

JUNHE SPECIAL REPORT



April 6, 2023

"Doing Business in a Re-opened China" S1:E3

Series I: Dipping a Toe in the Water

Episode III - Essentials for setting up a joint venture in China

Introduction

In Episode II of our series, we answered some of the most common questions that foreign investors have when they set up business entities in China. In this episode, we discuss legal and practical considerations for setting up joint ventures in China.

1. Why choose a joint venture?

Before 1990, foreign investments in many sectors could only be achieved through setting up a joint venture in China. As the country gradually opened up and joined the World Trade Organization in 2001, wholly owned foreign enterprises were permitted in more and more industries. On July 28, 2018, the Special Administrative Measures for Foreign Investment Access (also known as the Negative List) came into effect. The Negative List sets out the general principle that foreign investors could enjoy “national treatment” in all sectors, except for those expressly named on the Negative List. After four rounds of revisions, the 2021

edition of the Negative List reduced the number of sectors restricted or prohibited from foreign investment, from 48 to 31. Important sectors such as securities brokerage, life insurance, and vehicle manufacturing now all allow 100% foreign ownership. Despite this, many foreign investors¹ still choose joint ventures when entering the Chinese market, mainly due to commercial reasons: joint ventures can better utilize the resources of Chinese partners, (such as capital, technology, land lots, raw materials and distribution channels), thus reducing the investment of foreign investors as well as uncertainty of the project.

2. What have been the main trends and changes for joint ventures in China over recent years?

The pandemic has had a material impact on foreign investment in China. According to the Ministry of Commerce, 38,947 new foreign invested enterprises were established in 2022, down 19.2% from 2021². With the re-opening of China, consumption and investment is recovering. Wei Jianguo, the former Vice-minister of Commerce, in an interview earlier this year with China Daily, predicted that foreign direct investment may see double-digit growth and reach \$220-230 billion in 2023³.

¹ According to the Ministry of Commerce in the last statistical results on foreign investment by Investment mode before the promulgation of the new Foreign Investment Law, 8913 joint ventures were established from January to November 2019, accounting for 24% of all new foreign-invested enterprises.

² Data from the Chinese government website; for more information, please refer to http://www.gov.cn/xinwen/2023-02/28/content_5743623.htm

³ Data from China Daily website; for more information, please refer to

For Sino-foreign joint ventures, the background of Chinese partners has diversified, and the partners are playing more active roles in the corporate governance of joint ventures. Traditionally, a foreign investor often chooses a company in its same industry as the joint venture partner. Today, many joint ventures introduce financial investors, suppliers, R&D teams, distributors, and even employees as joint venture partners. Shareholders are increasingly active in the management of joint ventures, making it more important to set up an effective corporate governance to balance the interests of all stakeholders.

3. What are the main forms of joint ventures in China?

In January 2020, the Foreign Investment Law replaced the Sino-foreign Equity Joint Venture Law and the Sino-foreign Cooperative Joint Ventures Law which had regulated joint ventures in China for several decades. Following this, a joint venture could only be established as a limited liability company, a joint stock company or a partnership. We analyzed the difference between the three forms of business in S1 E2 of this series -- [How to Set up a Business Entity in China](#). A limited liability company is the most common form of foreign invested joint venture in China due to its straightforward registration process, flexibility in the shareholders' rights and obligations, mature legal regime, and the limited liability of the shareholders. This article focuses on joint ventures in the form of limited liability companies.

4. How is a joint venture established? How does it differ from establishing a wholly foreign-owned enterprise?

The journey to set up a joint venture begins with due diligence on the joint venture partner,

particularly on its reputation, financial situation and capabilities. If the joint venture partner contributes technology, land lots or other assets to the joint venture, due diligence and appraisals on these assets is also required. Joint venture partners will usually negotiate and enter a joint venture contract, articles of association, and the legal documents related to the ancillary transactions, such as technology licenses and distribution agreements. Currently, only the articles of association are required to be submitted to the registration authority during the establishment of a company. The registration process and the timeframe to set up a joint venture company is like that of a wholly foreign-owned company. For further details, please refer to S1 E2 of this series -- [How to Set up a Business Entity in China](#).

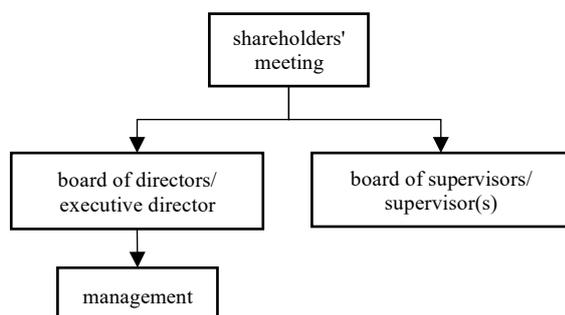
5. How are decisions made in joint ventures?

The governance of a joint venture in the form of a limited liability company is carried out through the shareholders' meeting, the board of directors (or the sole executive director), and the management (see the illustration chart below). The shareholders' meeting is the highest decision-making body of a company. It decides on important matters of the company and has the right to elect and remove the directors and supervisors⁴. The board of directors (or the sole executive director where there is no board of directors) reports to the shareholders' meeting. The board of directors has the right to make decisions on matters not reserved for the shareholders' meeting. The management, represented by the general manager and its executive team, is responsible for the daily business affairs and the daily operations, and can be appointed or removed by the executive director or the board of directors. The board of supervisors

<https://cn.chinadaily.com.cn/a/202301/19/WS63c8e826a3102ada8b22c11d.html>

⁴ If the articles of association require a representative of the employees to be a director or supervisor of the company, the representative shall be elected by the employees.

(or the supervisor(s) where there is no board of supervisors) have the right to inspect the company's financial conditions, supervise the performance of the directors and senior managers, and propose to remove them if they violate the laws, regulations, articles of association or decisions of the shareholders. According to the draft amendment to the Company Law ⁵, legislators may permit small-scale companies to set up audit committees under the board of directors to assume the roles of the supervising body and make the board of supervisors or supervisor(s) an optional choice. A foreign shareholder can participate in the governance of a joint venture company by nominating or appointing directors, supervisors and senior managers to the joint venture company and by exercising its information rights, voting rights and other statutory and contractual rights.



According to the Foreign Investment Law and its implementing rules, a Sino-foreign joint venture company established before January 1, 2020, may continue to have its board of directors as the highest authority in the company, but must change the highest authority to the shareholders meeting and complete relevant filing before January 1,

2025. After January 1, 2025, the market regulation authority will reject the registration and filing applications of foreign-invested enterprises that do not adjust their corporate governance structure according to the law. We are halfway through the 5-year transition period and we have assisted many joint venture companies to change their governance structure while preserving their existing business arrangements as much as possible.

6. What are the key issues to be considered in joint venture negotiations?

According to our experience, the following issues are critical in joint venture negotiations:

- (1) **Capital contribution timetable:** The parties to the joint venture need to clearly stipulate the timeline, amounts and conditions of capital contributions and the liabilities for failure of capital contributions. It is also important to agree on the denomination currency and mechanisms to deal with exchange rate fluctuations.
- (2) **Governance:** The parties to the joint venture need to agree on the mechanism for the appointment and removal of directors, supervisors and senior managers and their obligations respectively. The decision-making mechanism of the shareholders' meeting and the board of directors also needs to be clearly set out.
- (3) **Deadlock:** A deadlock breaking mechanism is essential where resolutions cannot be adopted at a shareholders' meeting or board

⁵ According to Article 69 of the Company Law (Second Review Draft of the Revised Draft) for Comments, a limited liability company may set up an audit committee among the board of directors in accordance with the provisions of the articles of association and exercise the powers and functions of the board of supervisors as provided for in this Law, without having a board of supervisors or supervisors.

According to Article 83 of the Company Law (Second Review Draft of the Revised Draft) for Comments, a small-sized limited liability company can have no board of supervisors and one or two supervisors to exercise the powers and functions of the board of supervisors under this Law; with the unanimous consent of all shareholders, it can also have no supervisors.

If the above amendment is retained, in the future, a company is allowed not to establish a board of supervisors or to instead establish an audit committee if the conditions are met.

of directors meeting. Common deadlock breaking mechanisms include: (i) escalating the dispute to the decision makers of the shareholders for a final decision; (ii) final decision by a shareholder unilaterally according to an agreed mechanism; (iii) final decision by a pre-agreed third party; (iv) one party buying out the other party or parties at an agreed price; or (v) dissolution of the company.

- (4) **Equity transfer:** The parties will agree on equity transfer restrictions, such as the lock-up period and the right of first refusal.
- (5) **Information and inspection rights:** The shareholders enjoy statutory information rights according to the Company Law, such as (i) reviewing and copying the articles of association, minutes of shareholders' meetings, resolutions of the board of directors and board of supervisors, and financial reports of the company, and (ii) reviewing the books and records of the company. Minority shareholders often request the right to inspect the company, including accessing its sites, facilities and offices, and engagement with the personnel of the company.
- (6) **Non-compete:** Non-compete clauses are often heavily negotiated between shareholders. Shareholders typically undertake not to compete with the joint venture company and negotiate on the scope of the non-compete business, territories and restriction period. Such restrictions usually extend to the affiliates and close relatives of the shareholders. It should be noted that non-compete clauses should not contradict the requirements of the PRC competition law.
- (7) **Ancillary transactions:** Negotiations regarding joint ventures often involve ancillary transactions, such as the supply of goods, provision of premises, licensing or transfer of

IPs, and commitment to distribute goods, etc. During negotiations, foreign investors shall weave the ancillary transactions into the joint venture transaction by introducing appropriate deal structures, payment terms, conditions, and covenants, as well as cross-default and cross-termination mechanisms.

7. What are the key issues to be considered in a joint venture with a financial investor?

(1) Balance of voting mechanism

Financial investors are unlikely to pursue active control of a joint venture company, but they do want to have an appropriate level of control over important matters. Therefore, the founding shareholders shall assess the impact on the joint venture company if the financial investors exercise their veto rights. Where there are multiple financial investors, it is common to allow financial investors to vote as a single class on an important matter, and to veto such matters only if the financial investors holding a simple majority or a two-thirds majority of all shares vote against it.

(2) Valuation adjustment mechanisms and redemption rights

Financial investors often want to negotiate a valuation adjustment mechanism (VAM) or redemption right. They may ask the joint venture company or the founding shareholders to compensate them or buy back their shares when a certain event is triggered. The shareholders need to review the reasonableness of triggering events, the formula of VAM or redemption, and whether a liability cap is desirable. The parties should also pay special attention to PRC laws and judicial practices regarding the validity and enforceability of VAM and the redemption provisions.

8. What are the key issues to be considered in a joint venture with a state-owned

enterprise?

When entering a joint venture with a state-owned enterprise, special attention needs to be given to the approval, appraisal, and process requirements which may be applicable when the state-owned enterprise contributes its capital or transfers its equity interests to a third party. In respect of corporate governance, the parties shall also consider if the state-owned shareholder has any special requirements, such as whether it is necessary to set up a labor union within the joint venture and whether any matter shall be subject to prior communication with the state-owned asset supervision authority, etc.

9. What can outside counsels offer to joint ventures in China?

Outside counsels with solid experience in joint venture transactions can help navigate the entire process through assistance with:

- due diligence on the joint venture partners and the assets they will contribute;
- the negotiation and execution of the joint venture contract and other legal documents; and
- the application for licenses and permits for the joint venture and ensuring its legal compliance.

Please email us at China_Business_Support@junhe.com for more information regarding our experience and fee structure.

In our next episode, we will discuss “Essentials for equity divestments by foreign investors”, stay tuned.

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君合专题研究报告



2023年4月6日

“再开放、话外资” 专题系列 S1:E3: 在华成立合资企业的商业和法律考量

引言

在本系列的第二篇中，我们回答了外国投资者于中国设立业务实体时的一些常见问题。本章节中，我们将围绕中外合资这一较为普遍的外商投资方式展开，就疫情后外国投资者在华成立合资企业的常见问题进行解答，帮助外国投资者更好地与中国合作伙伴达成合作，实现互惠共赢。

一、为什么要设立合资企业？

在 1990 年以前，绝大多数对华外商投资仅能通过合资形式实现。随着中国逐步对外开放并在 2001 年加入世界贸易组织，越来越多的行业允许外商独资经营。2018 年 7 月 28 日，《外商投资准入特别管理措施（负面清单）（2018 年版）》开始实施，在全国范围内仅对少数行业设置了禁止准入或者设定股比上限等准入限制，而外资进入其他行业则享受“准入前国民待遇”，原则上不得在负面清单之外的领域实行对外资准入的限制性措施。经过连续四年修订，2021 年的全国版负面清单已经由 2018 年的 48 项减少至了 31 项，证券、寿险、汽车制造等重要领域均可设立外商独资企业。尽管如此，现实中仍有大量外国投资者⁶出于商业考虑，选择在中

国设立合资企业：合资企业能够帮助外资更好地利用中方合作伙伴的资金、技术、土地、原材料和渠道等资源，从而减少自身的投入，降低投资的不确定性。

二、近年来合资企业在中国有哪些发展趋势和变化？

新冠疫情对中国外商投资有所扰动。根据商务部的数据，2022 年全年外商直接投资新设立企业 38497 家，比上年下降 19.2%⁷。随着中国重开国门，消费和投资正在加快复苏。商务部原副部长魏建国于今年初接受中国日报记者专访时预计今年外商对华直接投资将会以两位数速度增长，全年有可能达到 2200 亿至 2300 亿美元⁸。

对于中外合资企业而言，近年来合作伙伴的背景和对合资企业的参与度呈现多样化的趋势。传统的合资企业中外资往往选择行业内企业作为合作伙伴，而如今很多合资企业也会引入财务投资人、原材料供应商、研发团队、经销商作为股东，并且可能引入员工持股。此外，股东参与合资企业管理的热情超出以往，因此建立可平衡各方利益诉求的有效公司治理结构日益重要。

三、在华设立合资企业有哪些形式？

⁶ 根据商务部在《外商投资法》正式实施前最后一次按投资方式分类对外商投资进行的统计中，2019 年 1-11 月新批准设立的中外合资企业为 8913 家，占有新设立外商投资企业的 24%。

⁷ 数据来源于中国政府网《中华人民共和国 2022 年国民经济和社会发展统计公报》，[http://www.gov.cn/xinwen/2023-](http://www.gov.cn/xinwen/2023-02/28/content_5743623.htm)

[02/28/content_5743623.htm](http://www.gov.cn/xinwen/2023-02/28/content_5743623.htm)

⁸ 信息来源于中国日报中文网，

<https://cn.chinadaily.com.cn/a/202301/19/WS63c8c826a3102ada8b22c11d.html>

2020年1月《外商投资法》实施后,《中外合作经营企业法》与《中外合资经营企业法》一同退出了历史舞台。现存可以设立的合资企业包括有限责任公司、股份有限公司和合伙企业三种形式。我们在本系列法评第 S1:E2 篇-《[如何在中国设立商业实体](#)》中比较了三种企业形式的区别。其中有限责任公司因为注册流程规范简单、股东权利义务安排灵活、配套法律成熟、同时股东以出资额为限承担有限责任,在上述三种形式中占据主流地位,因此我们将中外合资有限责任公司作为本篇文章主要探讨的形式。

四、合资企业的设立流程是什么?与外商独资企业的设立流程有何不同?

由于合资企业存在一个或者多个合作伙伴,实践中往往需要先针对合作伙伴进行尽职调查,重点关注其声誉、财务状况和履约能力。如合作伙伴采用技术、土地等实物出资,则也通常需要对拟出资资产进行尽职调查及评估。合资各方一般会谈判和签署合资合同、章程,以及与合资企业相关的附属交易文件(例如技术许可、经销协议等)。在企业设立过程中目前一般仅需向公司登记部门提交公司章程。合资企业的注册流程和时间要求与外商独资企业基本相同,具体可参考本系列法评第 S1:E2 篇-《[如何在中国设立商业实体](#)》。

五、合资企业的各方如何进行决策?

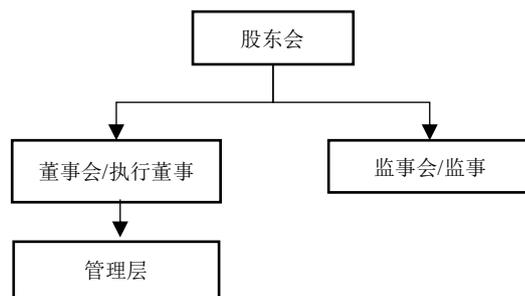
中外合资有限责任公司的内部治理主要通过股东会、执行董事或董事会、管理层三层机构实现(具体可见图一)。股东会是公司的权力机构,决定公司重大事项,并有权选举和更换董事、监事⁹;董事会(或选择不设董事会的情形下,执行董事)对

⁹ 如果公司章程规定部分董事、监事由职工代表担任,该代表应当由职工选举产生。

¹⁰ 根据《公司法(修订草案二次审议稿)征求意见稿》第六十九条,有限责任公司可以按照公司章程的规定在董事会中设置审计委员会,行使本法规定的监事会的职权,不设监事会或者监事。

内部文件,注意保密

股东会负责,享有股东会保留事项以外的公司的经营决策权;以总经理及高管团队为代表的管理层负责具体事务的执行和日常经营管理,由执行董事或董事会聘任或者解聘;监事或者监事会则有权检查公司财务情况,监督董事、高级管理人员执行职务的情况,并有权在其违反法律法规、章程或股东会决议时提出罢免建议。根据公司法的修订草案,立法机关也在探索允许规模较小的公司在董事会中设立审计委员会以行使监督职权,而不再强制性要求设立监事或者监事会¹⁰。目前对于中外合资有限公司的外方股东来说,通常可以通过提名或推荐代表其利益的董事、监事与高管或行使股东的信息权、表决权及其他法定和约定权利来参与对合资公司的管理。



(图一)

根据《外商投资法》及其实施条例的规定,在2020年1月1日前设立的中外合资企业可继续由董事会作为公司权力机构,应当在2025年1月1日前改变组织形式,以股东会作为公司权力机构,并办理变更登记。自2025年1月1日起,对未依法调整组织形式、组织机构等并办理变更登记的现有外商投资企业,市场监督管理部门不予办理其申请的其他登记事项,并将相关情形予以公示。随着5

《公司法(修订草案二次审议稿)征求意见稿》第八十三条则规定规模较小的有限责任公司,可以不设监事会,设一至二名监事,行使本法规定的监事会的职权;经全体股东一致同意,也可以不设监事。

若上述修订内容得以保留,在未来公司只要满足条件即可不设监事会或是以审计委员会代替监事会行使职权。

年过渡期的过半，我们已经协助中方或外方股东为多家中外合资有限公司完成了治理结构的变更，并且最大程度上维持了其原有的商业安排。

六、合资谈判中，需要考虑哪些重点问题？

根据我们的经验，合资谈判通常需要重点关注的问题有：

- (1) **出资时间表：**合资各方需要对于出资金额、出资期限、前提条件和违约责任进行明确约定，并且需提前约定好出资币种及应对汇率波动的机制。
- (2) **治理结构：**合资各方需明确董事、监事、高管的选任机制，职责分配和股东会及董事会的议事规则与决策机制。
- (3) **僵局处理：**在股东会和董事会层面出现僵局，导致公司无法作出有效决策时，需要有僵局处理的机制。常见的僵局处理的方法包括：提升至股东最高决策者以协商的方式力求解决；由各方事先约定的一方或者第三方作出最终决定；约定在僵局情况下由一方股东按照约定价格强制购买合资方的股权，或者将股权强制出售给其他方；终止和解散合资企业。
- (4) **股权转让：**各方往往会设置股权转让锁定期及优先购买权机制。
- (5) **信息权和检查权：**《公司法》赋予了股东默认的信息权，包括查阅、复制公司章程、股东会会议记录、董事会会议决议、监事会会议决议和财务会计报告，以及查阅公司会计账簿。实践中，少数股权方往往会额外要求有权对合资公司进行检查，包括进入合资公司的场地、设施和办公场所，以及接触合资公司人

员。

- (6) **不竞争条款：**不竞争条款往往是合资各方激烈争夺的条款。合资各方往往会要求其他合资方承诺不与合资企业竞争，就不竞争条款适用的业务、地域和时间作出明确约定，相关限制往往延伸至合资方关联公司和近亲属等。谈判此类条款时，需要注意相关约定应符合中国反垄断法的要求。
- (7) **附属交易：**合资企业的谈判经常涉及附属交易，常见的附属交易如合资方向合资公司供货、提供场地、进行技术许可或者转让、承诺经销货物等。谈判时需要注意将合资交易与附属交易互相关联，综合考虑交易价款和交易机制，适当设定先决条件、承诺、交叉违约和交叉终止机制，避免各交易出现各自为政的情况。

七、与财务投资人进行合资需要考虑哪些重点问题？

(1) 投票机制的平衡

通常而言，财务投资人不会过度追求公司的控制权，但他们仍然会要求确保自己对于重大事项的话语权，因此在合资条款谈判时需要评估就某些重大事项给予财务投资人一票否决权对公司日常经营可能造成的影响。对于合资公司存在多个财务投资人的情形，常见的做法是允许财务投资人作为单独一类股东进行表决，只有取得所有财务投资人中代表简单多数或者三分之二以上表决权的财务投资人的支持，才能否决某些重大事项。

(2) 对赌及赎回承诺

财务投资人在谈判中往往会要求增加对赌或

是赎回条款。在对赌条款触发时，财务投资人可能会要求创始人或者合资企业提供补偿或是回购其股份。合资方在谈判过程中需要着重关注对赌、赎回条款的触发条件是否合理，相关补偿或者回购义务的计算方式、可行性及是否需要设定责任上限。此外，还需关注法律法规及司法实践对于对赌、赎回条款效力及执行措施的要求。

八、与国有企业进行合资需要考虑哪些重点问题？

在与国有企业进行合资时，需要特别注意国有企业出资或股权转让时可能适用的国资审批、评估与进场交易要求。在公司治理方面，需要考虑到国资股东可能会提出的特殊要求，例如是否需要在公司内部设立工会，重大事项是否需与国资委事先沟通等。

九、外部律师能够提供哪些帮助？

在合资企业设立方面，经验丰富的外部律师可以协助客户把控整个合资交易的流程和时间表，并提供如下协助：

- 协助对合作伙伴及合资资产进行尽职调查；
- 协助合资合同及其他合资法律文件的谈判与签订；及
- 协助合资企业取得相关证照并合规经营。

君合团队在涉及合资企业法律服务领域经验丰富，如有需要可随时发邮至 China_Business_Support@junhe.com 索取报价表及业绩介绍。

下期预告：在下一期中，我们将介绍《外国投资者处置在华企业股权常见问题解析》。

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