civil cases, unless otherwise provided in Civil Procedure Law of the People’s Republic of China.
- The intermediate people’s courts shall have jurisdiction as courts of first instance over the following civil cases:
  1. major cases involving foreign element;
  2. cases that have major impact on the area under their jurisdiction; and
  3. cases as determined by the Supreme People’s Court to be under the jurisdiction of the intermediate people’s courts.
- The high people’s courts shall have jurisdiction as courts of first instance over civil cases that have major impact on the areas under their jurisdiction.
- The Supreme People’s Court shall have jurisdiction as the court of first instance over the following civil cases:
  1. cases that have major impact on the whole country; and
  2. cases that the Supreme People’s Court deems it should try.

There are no juries but judicial assessors in China. The people’s court of first instance shall try civil cases by a collegial panel composed of both judges and judicial assessors or of judges alone. When performing their duties, the judicial assessors shall have equal rights and obligations as the judges.

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Arbitration commissions are established in municipalities. There are more than 180 arbitration commissions in China. The parties' submission to arbitration to resolve their dispute shall be on the basis of both parties' free will and an arbitration agreement reached between them.

**Foreign Corrupt Practices:** What are the anti-corruption, anti-bribery and economic sanction laws which impact doing business in the country?

- Anti-corruption and anti-bribery issues are subject to Criminal Law of the People’s Republic of China and its amendments and Interpretations of the Supreme People’s Court and the Supreme People’s Procuratorate on Certain Issues Concerning the Application of Law in Handling Criminal Cases Involving Embezzlement and Bribery. Economic sanction laws include Anti-unfair Competition Law of the People’s Republic of China, Anti-Monopoly Law, and relevant regulations issued by Administration of Industry and Commerce (AIC) and National Development and Reform Commission (NDRC). In addition, the State Administration of Foreign Exchange is in charge of control and movement of foreign currency.

**Types of transaction:** How may businesses combine?

- The most common types of business combinations in China are:
  - Purchase of shares or assets;
  - Corporate reorganizations such as mergers, spin-offs, contributions of shares or assets;
  - Purchase of business units within insolvency proceedings;
  - Cooperation agreements such as joint ventures;
  - Takeover bids in listed companies;
  - Combinations of all the above transactions.

**Competition Law:** How do laws impact competition?

- The Anti-unfair Competition Law of the People’s Republic of China lists a series of activities of unfair competition, stipulates the obligation of supervision and inspection department to investigate alleged activities of unfair competition, and the legal liabilities of the business operator who violates the Law and causes losses to others.

**Employment Relations:** Briefly summarize major laws impacting employment and employee relations.

- Two main laws impacting employment and employee relations are:
  - Labor Law of the People’s Republic of China;
  - Labor Contract Law of the People’s Republic of China

**Statutes and regulations:** What are the main laws and regulations governing business combinations?

- Law of the People’s Republic of China on Securities;
- Company Law of the People’s Republic of China;
- Provisions on Foreign Investors’ Merger with and Acquisition of Domestic Enterprises;
- Provisions on Issues Concerning Regulating Material Asset Reorganization of Listed Companies;
- Measures for the Administration of Material Asset Reorganization of Listed Companies;
- Measures for the Administration on Acquisition of Listed Companies;
### Governing Law: What law typically governs the transaction agreements?

- Contract Law of the People’s Republic of China
- Interpretation on Certain Issues Concerning the Application of Contract Law of the People’s Republic of China (I)
- Interpretation on Certain Issues Concerning the Application of Contract Law of the People’s Republic of China (II)

### Filings & Fees: Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees payable in connection with a business combination?

For general cases: Ministry of Commerce of the People’s Republic of China (“MOFCOM”) or a provincial department in charge of commerce, State Administration for Industry and Commerce of the People’s Republic of China or its authorized local administration for industry and commerce, Administration of Foreign Exchange of the People’s Republic of China or a branch thereof; For listed companies: China Security Regulatory Authority. If in connection with State assets: State-Owned Assets Supervision and Administration Commission

- Transferor: stamp tax; income tax; VAT
- Transferee: stamp tax; income tax; VAT

### Information to be Disclosed: What information must be made public in a business combination? Does this depend on the structure used?

Only listed companies are required to disclose information in a business combination. If the equity interests of a listed company held by an investor and its persons acting in concert reach or exceed 5 percent of the issued shares of that company but do not reach 20 percent, a simplified written report on equity interest change including the following contents shall be formulated:

- Names and domiciles of the investor and its persons acting in concert; names, places of registration, and legal representatives of the investor and its persons acting in concert, if the investor and its persons acting in concert are legal persons;
- Purpose of shareholding, and whether the investor and its persons acting in concert intend to continue to increase their equity interests in the listed company within the next 12 months;
- Name of the listed company, type, number, and proportion of the stocks;
- Time when the equity interests held by them in the listed company reach or exceed five percent of the issued shares of the listed company or the equity interests held by them increases or decreases by five percent or more, and the method for the said change;
- Structure chart on equity control relationship between the controlling shareholder and the actual controller of the investor or its persons acting in concert. (Only if the investor and its persons acting in concert are the biggest shareholder or actual controller of the listed company)

If the equity interests held by an investor and its persons acting in concert reach or exceed 20 percent of the issued shares of a listed company but do not reach 30 percent, a detailed written report on equity interest change shall be formulated to disclose the following contents in addition to the information specified in the preceding article:
- Structure chart on equity control relationship between the controlling shareholder and the actual controller of the investor or its persons acting in concert, and;
- Prices, amount of capital required, source of capital, for obtaining relevant shares, and other payment arrangement;
- Whether or not there exists intra-business competition or potential intra-business competition between the business conducted by the investor and its persons acting in concert and their controlling shareholder and actual controller and the business of the listed company, and whether or not there exists continuous affiliated transaction. In the event of existence of intra-business competition or continuous affiliated transaction, whether or not corresponding arrangements have been made to avoid the intra-business competition between the investor, its persons acting in concert, their affiliated parties, and the listed company, and to maintain the independence of the listed company;
- Follow-up plans for adjusting the assets, businesses, personnel, organizational structure, articles of association of the listed company for the next 12 months;
- Major transactions between the investor or its persons acting in concert and the listed company during the past 24 months;
- There exists no circumstance specified in Article 6 of Measures for the Administration on Acquisition of Listed Companies; and
- Ability to submit relevant documents in accordance with the provisions of Article 50 of Measures for the Administration on Acquisition of Listed Companies.

Where a purchaser intends to acquire more than 30 percent of the shares of a listed company, and therefore is required to conduct acquisition by way of tender offer, the purchaser shall prepare a tender offer report, which shall state the following items:

- Name and domicile of the purchaser; name, place of registration, legal representative, and the structural chart on the equity control relationship between the purchaser, and its controlling shareholder and actual controller, if the purchaser is a legal person;
- Decision of the purchaser on acquisition and purpose of acquisition; whether or not the purchaser intends to increase the shareholding within the next 12 months;
- Name of the listed company, the type of shares to be acquired;
- Number and proportion of the shares to be acquired;
- Acquisition price;
- Amount of capital required for the acquisition, source of capital, and guarantee of the capital, and other payment arrangement;
- Conditions agreed upon in the tender offer;
- Period of acquisition;
- Number and proportion of shares of the target company held by the purchaser at the announcement of the tender offer report;
- Analysis into the impact of the present acquisition on the listed company;
- Follow-up plans for adjusting the assets, businesses, personnel, organizational structure, articles of association of the listed company for the subsequent 12 months;
- Major transaction between the purchaser or its affiliated parties with the listed company within the previous 24 months;
- Information on purchasing and selling of the stocks of the target company through securities transactions at securities exchange in the past six months; and
- Other contents that shall be disclosed as required by the CSRC.

**Disclosure of substantial shareholdings:** What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

- Information on the shareholders holding five percent or more of the shares, the controlling shareholders, and the actual controller shall be disclosed in the annual report of a listed company. Such requirements are generally applied regardless the company is a party to a business combination or not.

**Duties of directors and controlling shareholders:** What duties do the directors or managers of a company owe to the company’s shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

- The directors, controlling shareholders and senior management personnel of a company shall not make use of their affiliation to prejudice the interests of the company.

**Approval and appraisal rights:** What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

- For limited liability company, the proposed transfer of equity by a shareholder to any non-shareholder party shall be subject to the consent of more than half of the other shareholders. The shareholder shall notify the other shareholders in writing of the matters on the proposed equity transfer for their consent. Failure to reply by any of the other shareholders within 30 days upon receipt of the written notice shall be deemed as consent to the transfer. Where more than half of the other shareholders do not consent to the transfer, such
non-consenting shareholders shall purchase the equity to be transferred; failure to purchase the equity shall be deemed as consent to the transfer. With respect to any equity to be transferred with the consent of the shareholders, those shareholders other than the transferring party shall have the preemptive right under the same conditions. Where two or more shareholders claim to exercise their preemptive right, they shall determine the proportional ratio for purchase through consultation. Where the consultation fails, the preemptive right shall be exercised in proportion to their respective capital contribution at the time of the transfer. The shareholders of company limited by shares do not have such approval rights. Where a limited liability company is merged or divided, or it transfers its primary property, a shareholder of the company who votes against a resolution of the shareholders’ meeting may request the company to acquire the equity thereof at a reasonable price.

**Hostile transactions:** What are the special considerations for unsolicited transactions?

- Form a dedicated advisory team and hire consultants who previously had hostile takeovers;
- Formulate a reasonable basis for bidding and accurately calculate the interests of the shareholders of the Company and the Target Company;
- Announce the acquisition when the target company in the dry tree, mail in advance the tender offer documents;
- Setting a payment method based on the background of the target company’s shareholders typically involves cash, which increases the credibility of the acquisition and wins the support of “arbitrageurs.”

**Break-up fees – frustration of additional bidders:** Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company’s ability to protect deals from third-party bidders?

There are no relevant provisions on break-up fee and reverse break-up fee in the laws of China.

**For Limited Liability Company**
The shareholders of a limited liability company may transfer all or part of their equity among each other. The proposed transfer of equity by a shareholder to any non-shareholder party shall be subject to the consent of more than half of the other shareholders. The shareholder shall notify the other shareholders in writing of the matters on the proposed equity transfer for their consent. Failure to reply by any of the other shareholders within 30 days upon receipt of the written notice shall be deemed as consent to the transfer. Where more than half of the other shareholders do not consent to the transfer, such non-consenting shareholders shall purchase the equity to be transferred; failure to purchase the equity shall be deemed as consent to the transfer. Where two or more shareholders claim to exercise their preemptive right, they shall determine the proportional ratio for purchase through consultation. Where the consultation fails, the preemptive right shall be exercised in proportion to their respective capital contributions.
their respective capital contribution at the time of the transfer. The provisions on equity transfer otherwise prescribed by the articles of association of a company shall prevail.

**For Company Limited by Shares**

Shareholders shall transfer their shares at lawfully-established securities exchanges or by other means provided for by the State Council. The stocks of a listed company shall be listed and traded in accordance with relevant laws, administrative regulations and the trading rules of the securities exchange concerned. The shares of a company by the promoters thereof shall not be transferred within one year of the date of establishment of the company. The shares issued before the public offering of shares by the company shall not be transferred within one year of the date on which the stocks of the company are listed and traded on a securities exchange. The directors, supervisors, and senior management personnel of the company shall declare, to the company, information on their holdings of the shares of the company and the changes thereto. The shares transferrable by them during each year of their term of office shall not exceed 25 percent of their total holdings of the shares of the company. The shares that they held in the company shall not be transferred within one year of the date on which the stocks of the company are listed and traded. The aforesaid persons shall not transfer their shares of the company within six months of their departure from the company. The company's articles of association may set forth other restrictive provisions on the transfer of the shares of the company held by the directors, supervisors, and senior management personnel.

**Scope of M&A security review covers:** Foreign investors’ M&As of military industrial enterprises or military industry related supporting enterprises, enterprises located near key and sensitive military facilities, and other entities relating to national defense; foreign investors’ M&As of key domestic enterprises in areas such as agriculture, energy and resources, infrastructure, transport, technology, assembly manufacturing, etc., whereby the foreign investors might acquire the actual controlling right thereof.

**M&A security review work mechanism:** A system of ministerial panel for the security review of M&As of domestic enterprises by foreign investors (hereinafter referred to as “Ministerial Panel”) shall be established to be responsible for the specific M&A security review work; The Ministerial Panel shall be under the leadership of the State Council, while the National Development and Reform Commission and the Ministry of Commerce shall take the lead in carrying out M&A security review in conjunction with other relevant departments according to the industries and fields involved in the foreign M&A; and The main duties and responsibilities of the Ministerial Panel shall include: analyzing the impact of the M&A of domestic enterprises by foreign investors on the national security; studying and coordinating the major issues involved in the security review of foreign investors’ M&As of...
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<th><strong>Domestic enterprises; carrying out security review regarding the foreign investors’ M&amp;As of domestic enterprises if so required and making decisions.</strong></th>
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<td><strong>Conditional offers:</strong> What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?</td>
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| If a purchaser intends to acquire more than 30 percent of the shares of a listed company, and therefore is required to conduct acquisition by way of tender offer. Or a purchaser may voluntarily conduct acquisition by way of tender offer. There are no relevant provisions on exchange offer in the laws of China. Under normal conditions, banks are the main financial sources, the bank will scrutinize the conditions of the financing company:  
- First, the acquirer’s capital operation ability and management ability are good, can smoothly obtain financing and repay debts and smoothly reorganize after the acquisition;  
- Second, stable operation, high profitability and strong solvency.  
- Third, a high level of management and operation, and a reasonable and sound long-term development plan of the enterprise;  
- Fourth, with obvious market competition advantages;  
- Fifth, good financial condition, low debt ratio, and good asset liquidity. |
| **Financing:** If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer’s financing? |
| In practice, if a buyer needs to obtain financing for a transaction, usually a letter issued by financing firm is one of pre-conditions before entering into the transaction. The seller will assist to contact the financing firm and deliver checklist of required documents to buyer as required by the financing firm, if the seller offers seller’s financing. |
| **Minority squeeze-out:** May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process? |
| Minority stockholders may not be squeezed out. |
| **Cross-border transactions:** How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions? |
| A foreign investor’s purchase of the equity of a non-foreign-invested enterprise in China, or subscription of the capital increase of a non-foreign-invested enterprise in China, thereby transforming said enterprise into a foreign-invested enterprise; A foreign investor’s purchase of the equity held by Chinese shareholders in a foreign-invested enterprise in China, or subscription of the capital increase of a foreign-invested enterprise in China; A foreign investor establishes a foreign-invested enterprise, purchases by agreement the assets of a domestic enterprise through said foreign-invested enterprise, and operates such purchased assets, or purchases the equity of a domestic enterprise through the said foreign-invested |
enterprise; or A foreign investor directly purchases the assets of a domestic enterprise and uses the purchased assets.

Provisions on Foreign Investors’ Merger with and Acquisition of Domestic Enterprises Administrative Measures for Foreign Investors’ Strategic Investment in Listed Companies

**Waiting or notification periods:** Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

**Under normal conditions:** The domestic enterprise that sells assets shall issue a written notice to the creditors and publish an announcement on a nationwide-distributed newspaper at provincial level or above at least 15 days before the investor submits the application to the examination and approval authority. With respect to a foreign investor’s M&A of a domestic enterprise and establishment of an FIE, the examination and approval authority shall, within 30 days of receiving all the documents required to be submitted, decide whether to grant the approval or not in accordance with the law, unless otherwise provided for in the Provisions on Foreign Investors’ Merger and Acquisition of Domestic Enterprises.

In the event of a foreign investor’s M&A of Assets, the investor shall, within 30 days of its receipt of the Approval Certificate, apply to the relevant registration administrative authority for establishment registration and collects its business license for an FIE. In the event of a foreign investor’s M&A of Equity Interests, the merged and acquired Domestic Company shall apply to its original registration administrative authority for change of registration and collects its Business License for a Foreign-Invested Enterprise.

**For listed companies:** If the equity interests held by an investor and its persons acting in concert reach five percent of the issued shares of a listed company through securities transactions at securities exchanges or by means of transfer by agreement, a report on the equity interest change shall be formulated within 3 days of the occurrence of the said fact, and a written report shall be submitted to the CSRC and the securities exchange. The listed company shall be notified of the same, and a public announcement shall also be made. Within the said time limit, the stocks of that listed company shall not be traded. After the equity interests held by the aforementioned investor and its persons acting in concert reach five percent of the issued shares of a listed company, if the proportion of the shares held by them to the issued shares of the listed company increases or decreases through securities transactions at securities exchanges, each increase or decrease of five percent shall be subject to making a report and a public announcement in accordance with the provisions of the preceding paragraph. Within the time limit of report and within 2 days after a report or public announcement is made, the stocks of that listed company shall not be traded. Where a purchaser intends to acquire more than 30 percent of the shares of a listed company, and therefore is required to conduct acquisition by way of tender offer, the purchaser shall, within three days after the acquisition agreement is reached or similar arrangements are made, make an announcement on the summary of the tender offer report as reminder.
### Sector-specific rules: Are companies in specific industries subject to additional regulations and statutes?

No.

### Tax issues: What basic tax issues are involved in business combinations?

- Whether there are tax incentives, such as whether the company being acquired is in the tax preference area or industry;
- Optimization of business arrangements, such as maximization of tax efficiency regarding sales and other major operating arrangements;
- The existence of valuable tax assets such as unused tax losses;
- Whether the tax burden on the post-merger enterprise can be reduced through reasonable related-party transactions and transfer pricing arrangements.

### Labour and employee benefits: What is the basic regulatory framework governing labour and employee benefits in a business combination?

According to the Labor Contract Law of the People’s Republic of China, where an employing unit is merged, divided, etc., the existing labor contract shall remain valid and continue to be performed by the employing unit which succeeds to its rights and obligations. When making decisions on important matters, which have a direct bearing on the immediate interests of workers, the employing unit shall, after discussion by the conference of workers or all the workers, put forward plans and suggestions and make decisions after consulting with the trade union or the representatives of the workers on an equal footing. If, during the implementation of the decisions on important matters, the trade union or the workers hold that such decisions are inappropriate, it or they are entitled to put forward the opinion to the employing unit, and have decisions modified and improved through consultation. The trade unions shall protect the legitimate rights and interests of the workers in accordance with law and supervise the performance of labor contracts and collective contracts by the employing units. Where an employing unit violates the labor laws or regulations or breaches a labor contract or a collective contract, the trade union concerned shall have the right to put forward its opinions or request rectification. Where a worker applies for arbitration or brings a lawsuit, the trade union concerned shall provide him with support and assistance in accordance with law.
Restructuring, bankruptcy or receivership: What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

- Registered Capital. The acquirer shall find out if the target company has a feigned capital contribution or withdraws paid-in capital.
- Assets, debt and owner’s equity. The acquirer shall pay attention to the company’s assets structure, equity allocation, asset cover, non-performing assets and so on.
- Litigation risk. The acquirer shall pay attention that whether the target company legally signs and effectively contracts with its original workers, whether there is dispute between the shareholders of the target company and the distribution of shares, whether there is dispute between the target company and its creditors, and whether the target company and its responsible person have a crime.
- Tax. The acquirer shall pay attention that whether the target company is fully and duly paid the tax.
- Financial and Accounting system. The acquirer needs to conduct a detailed investigation on the financial and accounting system of the company to prevent the target company from intentionally raising the value of the company by making multiple proceeds, and objectively and reasonably assess the value of the target company.

Anti-corruption and sanctions: What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

China has strict regulations on corruption, if corruption behavior is found in M&A by regulatory authorities, the acquirer will fail in M&A, and the relevant person may be subject to criminal punishment.