[4] Compare Reed/Reed Lajoux 1998, p 352: "… acquirers should concentrate on areas of particular relevance to the transaction at hand."
[5] Compare Pack 2002, p 157.
[6] SCMP 9 May 2006, p B 2; compare Avedissian 2005, pp 26-27.
[7] SCMP 9 May 2006, p B 2, quoting an Ernst & Young survey according to which a due diligence exercise in China normally takes about 12 to 18 months as opposed to the typical three to six months in developed markets; Silli 2009, p 34.
[8] Davies 2003, p 16 ("poor transparency and inadequate documentation"); Silli 2009, p 34.
[9] SCMP 10 January 2005, p A 4; also see SCMP 27 June 2006, p B 1; for FIEs also see the rather vaguely formulated *Tentative Provisions on Archive Management of Foreign-invested Enterprises*, effective as of 20 December 1994; for latest developments regarding China's accounting standards see Leung/Leung, 2006, pp 35-37.
[10] Norton/Chao, 2001, pp 46-53.
[11] Compare Deschandol/Desmeules, 2005-2006, pp 13-15 (15); Silli 2009, p 34 ("cannot provide a satisfactory alternative").
[12] Norton/Chao 2001, p 53; compare Silli 2009, p 34; *infra*, ¶5-160.
[13] FT 10 July 2009, p 13; compare Taylor 2009, p 4; CM 2010, p 7.
[14] *Supra*, ¶2-100.
[15] Compare Reed/Reed Lajoux 1998, pp 370-381; Chu, 1995, pp 17-22.
[16] *Supra*, ¶1-310 to 1-316.
[17] *Infra*, chapters 5 to 12.
[18] Compare *supra* ¶1-312.
[19] Compare Chong 2001, pp 49-54.
[20] For the term "registered capital" see *supra*, chapter 1, note 87.
[21] The term "total amount of investment" means capital contributions made by the parties plus external financing.
[22] For the term "registered capital" see *supra*, chapter 1, note 87.
[23] For the term "total amount of investment" see *supra* note 21.
[24] For share pledges compare Wang Ling 2007, pp 23 ff.; Liu/Wang 2008-09, p 36.
[25] *Infra*, ¶14-400.
[26] *Ibid.* For the impact of the recent reform of the enterprise income tax system compare *infra*, ¶2-270 and ¶19-100.
[27] *Ibid.*
[28] For the legal framework governing corporate governance in China see Xi 2009; Young/Li/Lau 2007, pp 204 ff; Lin/Liu/Zhang 2007, pp 195 ff; Cheung 2007, pp 27 ff.
[29] For a general discussion of the corporate governance reforms in China see Xi 2009; Anderson/Guo, 4/2006, pp 17-24 and 5/2006, pp 17-24; Neumann 2006, p 31 f, also see the *Code of Corporate Governance of Listed Companies*, issued by CSRC on 7 January 2001, and the *Guidelines of the Shanghai Stock Exchange on Internal Control of Listed Companies* (eff 1 July 2006).
[30] Compare Art 126 *PRC Contract Law*; *infra* ¶3-100.
[31] Also see the *SPC's Court's Views on Certain on Certain Questions Concerning the Implementation of the PRC General Principles of Civil Law* (eff 16 January 1988).

[32] According to its Art 428 the *PRC Contract Law* has replaced the *PRC Economic Contract Law* of 1981, the *PRC Foreign Economic Contract Law* of 1985 and the *PRC Technology Contract Law* of 1987.
[33] Compare SCMP 9 May 2006, p B 2.
[34] China has over 22% of the world's population, but only 7% the world's arable land. Land is, therefore, one of the most valuable resources in China.
[35] In Chinese: 土地使用权.
[36] Art 10 of the *PRC Constitution* of 1988 reads as follows:
"No organisation or individual may infringe upon illegally, sell or otherwise transfer land illegally. Land use rights may be transferred in accordance with the provisions of the law."
In contrast, the same article of the PRC Constitution of 1979 provided for the following wording:
"No organisation or individual may infringe upon illegally, sell, lease or otherwise transfer land illegally."
[37] In particular the version of the *PRC Land Administration Law*, which entered into force on 29 December 1988, abolished the prohibition to lease out land and provided in its Art 2 para 4 that the Chinese state will establish a system of using state-owned land against consideration, compare Wolff 2005, p 65.
[38] In 2005 the number of contractual disputes over construction projects, including land disputes, heard by the SPC last year totalled 70,129 and involved RMB30.65 billion. The Ministry of Land apparently found that a substantial amount of land was developed without approval, SCMP 1 May 2006, p 3; also compare Stein 2006, pp 1 ff.
[39] Howson, 1995, pp 40 ff (40).
[40] Wolff 2005, pp 68-69; compare Zhu/Li 2007, pp 24 ff.
[41] Wolff, *ibid,* p 69.
[42] See Maguire 12-2008/1-2009, pp 17-18.
[43] In Chinese: 出让.
[44] In Chinese: 划拨.
[45] Wolff 2005, pp 69 ff.
[46] Lin/Wong 2007, p 29: "Forced eviction is a constant headache in urban development and construction."; also compare Art 42 *PRC Real Rights Law* (eff 1 October 2007) and the revised version of the *PRC Administration of Urban Real Estate Law* (eff 30 August 2007 — note that the Ministry of Housing and Urban-Rural Development has published a revised version of this law for public comments until 31 March 2009) for the preconditions under which the Chinese state can claim back state-owned land currently used by individuals or enterprises.
[47] See *eg* the new *PRC Law on Urban and Rural Planning Law* (eff 1 January 2008); SCMP 20 October 2007, p A 5: "… aims to weed out local government defiance of urban planning in pursuit of image-building projects, which often lead to illegal land reclamation and demolition and a waste of resources in building unnecessary grand structures."
[48] Artt 23, 24 *PRC Tentative Regulations on the Granting and Assigning of Land Use Rights regarding State-owned Land in Urban Areas* (eff 24 May 1990); Art 84 *PRC*

"The existing laws and administrative regulations concerning foreign-invested enterprises and the *Change in Equity Interest of Investors in Foreign-invested Enterprises Several Provisions* shall apply to equity acquisitions of foreign-invested enterprises in China by foreign investors. Matters not covered therein shall be handled by reference to these *Provisions*."

This reference is rather vague and consequently creates problems in practice. Of note, it is unclear if Article 14 of the *Acquisition of Domestic Enterprises by Foreign Investors Provisions,* which provides that the acquisition price must be determined by the parties based on the value of the equity interest assessed by an appraisal institution,[86] now also needs to be observed in the acquisition of FIE equity interest,[87] thus changing the former practice as described above. From a practical point of view, it is, therefore, sensible to discuss this issue with the competent examination and approval authority.[88]

If the assignment agreement provides that all or part of the purchase price has to be paid prior to the application for approval and if the transferee has failed to make the payment despite a request of the transferor to do do so within reasonable time, the transferor can apply to a court to request the termination of the assignment agreement and be reimbursed for losses incurred.[89]

¶5-160 Assignment agreement

For the transfer of FIE equity interest, the *Changes in Equity Interest of Investors in Foreign-invested Enterprises Several Provisions* require the assignor and the assignee to enter into an assignment agreement with the following contents:[90]

(1) the names and address of the assignor and the assignee as well as the names, positions and nationalities of their legal representatives;

(2) the portion of the equity interest assigned and the price;

(3) the time frame for and the form of the assignment;

(4) the rights and obligations of the assignee under the constitutional documents of the FIE;

(5) details regarding the liability in case of a breach of the assignment agreement;

(6) the governing law and dispute settlement mechanism;

(7) details regarding the effective date and the termination of the assignment agreement; and

(8) the time and venue of the conclusion of the assignment agreement.

In relation to item (4), it is normally sufficient to state in the assignment agreement that all rights and obligations under, *eg* the joint venture contract and the joint venture's articles of association of the assignor are transferred to the assignee as of the date of effectiveness of the assignment agreement.

In practice, agreements regarding the assignment of FIE equity interest are often short and do not take the form of contracts normally used in international M&A transactions. The main reason for this approach lies in the concern that Chinese parties[91] and approval authorities may not be able to appreciate sophisticated contract language and comprehensive regulations, thus leading to a delay of the approval process.

Consequently, and also for the sake of confidentiality in cases where the transfer of FIE equity interest forms part of an international M&A transaction, the China-related part of the transaction may be based on a separate agreement annexed to the master sale and purchase agreement. The master sale and purchase agreement may contain additional stipulations, in particular representations and warranties, covering the China-related parts of the transaction.

It is important in this context, however, that according to the SPC *Regulations on Several Issues Concerning the Trial of Cases of Disputes Related to Foreign-invested Enterprises (I)*[92] FIE-related supplementary agreements are valid and thus enforceable in China without approval only if they do not constitute a 'significant or substantial change'.[93] Examples of 'significant or substantial changes' are changes to an FIE's registered capital, corporate form, term, capital contributions, mergers and divisions as well as the transfer of FIE equity interest.[94]

¶5-170 Effective date

An agreement on the assignment of FIE equity interest and related agreements on the necessary amendments of the FIE's constitutional documents enter into force on the date of issuance of the amended Foreign-invested Enterprise Approval Certificate.[95] In contrast, in practice M&A agreements often provide that the closing date shall be the date of the issuance of the FIEs' new business license upon the registration of the transfer of FIE equity interest.

As the effective date depends on the completion of the approval process and thus the performance of Chinese approval authorities, the exact timing of the transaction and the precise effective date are not within the control of the parties.[96] In practice, there have been delays due to requests for additional documents or information. In other cases, the application was simply not processed presumably due to the approval authority's opposition to the transfer[97] or because the approval authority lacked the manpower to handle all incoming applications in time. Sometimes, no explanation for a delay was available at all.[98]

The lack of predictability of effective dates causes problems if the deal needs to be closed before a certain date, *eg* for tax or accounting reasons, or if the transfer of FIE equity interest is part of an international M&A transaction with a specific closing date.[99] To address the problem, different options have been considered in practice,[100] but none of which have provided completely satisfactory solutions. It appears that related problems can only be avoided where FIE equity interest is held through holding companies established offshore. In this case, instead of transferring the FIE equity interest, shares of the offshore holding company could be transferred and such transfer would in principle not be subject to Chinese law and its consent and approval requirements.[101]

FIE parties whose pre-emptive rights have been violated by an FIE equity interest transfer can request a court to declare an assignment agreement invalid within one year from the date the have known or ought to have known about the signing of the assignment agreement.[102] As a matter of prudent drafting practice all FIE parties should therefore be requested to waive expressively in writing all statutory[103] and contractual pre-emptive rights. In practice this is normally done together with, but in addition to the planned transfer of FIE equity interest is declared.[104]

There is no express rule on the documents that need to be submitted in this regard to the competent registration authority.[77] It must, therefore, be assumed that the "normal" requirements for the registration of establishing FIEs apply. The documents requested by the registration authority, however, may vary in practice and it is therefore advisable to seek an early co-ordination with the competent registration authority to obtain clarification.

¶7-500 Purchase price

The price to be paid, as consideration for the transfer of title to the assets of the target enterprise, shall be based on the value of the assets as appraised by an asset appraisal institution.[78] Special provisions apply for the acquisition of state assets.[79] As in the case of the acquisition of equity interest in domestic enterprises without FIE status by foreign investors,[80] selling assets at a price manifestly lower than the appraisal result in order to transfer capital abroad in a covert manner is prohibited.[81] The special significance — and the resulting difficulties — of this rule, was already discussed above.[82]

In addition, the special time frame within which the price is to be paid in asset deals conducted by foreign investors, corresponds to the rules on the timing of the purchase price in the acquisition of equity interest in domestic target enterprises without FIE status, *ie* in principle the acquisition price must be paid within three months from the date of issuance of the new FIE's business license.[83] In special circumstances and subject to the approval of the examination and approval authority, the foreign investor may pay at least 60% of the price within six months from the date of issuance of the new FIE's business license and pay the full balance within 12 months.[84]

Finally, stock-for-assets deals are now possible, at least in theory.[85] The payment with shares for the acquisition of assets of domestic target enterprises is, however, not yet a common scenario. Unlike in the case of stock-for-stock scenarios, the latest version of the *Acquisition of Domestic Enterprises by Foreign Investors Provisions* does not provide for special rules on stock-for-asset deals.

¶7-600 Asset purchase agreement

Asset purchase agreements need to provide for specific contents as follows:[86]

(1) the particulars of the parties to the agreement, including their names and domiciles as well as the names, positions and nationalities of their legal representatives, etc;

(2) the list and price of the assets to be purchased;

(3) the term and method of performance of the asset purchase agreement;

(4) the rights and obligations of the parties;

(5) the liability for a breach of contract and dispute settlement mechanism; and

(6) the date and the place of the execution of the agreement.

In practice, these contents will have to be supplemented by additional provisions, in particular by a comprehensive section on representations and warranties. Again,[87] it needs to be considered that complex contract structures may prevent Chinese authorities from approving the deal in a timely manner.

¶7-700 Effective date

The *Acquisition of Domestic Enterprises by Foreign Investors Provisions* do not contain express provisions regarding the effective date of asset deals conducted by foreign investors in China. It is necessary in this context to distinguish between the two different acquisition modes and the three stages of each transaction, *ie* the conclusion of the asset purchase agreement, the transfer of title to the assets and the establishment of the FIE that is supposed to own and operate the purchased assets.[88]

It appears that the date of effectiveness of the asset purchase agreement is in any event the date of the approval of the competent government authority. If an FIE is established first in order to acquire and operate the assets,[89] the establishment of the FIE is effective upon the issuance of such FIE's Business License.[90] The transfer of title to the assets of the target enterprise will then require all the preconditions[91] to be fulfilled for the transfer of ownership of any single property item covered by the asset deal. If the assets of the target enterprise are to be acquired by the foreign investor first for the purpose of making in-kind capital contributions to establish the FIE, the transfer of ownership of the target enterprise's assets to the foreign investor and all the PRC property law related requirements must be met in this regard.[92] Independent from this transaction, the effectiveness of the new FIE's establishment is again subject to the issuance of the FIE's business license,[93] which will precede the transfer of the assets by the foreign investor to the FIE.

In this context, the last paragraph of Article 23 of the *Acquisition of Domestic Enterprises by Foreign Investors Provisions* provides for the following problematic stipulation:

> "Where a foreign investor purchases the assets of a domestic enterprise by agreement and uses such assets to establish an FIE, the foreign investor may not carry out business with such assets prior to the establishment of the FIE."

First, this provision appears to acknowledge that the effectiveness of the acquisition of the target enterprise's assets by the foreign investor is independent from the establishment of the FIE which is supposed to become the ultimate owner of the assets. Secondly, despite the foreign investor's ownership of the acquired assets, the investor is not allowed to operate them. Instead, the "establishment" of the FIE is required first. The rationale behind this provision is that the assets of domestic enterprises with or without foreign participation shall only be operated onshore through a domestic enterprise with FIE status because of the involvement of a foreign investor. However, if this was the case it is unclear why Article 23 para 4 of the *Acquisition of Domestic Enterprises by Foreign Investors Provisions* focuses on the establishment of the FIE. In contrast, it should state that the operation of the FIE is only allowed after the contribution of the assets of the target enterprise. Moreover, it is questionable if the restrictions of the *Acquisition of Domestic Enterprises by Foreign Investors Provisions* could prevent circumvention by foreign investors who do not acquire all of a domestic target enterprise's assets at the same time or via different acquisition vehicles. The law is unclear at which point the applicability of the *Provisions* would be triggered.[94]

Upon receipt of the application for approval, the approval authority must seek an opinion from the state authority in charge of the administration of the industry within which the target company is operating and formulate a written response to the FIE within 10 days from the receipt of the opinion.[56] Upon a positive approval decision, the FIE must then apply for registration to the company registration authority where the target company is located.[57]

Within 30 days from the acquisition,[58] the FIE needs to file with its own examination and approval authority the following documents:[59]

(1) the completed form for FIE investments;

(2) the Business License of the target company (in photocopy); and

(3) the opinion of the provincial MOFCOM branch if the project falls within the restricted investment category.

The target company itself may only obtain FIE status if it is located in Central or Western China and if the foreign portion of its registered capital amounts to at least 25%.[60] In the event the target company has already obtained FIE status before the acquisition, the transaction will be governed by the *Changes in Equity Interest of Investors in Foreign-invested Enterprises Several Provisions.*[61]

Finally, on 29 August 2008, SAFE issued the *Circular on Relevant Operation Issues regarding the Administration of the Conversion of FOREX Capital of FIEs and Subsequent Payments.*[62] According to the *Circular*, registered FIE capital exceeding USD50,000 can in principle only be used for onshore RMB equity investments after special approval has been obtained.[63] This rule appears to make onshore investments rather difficult and it remains to be seen how practice it will respond.

¶10-211 Asset deals

The scope of applicability of the *Investment Within China by Foreign-invested Enterprises Tentative Provisions* does not cover asset deals.[64] Furthermore, it is questionable if the stipulations of the *Acquisition of Domestic Enterprises by Foreign Investors Provisions*[65] are meant to address asset acquisitions conducted by pre-existing FIEs. As already pointed out,[66] these *Provisions* seem to imply that asset deals conducted in China by foreign parties always require the establishment of a new FIE especially for the purpose of acquiring assets from Chinese target enterprises. Consequently, there is currently no special legal basis for asset deals conducted by pre-existing FIEs.[67] Due to the lack of sufficient case-related evidence, it is speculative whether this means that asset deals conducted by pre-existing FIEs are impossible, whether they are subject to the "normal" property law stipulations like any other domestic enterprise,[68] or whether they are to be handled in analogy to the *Investment Within China by Foreign-invested Enterprises Tentative Provisions*. Moreover, even if asset acquisitions of pre-existing FIEs were to fall within the scope of applicability of the *Acquisition of Domestic Enterprises by Foreign Investors Provisions,* it is uncertain which portion of a domestic enterprise's assets must be purchased to trigger the applicability of the *Provisions.*[69]

For the time being, the only practical solution to these problems is to liaise with the competent authorities in every single case to find out the approval and registration

practice. Hopefully, future practice or — even better — legislative activities will provide additional guidance and eliminate the current uncertainties.

¶10-212 Venture capital investments

Special rules apply in relation to FIEs which have been established only for the purpose of making short- and mid-term investments in new and high-tech enterprises for the purpose of capital gain,[70] *ie* for foreign-invested venture capital firms.[71] Details regarding onshore investments of foreign-invested venture capital firms will be addressed in a separate chapter.[72]

¶10-300 Acquisitions by domestic enterprises without FIE status

For the transfer of equity interest in limited liability companies and the transfer of shares of companies limited by shares, the provisions of the *PRC Company Law* need to be observed.[73] Holders of equity interest in limited liability companies may transfer their equity interest to other equity interest holders.[74] The transfer to third parties requires the majority consent of other equity interest holders. Potential transferors shall notify the other equity interest holders of the particulars of the planned transfer in writing and solicit their consent. If the consent of the majority of equity interest holders cannot be secured, those who have objected shall purchase and have the pre-emptive right to purchase the equity interest to be transferred.[75] Special provisions of the company's articles of association prevail.[76]

Asset deals require compliance with the laws and regulations of the PRC's property law governing the transfer of ownership as outlined above.[77] Finally, special aspects regarding the acquisition of listed companies have already been discussed in the previous chapter.[78] Onshore venture capital investments without foreign participation will be the topic of the later chapter.[79]

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[1] With the exception of ¶5-200.
[2] *Supra*, ¶1-320.
[3] Compare *supra*, ¶1-320; Wolff 2001, pp 38 ff.
[4] Latest version eff 22 June 2009.
[5] Also see Art 2 para 1 *Investment Within China by Foreign-invested Enterprises Tentative Provisions* (eff 1 September 2000).
[6] Pursuant to Art 13 *Establishment of Companies with an Investment Nature by Foreign Investors Provisions* (dated 10 June 2003) Holding-FIEs may act as sponsors in establishing companies limited by shares or hold unlisted non-traded legal person shares of foreign-invested companies limited by shares. Holding-FIEs may also hold unlisted non-traded legal person shares of other companies limited by shares.
[7] Artt 52 para 1 *Acquisition of Domestic Enterprises by Foreign Investors Provisions* (eff 22 June 2009).
[8] Wolff 2006, p 105.

[29] Art 33 (4) EJV Law Implementing Rules; Art 29 (5) CJV Law Implementing Rules.
[30] Art 10 para 2 sentence 1 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[31] *Ibid*, Art 10 para 2 sentence 2.
[32] *Ibid*, Art 11 para 2.
[33] *Ibid*, Art 12 sentence 1.
[34] Also see Art 17 (3) *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[35] Compare *supra*, ¶5-110 and ¶6-200.
[36] Art 11 para 2 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001). The practical meaning of this provision is not totally clear.
[37] Also see Art 32 of the SPC's *Several Issues Concerning the Trial of Civil Dispute Cases Relating to Enterprise Restructuring Provisions* (1 February 2003).
[38] Cheng 1999, p 43.
[39] *Infra*, ¶11-230.
[40] Art 7 para 1 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[41] *Ibid*, Art 7 para 2.
[42] *Ibid*, Art 7 para 3. MOFCOM approval is required if one of the mergers parties is a joint stock company, *ibid,* and the special rules governing listed companies limited by shares must be observed if the merger involves a listed company, Art 16 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[43] Art 20 para 1 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[44] Art 20 para 2 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[45] A model form has been published by MOFTEC (now MOFCOM), see the *MOFTEC Notice on Distributing the Model Announcement and Notices for Merger, Divisions, and the Reduction of Registered Capital of Foreign-invested Enterprises*, promulgated on 14 March 2003 and effective as of the same date.
[46] *Ie* in case of an EJV and a CJV, the joint venture contract and the articles of association, in case of a WFOE, the articles of association.
[47] Art 24 sentence 1 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001). This time limit may be extended to 180 days if anti-trust concerns exist on the MOFCOM level, for the situation prior to 1 August 2008 see Art 24 para 2 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001); for details compare *infra* ¶18-200.
[48] Art 27 para 1 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001); also see Art 32 of the SPC's *Several Issues Concerning the Trial of Civil Dispute Cases Relating to Enterprise Restructuring Provisions* (eff 1 February 2003).
[49] Art 28 para 1 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[50] *Ibid*, Art 29.
[51] *Ibid*, Art 30.

[52] *Ibid*, Art 31 para 1.
[53] *Ibid*, Art 31 para 2. This requirement does of course not apply in relation to purely Chinese merger parties.
[54] *Ibid*, Art 32.
[55] *Ibid*.
[56] *Ibid*, Art 22 para 1.
[57] *Ibid*, Art 22 para 2. The company to be dissolved may appeal against the refusal to approve its dissolution to the MOFCOM authority located on the level above its own examination and approval authority and above the level of the examination and approval authority in charge of approving the merger, Art 22 para 3 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001). The authority in charge of the appeal shall decide within 30 days, *ibid.*
[58] Lu 2001, p 70.
[59] Promulgated on and effective as of 9 October 2004.
[60] Compare Artt 2 and 18 *Administration of the Verification of Foreign-invested Projects Tentative Procedures* (eff 9 October 2004), discussed in detail *supra*, ¶5-120.
[61] See Artt 17 to 25 *PRC Regulations on the Administration of Company Registration* (latest version promulgated on 18 December 2005).
[62] See Art 39 *PRC Regulations on the Administration of Company Registration* (latest version promulgated on 18 December 2005).
[63] *Ibid.* Art 39 with Artt 43 to 45.
[64] Artt 7 para 1 and 2 with 31 para 1 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001); also see Item 13 *Implementation Opinions for the Application of Laws and Regulations Concerning the Examination and Approval for the Registration of Foreign-invested Companies* (dated 24 April 2006).
[65] Art 31 para 1 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[66] *Ibid*, Art 31 para 2.
[67] *Ibid*, Art 31 para 2.
[68] *Ibid*, Art 36.
[69] Art 37 *Merger and Division of Foreign Investment Enterprises Provisions* (eff 22 November 2001).
[70] The *Acquisition of Domestic Enterprises by Foreign Investors Provisions* (latest version eff 22 June 2009) are applicable "by reference" according to their Art 52 para 3. It is doubtful, however, if these *Provisions* provide for suitable rules in merger situations.
[71] For tax aspects see ¶19-230
[72] Art 21 *Merger and Division of Foreign Investment Enterprises Provisions* (22 November 2001).
[73] For the term "registered capital" compare *supra*, chapter 1, note 87.
[74] For the term "total amount of investment" compare *supra*, chapter 2, note 21.
[75] Pursuant to Art 25 *Merger and Division of Foreign Investment Enterprises Provisions* (22 November 2001) the post-merger entity shall succeed to all claims and debts of the merger parties; also compare Art 90 *PRC Contract Law* (eff 1 October 1999); Art 31 of the SPC's *Several Issues Concerning the Trial of Civil Dispute Cases Relating to Enterprise Restructuring Provisions* (eff 1 February 2003).

unfair advantage on the one hand and potential national security risk on the other.[42] In light of all these difficulties, it appears that Chinese outbound investors now prefer cautious M&A strategies over direct investment alternatives,[43] with majority equity holdings no longer being seen as mandatory.[44]

Outbound M&A activities of Chinese companies do not only have to overcome difficulties arising out of the special regulatory, economic, cultural and political situation of target countries. In contrast, Chinese law also imposes restrictions on outbound investments. These restrictions can prove fatal for outbound project, for example, where non-Chinese competitors for lucrative investment targets are able to finalize their investment decisions much faster.[45] It is therefore important to understand the constraints imposed by China's regulatory framework. This, among other constraints, must be considered in the timing and structuring of outbound M&A deals and when drafting the underlying contractual documentation.[46]

In relation to inbound M&A projects, different authorities take charge of different aspects of outbound investments. Related rules are therefore scattered in a number of different regulations. Most importantly, non-finance outbound investments are subject to an NDRC and MOFCOM approval requirement.[47] Other authorities may have to be involved in special industry sectors. Foreign exchange rules and special rules regarding the financing of outbound activities supplement the legal framework.[48] Finally, the anti-trust rules of China's competition law regime may have to be considered for outbound M&A transactions.

Foreign exchange restrictions and financing issues[49] as well as anti-trust issues[50] will be addressed in later chapters. The following sections explain the involvement of the NDRC and of MOFCOM in outbound M&A transactions and summarize the most important industry-related specifics.

¶14-320 NDRC approval

As far as outbound investments are concerned[51] the NDRC approval requirement stems from the *Interim Measures for the Administration of the Examination and Approval of Overseas Investment Projects,* promulgated by the NDRC predecessor, *ie* the State Development and Reform Commission, on 9 October 2004. The *Interim Measures*, which have entered into force on the same day, are supplemented by the *Notice on Issues Concerning the Improvement of the Administration of Overseas Investment Projects*, promulgated by the NDRC and in force since 8 June 2009.[52]

The involvement of the NDRC is aimed at ensuring that outbound projects comply with Chinese laws and regulations as well as with industrial policies, and that they do not harm the sovereignty, security and public interest of the Chinese state or international law. The NDRC also makes sure that outbound projects comply with general goals in terms of overall economic and financial planning and development. The NDRC is also supposed to conduct viability checks and is particularly concerned with the ability of Chinese investors to engage in the respective overseas investment project.[53]

The *Interim Measures for the Administration of the Examination and Approval of Overseas Investment Projects*[54] apply to overseas direct investments and M&A projects of

Chinese legal persons, individuals[55] or other entities[56] investing directly or through their overseas subsidiaries,[57] including investments in Hong Kong, Macau and Taiwan.[58]

Outbound investment projects that fulfil the following criteria are subject to central-level NDRC approval:[59]

- projects regarding the exploration and exploitation of natural resources with an investment of the Chinese party of at least USD30 million; and
- other projects with foreign exchange investments of the Chinese party of more than USD10 million.

Outbound investment projects that fulfil the following criteria shall be examined by central-level NDRC and be reported for examination and approval to the State Council:[60]

- projects regarding the exploration and exploitation of natural resources with an investment by a Chinese party of at least USD200; and
- other projects with foreign exchange investments by a Chinese party of more than USD50 million.

For such projects that require both central-level NDRC as well as State Council approval, a project application report has to be submitted to the central-level NDRC via the competent provincial NDRC department.[61] Outbound investors under direct state planning or under central government administration may submit the application report directly to the NDRC.[62] The project application report shall have the following contents:[63]

(1) name of the project and basic information about the investor;

(2) project background and investment environment;

(3) project related information, such as construction scale, products, target markets, projected profits and risk assessment;

(4) investment related information, such as total amount of investment, capital contribution of each party, mode of contribution, financing schemes, involved foreign currency amounts; and

(5) details of the target in case of M&A transactions.

The following documents shall be submitted to the NDRC together with the project application report:[64]

(1) a resolution of the Board of Directors of the investor or a related decision regarding capital investments;

(2) documentary evidence regarding the status of the Chinese party and potential foreign partners;

(3) a letter of intent issued by a bank regarding financing;

(4) an appraisal report in case of investments in kind issued by qualified assessors or other documentary evidence issued by third parties proving the value of assets;

(5) in case of Sino-foreign joint projects, the related letter of intent, cooperation agreement or other documents; and

(6) in case of tender offers and acquisitions a confirmation letter issued by the NDRC prior to the bid or business start.[65]

because it would (potentially) disturb market competition for small-scale juice manufacturers and Coca Cola's ability to take advantage of its dominant post-deal market position.[148] In fact, observers believe that the transaction would have given Coca Cola a quasi-monopoly in the mainland juice market.[149]

MOFCOM's decision is relatively short.[150] Commentators have therefore questioned whether MOFCOM's decision was based on reliable evidence.[151] Others have speculated whether MOFCOM's decision may not have been based on anti-trust concerns, but rather on considerations or even protectionist motivations,[152] an idea that was rejected by MOFCOM.[153]

¶18-354 Mitsubishi's proposed acquisition of Lucite

Mitsubishi Rayon Co. Ltd. (Mitsubishi) submitted its initial concentration notification in relation to the acquisition of Lucite International Group Limited (Lucite) on 22 December 2008. As in the InBev-Anheuser case, the *Anti-Monopoly Bureau* requested several rounds of supplementary materials before it accepted the notification as complete on 20 January 2009.[154] MOFCOM decided to conduct an in-depth investigation on 20 February 2009 during which the relevant trade associations, competitors and filing parties were invited to make written submissions or to participate in telephone conversations and meetings.[155] The *Anti-Monopoly Bureau* published its decision[156] on 24 April 2009, approving the acquisitions subject to restrictive conditions[157] as follows:

- Within a period of six months,[158] Lucite International (China) Chemical Industry Co. Ltd. shall set aside[159] 50% of its methyl methacrylate production capacity by transferring to one or more unaffiliated purchasers.[160] The duration of this condition shall last for five years and during this period the unaffiliated purchaser(s) shall be entitled to acquire such production capacity at production cost. The production cost shall be audited by independent auditors on a yearly basis. If Mitsubishi fails to complete this "capacity divesture" during the six-month period, MOFCOM shall be allowed to appoint an independent trustee to sell all of Mitsubishi's equity interest in Lucite International (China) Chemical Industry Co. Ltd. to an unaffiliated third party acquirer.[161]
- The methyl methacrylate production operations of Lucite International (China) Chemical Industry Co. Ltd. and Mitsubishi must be managed separately and must operate independently as competitors in China until the conditions set out in the previous paragraph have been fulfilled. In case of violation of this condition, fines between RMB250,000 and RMB500,00 may be imposed depending on the seriousness of the case.[162]
- For a period of five years from the closing of the proposed transaction, Mitsubishi shall not acquire any Chinese enterprises manufacturing methyl methacrylate, polymethyl methacrylate or cast sheet products or set up facilities in China with this scope of business.[163]

MOFCOM explained in its decision that Mitsubishi and Lucite are both manufacturers and sellers of methyl methacrylate and have a "significant overlap" in such product market in China.[164] Moreover, some overlaps exist in relation to some methyl methacrylate monomer, polymethyl methacrylate moulding compounds and polymethyl

methacrylate sheet.[165] MOFCOM concluded that the proposed acquisition would (i) negatively impact on the methyl methacrylate market in China as — horizontally — it would allow Mitsubishi to exclude and restrict competitors due to its potential market dominance, and (ii) it would — vertically — allow Mitsubishi to "foreclose downstream competitors by using its dominant position in the upstream" methyl methacrylate market in China.[166]

¶18-355 General Motors' proposed acquisition of Delphi

On 28 September 2009 MOFCOM approved the re-acquisition of bankrupt car-part manufacturer Delphi Corporation (Delphi) by General Motors Company (GM) subject to certain conditions.[167] MOFCOM had accepted the application on 31 August 2009 and concluded that the (offshore) transaction may affect competition within the Chinese market due to vertical relationships in the automotive markets. While the transaction had been cleared in the US and the EU MOFCOM therefore imposed the following post-transaction conditions:[168]

- Delphi and its subsidiaries and affiliates must continue to supply domestic carmakers on the basis of non-discrimination and to reasonable conditions which do not directly or indirectly eliminate or restrict competition.
- GM and Delphi must not exchange business secrets regarding domestic carmakers.
- Delphi must continue to support its customers in changing suppliers and not impose any conditions during the transition period which may restrict competition.
- GM must continue to source parts from different supplier on the basis of non-discrimination and not favour Delphi over its competitors.

¶18-356 Pfizer's proposed acquisition of Wyeth

One day after the GM-Delphi decision, *ie* on 29 September 2009, MOFCOM approved US pharmaceutical company Pfizer Inc.'s (Pfizer) USD68 billion acquisition of its rival Wyeth Corporation (Wyeth).[169] MOFCOM had accepted the notification on 9 June 2009. The transaction had been cleared by anti-competition authorities of the EU and New Zealand. The Australian authorities had given clearance subject to divestment of some assets.[170] As in the GM-Delphi decision MOFCOM imposed restrictive conditions including the following:[171]

- Pfizer must divest its swine mycoplassmal pneumonia vaccine business (including related tangible and intangible assets) under the brands "Respisure" and "Respisure One".
- An independent purchaser for the divested business must be identified within six month from the date of the decision, otherwise MOFCOM may appoint a trustee to sell the business.
- An interim administrator is to take over the divested business until its sale to an independent purchaser to keep the divested business competitive and independent.

PAN Jonathan, *Perspectives on Acquisitions of Non-listed Shares*, CLP 11/2003, p 71.

PASQUIER Gerald & BOONE Daniel & MARIA David, *Luxembourg Hong Kong Double Tax Treaty: The Best of Both Worlds*, Hong Kong Lawyer 5/2009, pp 59-64

PAUL, HASTINGS, JANOFSKY & WALKER, *Using a Chinese Entity for an All-foreign Joint Venture — Does it Make Sense?*, CLP May/2005, pp 28-33.

PICOT Gerhard (ed), *Handbook of International Mergers and Acquisitions* (Houndsmill & New York: Palgrave McMillan, 2002).

PISSLER Knut Benjamin, *Chinesisches Kapitalmarktrecht (Chinese Capital Markets Law)* (Mohr Siebeck: Tübingen, Germany, 2004).

PISSLER Knut Benjamin, *"Control Transactions" in der Volksrepublik China* ('Control Transactions' in the People's Republic of China), in BAUM Harald *et. al.* , Perspektiven des Wirtschaftsrechts (Perspectives of Business Law) (De Gruyter Recht: Berlin, 2008), pp 453-479.

PISSLER Knut Benjamin, *Die Gründung ausländischer Partnerschaftsunternehmen in China nach den neuen Registrierungsbestimmungen: Konkretisierungen, Antworten, Einschränkungen und neue Fragen* (The Establishment of Foreign Partnership Enterprises in China According to the New Registration Rules: Specifications, Answers, Limitations and New Questtions), ZchinR 2010, pp 125-131.

PLOWMAN Nicholas, *Utilising BVI and Cayman Island entities for private equity investment into China*, 6/2009, p 14-15.

PO Danny, *Extraterritorial enforcement of tax,* CLP2/2010, pp18-20.

PO Danny, *Restructuring rules restructured*, CLP 6/2009, pp 23-25.

PRICEWATERHOUSECOOPERS, *PricewaterhouseCoopers Analysis: China M&A Activity Aided by Favorable Regulatory Changes, More Private Equity Investment, http://www.primezone.com/newsroom/news.html?d=94234* (last visited on 1 August 2010).

PRICEWATERHOUSECOOPERS, *Asia Pacific M&A Bulletin (Year-end 2008)*, http://www.pwchk.com/home/eng/m&abulletin_ap_ye2008.html (last visited on 1 August 2010).

PRICEWATERHOUSECOOPERS, *News Flash – China Tax and Business Advisory*, May 2009, http://www.pwchk.com/home/eng/chinatax_news_may2009_11.html (last visited on 1 August 2010).

PRICEWATERHOUSECOOPERS, *News Flash – China Tax and Business Advisory*, June 2009, http://www.pwccn.com/home/eng/chinatax_news_jun2009_15.html (last visited on 1 August 2010).

PRIEUR Landon R., *Companies Limited by Shares*, in China Company Law Guide, Chapter 80.

PT, *How long is China's anti-monopoly arm?*, CLP 7-8/2009, p 36.

PT, Regulator makes outbound investment easier, CLP 708/2009, p 9.

QIN Charles & MEI Michael, *Measures for the transfer of state-owned assets of financial enterprises*, CLP 5/2009, p 27.

QU Zhen Charles, *The Doctrinal Basis of the Trust Principles in China's Trust Law, 38 Real Property*, Probate and Trust Journal (Summer 2003), pp 345-376.

REED Stanley Foster, *The M&A Deskbook* (New York et al: McGraw-Hill, 2001).

REED Stanley Foster & REED LAJOUX Alexandra, *The Art of M&A*, 3rd ed (New York et al: McGraw-Hill, 1998).

REHM Gebhard M. & JULIUS Hinrich, *The New Chinese Property Rights Law: An Evaluation from a Continental Perspective*, Columbia Journal of Asian Law Vol 22, Spring 2009 (No. 2), pp 179-234.

ROMANN Alfred, *Chinese IP under threat worldwide*, China Business Law Journal 5/2010, pp 36-40.

ROSS Lester & CHEN Grace, *Revising the Foreign-invested Holding Company Regulations*, CLP 3/2005, pp 47-50.

ROSS Lester & WOLL Robert & ZHOU Kenneth, *China's Clearance of the Panasonic/Sanyo Transaction with Conditions*, 13 November 2009, http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9304 (last visited on 1 August 2010).

ROSS Lester & ZHOU Kenneth, *New Regulations on Equity Incentives for Employees of Listed Companies*, CLP 4/2006, pp 25-27.

ROTHSTEIN Joel H, *A transforming force*, CLP 12/2009-1/2010, pp 20-23.

ROTHSTEIN Joel H., *New Measures on Foreign Investment in China Real Estate*, CLP 9/2006, pp 18-20.

ROULES Daniel F. & CHEN Dongqing, *Everything is old again*, CLP 4/2010, p 18-19

RUSSELL George W, *Paradise lost?,* China Business Law Journal 3/2010, pp 19-33.

SEELYE H. Ned/SEELYE-JAMES Alan, *Culture Clash* (Lincolnwood: NTC Business Books, 1995).

SHAW Alison, *A going concern? Investors eye FIE acquisition options*, China Direct Investor May 1998, pp 3-10.

SHENG Michael & XU Bin, *China Adopts a Comprehensive Competition Law After a 13-Year Journey*, CLP 9/2007, p 95.

未按本条规定办理审批和备案的质押行为无效。

第十三条 依照《担保法》的规定，出质股权转移为质权人或其他受益人所有的，企业除应向审批机关报送第九条（一）、（二）、（三）、（五）项规定的文件外，还应同时报送质权人或其他受益人获得原投资者股权的有效证明文件。审批机关根据上述文件和本规定第十二条所述文件以及有关法律、法规的规定进行审核。

第十四条 由于本规定第二条（五）、（六）项原因需要变更股权的，企业除报送第九条（一）、（二）、（三）、（五）项规定的文件外，还应向审批机关报送股权获得人获得原投资者股权的有效证明文件。

由于本规定第二条（五）、（六）项的规定导致企业投资者变更的，如果企业其他投资者不同意继续经营，可向原审批机关申请终止原企业合同、章程。原企业合同、章程终止后，股权获得人有权参加清算委员会并分配清算后的企业剩余财产，如果股权获得人不同意继续经营，经企业其他投资者一致同意，可依照本规定将其股权转让给企业其他投资者或第三人。

第十五条 由于本规定第二条（七）项因需要更换投资者或变更股权的，守约方投资者有权单方面向审批机关申请变更。守约方投资者除报送第九条（一）、（二）、（三）、（五）项规定的文件外，还应向审批机关报送下列文件：

（一）由中国注册的会计师及其所在事务所为企业出具的验资报告；

（二）守约方催告违约方缴付或缴清出资的证明文件。

如有新投资者参股，还应向审批机关报送新投资者的合法开业证明和资信证明。违约方已经按照企业原合同、章程规定缴付部分出资的，还应向审批机关报送企业对违约方的部分出资进行清理的有关文件。

Pledge acts that have not been examined and approved and placed on the record in accordance with this Article shall be invalid.

Article 13. If the ownership of a pledged Equity Interest passes to the pledgee or another beneficiary in accordance with the provisions of the Security Law, the Enterprise shall submit to the examination and approval authority valid documentary evidence of the pledgee's or other beneficiary's obtaining of the Equity Interest of the original investor, in addition to the documents specified in Items (1), (2), (3), and (5) of Article 9. The examination and approval authority shall carry out the examination and approval in accordance with the above-mentioned documents, the documents mentioned in Article 12 hereof and the relevant laws and regulations.

Article 14. If Equity Interest needs to be changed for a reason set forth in Items (5) and (6) of Article 2 hereof, in addition to submitting the documents specified in Items (1), (2), (3), and (5) of Article 9, the Enterprise shall submit to the original examination and approval authority valid documentary evidence of the obtaining of the Equity Interest of the original investor by the person that obtained the Equity Interest.

If the provisions of Item (5) or (6) of Article 2 hereof result in a change in an investor in an Enterprise and the other investors in the Enterprise do not agree to continue operations, an application may be made to the original examination and approval authority to terminate the contract for and articles of association of the original Enterprise. After the contract for and articles of association of the original Enterprise have been terminated, the person that obtained the Equity Interest shall have the right to join the liquidation committee and to be distributed property of the Enterprise remaining after liquidation. If the person that obtained the Equity Interest does not agree to continue operations, it may assign its Equity Interest to another investor in the Enterprise or a third party in accordance with these Regulations.

Article 15. If an investor needs to be replaced or Equity Interest needs to be changed for the reason set forth in Item (7) of Article 2 hereof, the non-breaching investor shall have the right to unilaterally apply to the original examination and approval authority to make such change. In addition to submitting the documents specified in Items (1), (2), (3) and (5) of Article 9, the non-breaching investor shall submit the following documents to the original examination and approval authority:

(1) the investment verification report issued for the Enterprise by an accountant registered in China and the accountant's firm; and

(2) documentary evidence of the non-breaching party's urging the party in breach to make or make in full its capital contribution.

If a new investor participates in the equity, proof of the lawful commencement of business and creditworthiness of the new investor shall be submitted to the examination and approval authority as well. If the party in breach had already made part of its capital contribution in accordance with the original contract for and articles of association of the Enterprise, documents related to the Enterprise's disposal of the portion of capital contribution of the party in breach shall also be submitted to the examination and approval authority.

3. 公司注册资本；

4. 投资者的名称或姓名；

5. 投资者的权利和义务；

6. 投资者的出资方式和出资额；

7. 投资者转让出资的条件；

8. 公司的机构及其产生办法、职权、议事规则；

9. 公司的法定代表人；

10. 公司的解散事由与清算办法；

11. 投资者认为需要规定的其他事项。

投资者应当在公司章程上签名、盖章。

第十条 省级审批机关接到上述申请后，按照被投资公司的经营范围，征求同级或国家行业管理部门的意见。

省级审批机关应自收到同级或国家管理行业部门同意或不同意的意见起十日之内，作出书面批复。

第十一条 省级审批机关对外商投资企业作出同意批复的，外商投资企业凭该批复文件向被投资公司所在地公司登记机关申请设立登记。

公司登记机关依《公司登记管理条例》的有关规定，决定准予登记或不予登记。准予登记的，发给《（加注）营业执照》。

第十二条 自被投资公司设立之日起三十日内，外商投资企业应向原审批机关备案。备案材料包括：

1. 外商投资企业投资备案表；

2. 被投资公司的营业执照（复印件）；

3. 被投资公司经营范围涉及限制类领域的，还应提交省级审批机关作出的同意设立被投资公司的批复。

(c) the company's registered capital;

(d) the names of the investors;

(e) the rights and obligations of the investors;

(f) the investors' methods of capital contribution and capital contribution amounts;

(g) the conditions for the assignment of the investors' contributions;

(h) the company's organisations and their method of constitution, their functions and powers and their rules of procedure;

(i) the company's legal representative;

(j) the grounds for dissolution and method of liquidation of the company; and

(k) other matters that the investors consider necessary to specify.

The investors shall sign their names and affix their seals to the company's articles of association.

Article 10. After receipt of the aforementioned application, the Provincial Level Examination and Approval Authority shall, in accordance with the scope of business of the Investee Company, seek the opinion of the industry administration authority at the same level or at State level.

The Provincial Level Examination and Approval Authority shall issue a written official reply within ten days of its receipt of the opinion of the industry administration authority at the same level or at State level as to whether or not it agrees.

Article 11. If the official reply from the Provincial Level Examination and Approval Authority to the foreign-invested enterprise states that it agrees, the foreign-invested enterprise shall apply for registration of establishment to the company registration authority of the place where the Investee Company is to be located, on the strength of the written official reply.

The company registration authority shall decide whether to grant registration or not pursuant to the relevant provisions of the Company Registration Regulations. Companies granted registration shall be issued an (Annotated) Business Licence.

Article 12. Within 30 days of the date of establishment of the Investee Company, the foreign-invested enterprise shall report the same to its original examination and approval authority for the record. The documents filed shall include:

(1) a record-filing form for investment by an foreign-invested enterprise;

(2) the business licence (photocopy) of the Investee Company; and

(3) if the scope of business of the Investee Company involves a field in the restricted category, the official reply by which the Provincial Level Examination and Approval Authority agreed to the establishment of the Investee Company shall also be submitted.

重新签订或变更劳动合同。对解除劳动合同的职工要依法支付经济补偿金，对移交社会保险机构的职工要依法一次性缴足社会保险费，所需资金从改组前被改组企业净资产抵扣，或从国有产权持有人转让国有产权收益中优先支付。

（三）以出售资产方式进行改组的，企业债权债务仍由原企业承继；以其他方式改组的，企业债权债务由改组后的企业承继。转让已抵押或质押的国有产权、资产的，应当符合《中华人民共和国担保法》的有关规定。债务承继人应当与债权人签订相关的债权债务处置协议。

（四）改组方应当公开发布改组信息，广泛地征集外国投资者，对外国投资者的资质、信誉、财务状况、管理能力、付款保障、经营者素质等进行调查。优先选择能带来先进技术和管理经验、产业关联度高的中长期投资者。

改组方和外国投资者应当应对方的合理要求，如实、详尽地提供有关信息资料，不得有误导和欺诈行为，并承担相应保密义务。

（五）企业改组以转让国有产权或出售资产方式进行的，改组方应当优先采用公开竞价方式确定外国投资者及转让价格。采用公开竞价方式转让，应当依法履行有关手续，并将拟转让国有产权或拟出售资产的相关情况予以公告。采取协议转让的，也应当公开运作。

不论采取何种转让方式，改组方与外国投资者均应当按照国家有关规定和本规定签订转让协议。转让协议内容应当主要包括转让国有产权的基本情况、职工安置、债权债务处置、转让比例、转让价格、付款方式及付款条件、产权交割事项以及企业重整等条款。

第九条 利用外资改组国有企业应当按下列程序办理：

labour contracts of, its staff and workers who are kept on. It shall, in accordance with the law, pay severance pay to those staff members and workers whose labour contracts are terminated and for those staff and workers, the responsibility for whom is transferred to the social insurance authority, it shall pay in full in one lump sum the social insurance premiums. The funds required shall be deducted from the net assets of the Enterprise to be Reorganised before the reorganisation or on a priority basis from the proceeds derived by the Owner of the State-owned Property Rights from the assignment of the State-owned Property Rights.

(3) If the reorganisation is to be effected through the sale of assets, the original enterprise shall succeed to the enterprise's claims and debts, otherwise the reorganised enterprise shall succeed to the enterprise's claims and debts. The assignment of mortgaged or pledged State-owned Property Rights or assets shall comply with the relevant provisions of the *PRC, Security Law*. The successor to the debts shall execute relevant agreements for the disposal of claims and debts with the creditors.

(4) The Reorganising Party shall publish information on the reorganisation, recruit Foreign Investors extensively and investigate the Foreign Investors' qualifications, reputation, financial position, management capabilities, payment guarantees, business ethics, etc. It shall give priority consideration to medium and long-term Foreign Investors that can offer advanced technology, management experience and a high degree of industrial compatibility.

The Reorganising Party and the Foreign Investor shall respond to the reasonable demands of the opposite party by providing relevant truthful and detailed information and data, may not mislead or deceive the opposite party and shall bear the appropriate confidentiality obligations.

(5) If the enterprise reorganisation is to be effected through the assignment of State-owned Property Rights or the sale of assets, the Reorganising Party shall preferentially opt for an open competitive pricing method to determine the Foreign Investor and assignment price. When selecting an open competitive pricing method of assignment, the relevant procedures shall be carried out in accordance with the law and the relevant details on the State-owned Property Rights to be assigned or the assets to be sold shall be announced publicly. If assignment by agreement is opted for, such assignment shall be conducted in an open manner.

Regardless of the assignment method opted for, the Reorganising Party and the Foreign Investor shall execute an assignment agreement in accordance with the relevant State regulations and these Provisions. The terms of the assignment agreement shall mainly include the basic information on the State-owned Property Rights to be assigned, the settlement arrangements for the staff and workers, the disposal of claims and debts, the assignment ratio, the assignment price, the method of payment and payment conditions, matters relating to the delivery of the property rights, corporate restructuring, etc.

Article 9. The Use of Foreign Investment to Reorganise State-owned Enterprises shall be effected in accordance with the following procedure:

（一）转让企业国有产权的有关决议文件；

（二）企业国有产权转让方案；

（三）转让方和转让标的企业国有资产产权登记证；

（四）律师事务所出具的法律意见书；

（五）受让方应当具备的基本条件；

（六）批准机构要求的其他文件。

第二十九条 企业国有产权转让方案一般应当载明下列内容：

（一）转让标的企业国有产权的基本情况；

（二）企业国有产权转让行为的有关论证情况；

（三）转让标的企业涉及的、经企业所在地劳动保障行政部门审核的职工安置方案；

（四）转让标的企业涉及的债权、债务包括拖欠职工债务的处理方案；

（五）企业国有产权转让收益处置方案；

（六）企业国有产权转让公告的主要内容。

转让企业国有产权导致转让方不再拥有控股地位的，应当附送经债权金融机构书面同意的相关债权债务协议、职工代表大会审议职工安置方案的决议等。

第三十条 对于国民经济关键行业、领域中对受让方有特殊要求的，企业实施资产重组中将企业国有产权转让给所属控股企业的国有产权转让，经省级以上国有资产监督管理机构批准后，可以采取协议转让方式转让国有产权。

第三十一条 企业国有产权转让事项经批准或者决定后，如转让和受让双方调整产权转让比例或者企业国有产权转让方案有重大变化的，应当按照规定程序重新报批。

(1) documents relating to the decision on transfer of the State-owned property rights of enterprises;

(2) plan for the transfer of the State-owned property rights of enterprises;

(3) registration certificates for the State-owned property rights of the Transferor and the target enterprise;

(4) legal opinion issued by a law firm;

(5) basic criteria to be fulfilled by the Transferee; and

(6) other documents required by the approval authority.

Article 29. The plan for the transfer of the State-owned property rights of enterprises shall in general set out the following:

(1) the basic circumstances regarding the transfer of State-owned property rights of the target enterprise;

(2) circumstances related to verification of the transfer of the State-owned property rights of enterprises;

(3) the plan for the staff placement of the enterprise which has been examined and verified by the local labour and social security department;

(4) the plan for handling claims and debts of the target enterprise, including arrears in wages of employees;

(5) the plan for income derived from the transfer of the State-owned property rights of enterprises; and

(6) the main content of the announcement of transfer of the State-owned property rights of enterprises.

If the transfer of State-owned property rights of enterprises means that the Transferor no longer holds a controlling share, the written agreement from the creditor financial organisation on the debt/credit agreement, and the resolution of the employees' assembly on staff placement shall be appended.

Article 30. If industries or areas crucial to the national economy have special requirements on Transferees, the transfer of the State-owned property rights where an enterprise transfers State-owned property rights of the enterprise to its controlling enterprises in the implementation of asset reorganisation, the State-owned property rights may be transferred by agreement with the approval of the State-owned assets supervision and administration authority at the provincial level or above.

Article 31. After the transfer of State-owned property rights of enterprises has been approved or decided, if the Transferor and the Transferee adjust the ratio of property rights to be transferred, or if there are major changes to the plan for transfer of the State-owned property rights of enterprises, re-submission and re-approval shall be required in accordance with the prescribed procedures.

（一）投资者进行战略投资所持上市公司 A 股股份，在其承诺的持股期限届满后可以出售；

（二）投资者根据《证券法》相关规定须以要约方式进行收购的，在要约期间可以收购上市公司 A 股股东出售的股份；

（三）投资者在上市公司股权分置改革前持有的非流通股份，在股权分置改革完成且限售期满后可以出售；

（四）投资者在上市公司首次公开发行前持有的股份，在限售期满后可以出售；

（五）投资者承诺的持股期限届满前，因其破产、清算、抵押等特殊原因需转让其股份的，经商务部批准可以转让。

第二十一条 投资者减持股份使上市公司外资股比低于 25%，上市公司应在十日内向商务部备案并办理变更外商投资企业批准证书的相关手续。

投资者减持股份使上市公司外资股比低于 10%，且该投资者非为单一最大股东，上市公司应在十日内向审批机关备案并办理注销外商投资企业批准证书的相关手续。

第二十二条 投资者减持股份使上市公司外资股比低于 25%，上市公司应自外商投资企业批准证书变更之日起三十日内到工商行政管理机关办理变更登记，工商行政管理机关在营业执照上企业类型调整为“外商投资股份公司（A 股并购）”。上市公司应自营业执照变更之日起三十日内到外汇管理部门办理变更外汇登记，外汇管理部门在外汇登记证上加注“外商投资股份公司（A 股并购）”。

投资者减持股份使上市公司外资股比低于 10%，且投资者非为单一最大股东，上市公司自外商投资企业批准证书注销之日起三十日内到工商行政管理机关办理变

(1) the “A” shares held by an investor through strategic investment in a listed company can be sold upon expiry of the period which the investor undertakes to hold the shares;

(2) an investor acquiring shares by way of an offer in accordance with the relevant provisions of the Securities Law may acquire shares sold by shareholders of “A” shares of the listed company during the offer period;

(3) the non-circulating shares held by an investor prior to the equity separation reform of a listed company can be sold upon completion of the equity separation reform and expiry of the moratorium;

(4) the shares held by an investor prior to the initial public offer of a listed company can be sold upon expiry of the moratorium; and

(5) where an investor has obtained the approval of the Ministry of Commerce to transfers shares prior to the expiry of the period which the investor undertakes to hold the shares for special reason such as bankruptcy, liquidation, mortgage etc which requires the investor to transfer its shares.

Article 21. In the event that the reduction in shareholding of an investor renders the foreign shareholding ratio of a listed company to fall below 25%, the listed company shall file records with the Ministry of Commerce within ten days and complete the relevant formalities for amendment to the Foreign Investment Enterprise Approval Certificate.

In the event that the reduction of shareholding of an investor renders the foreign shareholding ratio of a listed company to fall below 10% and the investor is not the single largest shareholder, the listed company shall file records with the examination and approval authorities within ten days and complete the relevant formalities for cancellation of the Foreign Investment Enterprises Approval Certificate.

Article 22. In the event that the reduction in shareholding of an investor renders the foreign shareholding ratio of a listed company to fall below 25%, the listed company shall complete change registration formalities with the industrial and commercial administration authorities within 30 days from the amendment of the Foreign Investment Enterprise Approval Certificate; the industrial and commercial administration authorities shall amend the “type of enterprise” on the business licence to read as “foreign-invested shareholding company (acquisition of “A” shares)”. The listed company shall complete change formalities for foreign exchange with the foreign exchange administration authorities within 30 days from the amendment of the business licence; the foreign exchange administration authorities shall indicate the wordings “foreign-invested shareholding company (acquisition of “A” shares)” on the foreign exchange registration certificate.

In the event that the reduction of shareholding of an investor renders the foreign shareholding ratio of a listed company to fall below 10% and the investor is not the single largest shareholder, the listed company shall complete change registration formalities with the industrial and commercial administration authorities within 30 days from the cancellation of the Foreign Investment Enterprise Approval Certificate and the type of

收购人提供任何形式的财务资助，不得损害公司及其股东的合法权益。

第九条 收购人进行上市公司的收购，应当聘请在中国注册的具有从事财务顾问业务资格的专业机构担任财务顾问。收购人未按照本办法规定聘请财务顾问的，不得收购上市公司。

财务顾问应当勤勉尽责，遵守行业规范和职业道德，保持独立性，保证其所制作、出具文件的真实性、准确性和完整性。

财务顾问认为收购人利用上市公司的收购损害被收购公司及其股东合法权益的，应当拒绝为收购人提供财务顾问服务。

第十条 中国证监会依法对上市公司的收购及相关股份权益变动活动进行监督管理。

中国证监会设立由专业人员和有关专家组成的专门委员会。专门委员会可以根据中国证监会职能部门的请求，就是否构成上市公司的收购、是否有不得收购上市公司的情形以及其他相关事宜提供咨询意见。中国证监会依法做出决定。

第十一条 证券交易所依法制定业务规则，为上市公司的收购及相关股份权益变动活动组织交易和提供服务，对相关证券交易活动进行实时监控，监督上市公司的收购及相关股份权益变动活动的信息披露义务人切实履行信息披露义务。

证券登记结算机构依法制定业务规则，为上市公司的收购及相关股份权益变动活动所涉及的证券登记、存管、结算等事宜提供服务。

第二章 权益披露

第十二条 投资者在一个上市公司中拥有的权益，包括登记在其名下的股份和虽未登记在其名下但该投资者可以实际支配表决权的股份。投资者及其一致行动人在一个上市公司中拥有的权益应当合并计算。

create undue obstacles to the takeover, use the resources of the company to provide any form of financial assistance to the purchaser, or harm the lawful rights and interests of the company and its shareholders.

Article 9. When engaging in the takeover of a listed company, a purchaser shall hire a professional institution registered in China with qualifications for engaging in financial advisory business as its financial advisor. No purchaser may engage in the takeover of a listed company if it fails to engage a financial advisor in accordance with the provisions hereof.

The financial advisor shall act with due diligence, observe the industrial standards and professional ethics, maintain its independence and ensure the truthfulness, accuracy and completeness of the documents it produces or issues.

The financial advisor shall refuse to provide financial advisory services to the purchaser if it believes that the purchaser uses the takeover of the listed company to harm the lawful rights and interests of the target company and its shareholders.

Article 10. The CSRC shall regulate the activities of takeover of listed companies and the associated changes in share interest in accordance with the law.

The CSRC shall set up a special committee comprised of professionals and relevant experts. The special committee may provide consultancy advice at the request of the functional departments of the CSRC on whether a takeover of a listed company is constituted, whether there is a circumstance in which the takeover of a listed company may not proceed, and on other relevant matters. The CSRC shall make decisions in accordance with the law.

Article 11. The stock exchange shall formulate operational rules in accordance with the law to organise trading and provide services for the takeover of listed companies and the associated changes in share interest, to implement real-time monitoring of the relevant securities trading activities, and to supervise the conscientious performance of the information disclosure obligations by the persons with information disclosure obligations in the takeover of listed companies and the associated changes in share interest.

The securities registration and clearing institution shall formulate operational rules in accordance with the law to provide services in connection with matters involved in the takeover of listed companies and the associated changes in share interest such as the registration, deposit and clearing of securities.

PART II — DISCLOSURE OF INTERESTS

Article 12. The interests held by an investor in a listed company shall include the shares registered in its name and the shares which, although not registered in its name, can actually be controlled by the said investor in respect of their voting rights. The interests held by an investor and the person(s) acting in concert in a listed company shall be calculated collectively.

（一）收购人是否具备主体资格；

（二）收购人的实力及本次收购对被收购公司经营独立性和持续发展可能产生的影响分析；

（三）收购人是否存在利用被收购公司的资产或者由被收购公司为本次收购提供财务资助的情形；

（四）涉及要约收购的，分析被收购公司的财务状况，说明收购价格是否充分反映被收购公司价值，收购要约是否公平、合理，对被收购公司社会公众股股东接受要约提出的建议；

（五）涉及收购人以证券支付收购价款的，还应当根据该证券发行人的资产、业务和盈利预测，对相关证券进行估值分析，就收购条件对被收购公司的社会公众股股东是否公平合理、是否接受收购人提出的收购条件提出专业意见；

（六）涉及管理层收购的，应当对上市公司进行估值分析，就本次收购的定价依据、支付方式、收购资金来源、融资安排、还款计划及其可行性、上市公司内部控制制度的执行情况及其有效性、上述人员及其直系亲属在最近二十四个月内与上市公司业务往来情况以及收购报告书披露的其他内容等进行全面核查，发表明确意见。

第六十八条 财务顾问受托向中国证监会报送申报文件，应当在财务顾问报告中作出以下承诺：

（一）已按照规定履行尽职调查义务，有充分理由确信所发表的专业意见与收购人申报文件的内容不存在实质性差异；

（二）已对收购人申报文件进行核查，确信申报文件的内容与格式符合规定；

（三）有充分理由确信本次收购符合法律、行政法规和中国证监会的规定，有充分理由确信收购人披露的信息真实、准确、完整，不存在虚假记载、误导性陈述和重大遗漏；

（四）就本次收购所出具的专业意见已提交其内核机构审查，并获得通过；

(1) whether the purchaser possesses the entity qualification;

(2) an analysis of the strength of the purchaser and the effect that the takeover may have on the business independence and continuous development of the target company;

(3) whether the purchaser has used the assets of the target company or whether the target company has provided financial assistance to the takeover;

(4) in the case of a takeover by offer, analyse the financial status of the target company, state whether the acquisition price fully reflects the value of the target company, whether the takeover offer is fair and reasonable, and make recommendation on the acceptance of the offer by the holders of the public shares of the target company;

(5) where the purchaser pays the acquisition price with securities, a valuation analysis shall be made on the relevant securities on the basis of the assets, business and profit forecast of the issuer of the securities, and professional opinion shall be given on whether the terms of the takeover are fair to the holders of the public shares of the target company and on whether to accept the terms of takeover proposed by the purchaser;

(6) in the case of a management buyout, a valuation analysis of the listed company shall be made, and a full verification shall be conducted and express opinion shall be given on the pricing basis of the takeover, the payment method, the funding sources of the takeover, the financing arrangement, the repayment plan and its feasibility, the implementation of the internal control system of the listed company and its effectiveness, the business dealings of the aforementioned personnel and their directly related family members with the listed company in the most recent 24 months and the other contents disclosed in the takeover report.

Article 68. If a financial advisor is entrusted to submit documents to the CSRC, it shall make the following undertakings in the financial advisor's report:

(1) it has performed the obligation of due diligence investigation according to provisions and has sufficient reasons to believe that there is no substantive difference between the professional opinion issued by it and the contents of the documents submitted by the purchaser;

(2) it has verified the documents submitted by the purchaser and believe that the contents and format of the documents submitted comply with regulations;

(3) it has sufficient reason to believe that the takeover is in compliance with laws and administrative regulations, and the provisions of the CSRC, and that the information disclosed by the purchaser is truthful, accurate and complete and does not contain any falsehood, misleading representation and major omission;

(4) the professional opinion issued on the takeover has been submitted to its internal verification organ for review and has passed the review;

回计划，并申请换发无加注的外商投资企业批准证书。同时，境内公司应自完成境外上市之日起三十日内，向国务院证券监督管理机构报告境外上市情况并提供相关的备案文件。境内公司还应向外汇管理机关报送融资收入调回计划，由外汇管理机关监督实施。境内公司取得无加注的批准证书后，应在三十日内向登记管理机关、外汇管理机关申请换发无加注的外商投资企业营业执照、外汇登记证。

如果境内公司在前述期限内未向商务部报告，境内公司加注的批准证书自动失效，境内公司股权结构恢复到股权并购之前的状态，并应按本规定第三十六条办理变更登记手续。

第四十八条 特殊目的公司的境外上市融资收入，应按照报送外汇管理机关备案的调回计划，根据现行外汇管理规定调回境内使用。融资收入可采取以下方式调回境内：

（一）向境内公司提供商业贷款；

（二）在境内新设外商投资企业；

（三）并购境内企业。

在上述情形下调回特殊目的公司境外融资收入，应遵守中国有关外商投资及外债管理的法律和行政法规。如果调回特殊目的公司境外融资收入，导致境内公司和自然人增持特殊目的公司权益或特殊目的公司净资产增加，当事人应如实披露并报批，在完成审批手续后办理相应的外资外汇登记和境外投资登记变更。

境内公司及自然人从特殊目的公司获得的利润、红利及资本变动所得外汇收入，应自获得之日起六个月内调回境内。利润或红利可以进入经常项目外汇帐户或者结汇。资本变动外汇收入经外汇管理机关核准，可以开立资本项目专用帐户保留，也可经外汇管理机关核准后结汇。

non-annotated foreign-invested enterprise approval certificate. Also, the Domestic Company shall, within 30 days of the completion of overseas listing, report the status of overseas listing and provide the relevant record filing documents to the State Council's securities regulatory authority. The Domestic Company shall also file the financing proceeds repatriation plan to the foreign exchange administration authority and implement the plan under the supervision of the foreign exchange administration authority. After the Domestic Company has obtained the non-annotated approval certificate, it shall apply to the registration administration authority and the foreign exchange administration authority for replacement of non-annotated foreign-invested enterprise business licence and foreign exchange registration certificate within 30 days.

If the Domestic Company fails to report the matter to the Ministry of Commerce within the aforementioned time limit, the annotated approval certificate of the Domestic Company will automatically become void, the equity structure of the Domestic Company shall restore to the status before the Equity Acquisition, and the Domestic Company shall handle amendment registration in accordance with Article 36 hereof.

Article 48. The financing proceeds from the overseas listing of the special purpose company shall be repatriated back to China, pursuant to the repatriation plan filed with the foreign exchange administration authority, for use in accordance with the current foreign exchange control regulations. The financing proceeds may be repatriated back to China in the following ways:

(1) by providing commercial loans to the Domestic Company;

(2) by establishing a new foreign-invested enterprise in China; and

(3) by acquiring a domestic enterprise.

Repatriation of the overseas financing proceeds of the special purpose company in the aforementioned circumstances shall comply with the laws and administrative regulations of China concerning the administration of foreign investment and foreign debts. If the repatriation of the overseas financing proceeds of the special purpose company leads to an increase of the equity in the special purpose company held by the Domestic Company and natural person or an increase in the net assets of the special purpose company, the party shall disclose the matter truthfully and apply for approval, and shall handle the corresponding change of the foreign investment-related foreign exchange registration and overseas investment registration after completion of the examination and approval procedures.

The profits, dividends and foreign exchange income from capital change received by the Domestic Company and natural person from the special purpose company shall be repatriated back to China within six months of receipt thereof. The profits or dividends may be credited into the foreign exchange account under the current account or be settled. The foreign exchange income from capital change may be kept in a special account opened under the capital account upon verification and approval by the foreign exchange administration authority and may also be settled upon verification and approval by the foreign exchange administration authority.

履行出资人职责的机构应当按照国家有关规定，确定其任命的国家出资企业管理者的薪酬标准。

第二十八条　国有独资企业、国有独资公司和国有资本控股公司的主要负责人，应当接受依法进行的任期经济责任审计。

第二十九条　本法第二十二条第一款第一项、第二项规定的企业管理者，国务院和地方人民政府规定由本级人民政府任免的，依照其规定。履行出资人职责的机构依照本章规定对上述企业管理者进行考核、奖惩并确定其薪酬标准。

第五章　关系国有资产出资人权益的重大事项

第一节　一般规定

第三十条　国家出资企业合并、分立、改制、上市，增加或者减少注册资本，发行债券，进行重大投资，为他人提供大额担保，转让重大财产，进行大额捐赠，分配利润，以及解散、申请破产等重大事项，应当遵守法律、行政法规以及企业章程的规定，不得损害出资人和债权人的权益。

第三十一条　国有独资企业、国有独资公司合并、分立，增加或者减少注册资本，发行债券，分配利润，以及解散、申请破产，由履行出资人职责的机构决定。

第三十二条　国有独资企业、国有独资公司有本法第三十条所列事项的，除依照本法第三十一条和有关法律、行政法规以及企业章程的规定，由履行出资人职责的机构决定的以外，国有独资企业由企业负责人集体讨论决定，国有独资公司由董事会决定。

第三十三条　国有资本控股公司、国有资本参股公司有本法第三十条所列事项的，依照法律、行政法规以及公司章程的规定，由公司股东会、股东大会或者董事会决定。由股东会、股东大会决定的，履行出资人职责的机构委派的股东代表应当依照本法第十三条的规定行使权利。

according to the evaluation results.

Organs that perform the duties of an investor shall ascertain the remuneration levels for state-invested enterprise managers they appoint in accordance with the relevant regulations of the state.

Article 28. The main personnel in charge of wholly state-owned enterprises, wholly state-owned companies and state-controlled companies shall be subject to economic responsibility audits in respect of their respective terms of office.

Article 29. Where the State Council and local government require that the managers specified in Items 1 and 2 of Paragraph 1 of Article 22 of this *Law* be appointed and dismissed by the government at the same level, such requirements shall apply. Organs that perform the duties of an investor shall evaluate, reward or penalise such managers and determine their remuneration levels.

Chapter V — Major Matters Concerning the Rights and Interests of Investors in State-owned Assets

Section 1 — General Rules

Article 30. Major events involving state-invested enterprises, including but not limited to mergers, divisions, restructurings, listings, increases or reductions in registered capital, issuance of bonds, major investments, providing major guarantees to external parties, transfers of major assets, large-scale donations, profit distributions, dissolutions and applications for bankruptcy shall be carried out in accordance with laws, administrative regulations and articles of association, and shall not damage the rights and interests of investors or creditors.

Article 31. Decisions on mergers, divisions, increases or reductions in registered capital, issuance of bonds, profit distributions, dissolutions, applications for bankruptcy and other major events involving wholly state-owned enterprises and wholly state-owned companies shall be made by organs that perform the duties of an investor.

Article 32. Where any of the events listed in Article 30 occurs in relation to a wholly state-owned enterprise or wholly state-owned company, the relevant decisions shall be made by the persons in charge of the wholly state-owned enterprise, as applicable, or through collective discussions or by the board of directors of a wholly state-owned company, as applicable, unless decisions on the event in question are to be made by the organ that performs the duties of investors in accordance with Article 31 and relevant laws, administrative regulations and the enterprise's articles of association.

Article 33. Where any of the events listed in Article 30 occurs in relation to a state-controlled company or partly state-owned company, the relevant decisions shall be made by the shareholders' meeting, the general meeting of shareholders or the board of directors in accordance with laws, administrative regulations and the company's articles of association. Where such decisions are made by the shareholders' meeting or the general meeting of shareholders, shareholder representatives designated by the organ that performs