

BUSINESS ORGANISATIONS AND STRUCTURES IN CHINA

中国的商业组织和公司

BY EDITORIAL STAFF WRITER

编辑人员撰写

- COMPARATIVE NOTES ON PRC AND ENGLISH LAWS

- 中英法律比较研究

In China, business organisations fall into three categories: business legal person, business partnership and business individual. According to art 37 of the General Principles of the Civil Law of the PRC, an enterprise is considered a legal person provided it has the following criteria:

中国的商事组织一般分为 3 类：商法人、商合伙和商个人。根据《民法通则》第 37 条的规定，满足以下条件的企业被视为法人：

- (1) Establishment in compliance with the law;
 - (2) Possession of necessary property or funds;
 - (3) Possession of its own name, organisation and premises;
 - (4) Acceptance of civil liability.
- (1) 依法成立；
(2) 有必要的财产或者经费；
(3) 有自己的名称、组织机构和场所；
(4) 能够独立承担民事责任。

An official organ, which has its own funds, can be considered a legal person as well. Institutions and social organisations that satisfy the four criteria are also considered legal persons.¹ An enterprise as a legal person is similar to a profitable social organisation and is a business legal entity. Official organs, institutions, social organisations and other non-enterprise legal persons are not considered business entities. There is no business trust in China, and trust business is carried out under the structure of limited liability companies and joint stock limited companies.

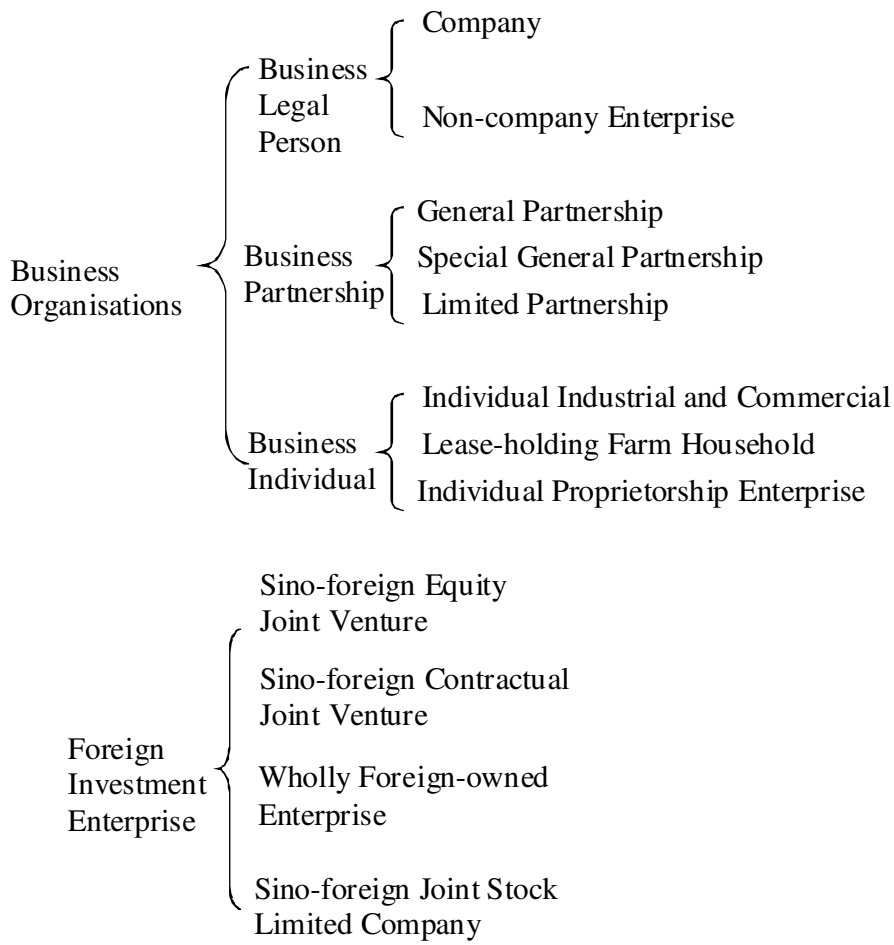
有独立经费的机关也被视为法人。具备上述四个条件的事业单位和社会团体也被视为法人。²⁶ 其中企业法人类似于营利性社团法人，视为商法人；而机关、事业单位和社会团体等非企业法人一般不能成为商法人。中国尚未有商业信托这种商业组织形式，信托公司采取有限责任公司或者股份有限公司的形式。

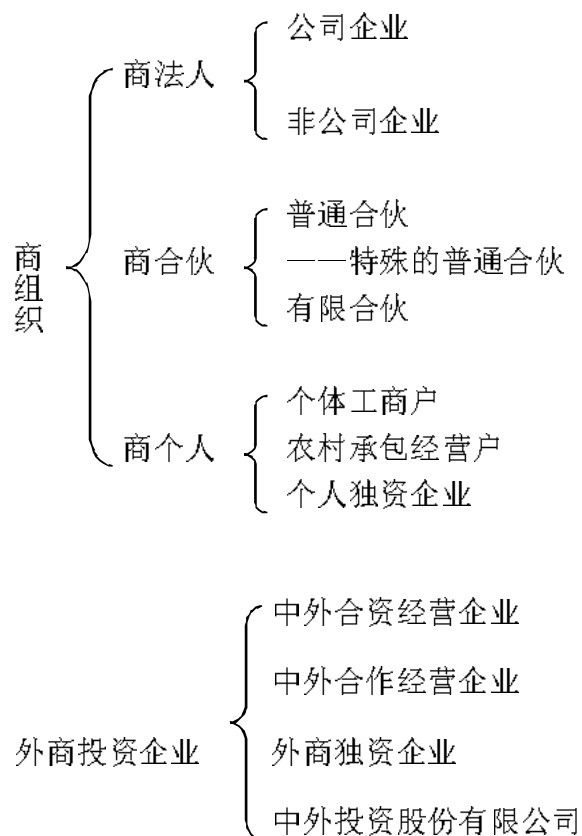
Figure 1.1: Structure of business organisations in China

1 Art 50 of the General Principles of the Civil Law of the PRC

图表1.1: 中国商事组织分类简表

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BUSINESS LEGAL PERSON

商法人

Under Chinese law, a business legal person can be an incorporated enterprise, a non-incorporated enterprise such as state-owned enterprise, a collective-owned enterprise, or an enterprise owned by the whole people (a kind of enterprise mainly set up during the planning economy period, and rarely used in today's economy). The term excludes unlimited companies that exist in English company law, but not in PRC company law. Incorporated enterprises include limited liability companies and joint stock limited companies.

根据中国法，商法人包括公司企业和非公司企业。非公司企业包括国有企业、集体企业、全民所有制企业（主要是计划经济时代的产物，现在已经较少用这种形式）等，但是排除了英国公司法中存在的无限公司。公司企业包括有限责任公司和股份有限公司。中国法下不存在无限公司。

Limited liability guarantee companies do not exist under PRC company law. However, limited liability companies, in which shareholders are liable to the extent of their capital contributions, do exist. A private limited liability company under English company law is similar to a limited liability company under PRC company law. However, a private limited liability company requires capital to be divided into shares, while the limited liability company does not. Also, shareholders of the latter are vested with legal rights to ownership of the company's assets in proportion to their shares. In the case of limited liability company, shareholders are vested with legal rights in proportion to their respective registered capital contributions.

中国公司法中没有所谓的保证有限公司。但是，存在有限责任公司，其股东仅就其认缴的出资额对公司承担责任。英国公司法中的私人有限公司类似于中国公司法中的有限责任公司。但是，私人有限公司要求将资本划分为股份，而有限责任公司没有这样的要求。另外，后者的股东根据其股票份额对公司财产享有股东权利。在有限责任公司的情况下，股东根据其各自的出资份额享有相应的权利。

A public limited liability company under English company law is closer to a joint stock limited company in the Chinese context. Both public limited companies in England and joint stock limited companies in China issue shares to their shareholders. Under the PRC law, a joint stock limited company can be a listed or unlisted company. A public limited liability company can be both listed and unlisted as well. A listed company means a joint stock limited company whose shares are listed and traded in a stock exchange. This is the same situation in England.

英国公司法中的公众有限公司更像是中国公司法中的股份有限公司。英国法下的公众有限公司和中国法下的股份有限公司均向其股东发行股份。中国法下，股份有限公司分为上市公司和非上市公司。而公众有限公司也可以分为上市公司和非上市公司。上市公司是指其股票在证券交易所上市交易的股份有限公司。这与英国法规定相同。

According to the PRC Company Law, a limited liability company can be converted to a joint stock limited company when it meets the requirements for the establishment of a joint stock limited company. The same will apply for the conversion from a joint stock limited company to a limited liability company.

根据《公司法》的规定，有限责任公司在符合股份有限公司的条件下，可以变更成股份有限公司；股份有限公司符合有限责任公司的条件下，也可以变更成有限责任公司。

The PRC Company Law also defines a holding company as one which holds more than 50 percent of the capital or shares of a company, or which, although it holds less than 50 percent of the capital or shares, has substantial influence over shareholders' resolutions during shareholders' meetings with its voting right. This is similar to the concept of a holding company under the English company law.

《公司法》还对“控股股东”作了定义：出资额或持有股份占 50% 以上，或者出资额或者持有股份的比例虽不足 50%，但其表决权已足以对股东会、股东大会的决议产生重大影响的股东。这与英国公司法下关于控股公司的基本原则一致。

There is no concept of “related person” under PRC Company Law. Instead, the PRC Company Law generally describes “related” as the relation between the holding shareholders, actual controllers, directors, supervisors, or senior management personnel and the company directly or indirectly under the control of the above persons. Under English law, a company is related if it is in a holding-subsidary situation or when two companies are both subsidiaries of a holding company.

中国公司法并未对关联公司的概念作出规定，但《公司法》对“关联关系”作了概括性的说明，即：公司控股股东、实际控制人、董事、监事、高级管理人员与其直接或者间接控制的企业之间的关系。英国法下，如果互为控股公司和子公司的关系或者同时为同一控股公司的子公司，即为关联公司。

The concept of “a group of enterprises” does exist in China. According to the *Provisional Regulation on Administration of Registration of Groups of Enterprises*, a group of enterprises is a combination of enterprises, and the capital is the link between each enterprise within the group. Such a group consists of the holding company and no less than 5 subsidiaries. It has its own group identity name and articles of association, but does not enjoy the status of a legal person. After registration with the competent authorities, a Registration Certificate for Groups of Enterprises will be issued to the group.

在中国法下，存在“企业集团”这样一个概念。根据《企业集团登记管理暂行规定》的规定，企业集团是以资本为主要连接纽带而形成的企业法人联合体。它的组成成员中包括母公司和不少于 5 家的子公司，并且拥有企业集团名称和企业集团章程，但不具备法人资格。经核准登记之后，还会有《企业集团登记证》发给企业集团。

BUSINESS PARTNERSHIP

商合伙

Partnerships under Chinese law consist of two major types: civil partnerships and business partnerships. A business partnership is often referred to as a partnership enterprise. With the implementation of PRC Partnership Enterprise Law 2007, there are now both general partnerships and limited partnerships in China. They are the same as in English law.

根据中国法，合伙主要有两大类型：一是民事合伙，一是商事合伙。商事合伙通常称为合伙企业。随着 2007 年中国《合伙企业法》的施行，中国现在和普通法辖区一样既有普通合伙，也有有限合伙。这与英国法的规定相同。

Rules governing partnerships in China are more or less the same as under English law. The definition of a “limited” partnership under PRC Partnership Enterprise Law 2007 is similar to English Limited Partnerships Act. Art 2 of the PRC Partnership Enterprise Law 2007 provides that there must be at least one general partner. The limited partner takes no part in the management of the partnership affairs. Limited liability partnerships exist in England and are governed more by the principles of company law. In China, there is no limited liability partnership.

规范中国合伙企业的法律与英国法下的规范或多或少有着相同之处。中国 2007 年《合伙企业法》下的“有限”合伙定义与英国 Limited Partnerships Act 下的定义相似。中国 2007 年《合伙企业法》第 2 条规定，有限合伙必须至少有一名普通合伙人。有限合伙人不参与合伙企业事务的管理。有限责任合伙存在于英国，更多是由公司法来规范，但中国并不存在有限责任合伙的组织形式。

In China there is a hybrid version under the Partnership Enterprise Law 2007 referred to as ‘special general partnership’. There are differences between ‘special general partnership’ and ‘general partnership’. A special general partnership has the following characteristics:

在中国，2007 年《合伙企业法》中还规定了一种“混合版本”的合伙制，被称为“特殊的普通合伙”。它与普通合伙企业存在区别。特殊的普通合伙具有以下特征：

- (1) Its business name has to include the wording “special general partnership”;
- (2) Under art 55 of the Partnership Enterprise Law 2007, enterprises that provide professional services can operate as a special general partnership;
- (3) Under this business structure, partners jointly and severally assume unlimited liability arising from their business activities. However, with regards to liabilities arising out of the intentional and wrongful acts committed by one or more partners, the defaulting partner(s) will bear unlimited or unlimited joint and several liabilities. The other partners’ liabilities are limited to their share of the partnership assets;²
- (4) A special general partnership enterprise is required to set up a risk fund and be covered by professional indemnity insurance. The risk fund will be used to cover liabilities incurred by the partners arising from their business activities.

2 Art 57 of the Partnership Enterprise Law 2007.

(1) 特殊的普通合伙企业名称中应当标明“特殊普通合伙”字样；

(2) 根据 2007 年中国《合伙企业法》第 55 条规定，以专业知识和专门技能为客户提供有偿服务的专业服务机构可以选择以这种商业结构运作；

(3) 在这种商业结构下，一般而言，合伙人对合伙企业的商业活动产生的债务仍承担共同的无限连带责任。例外的是，在执业活动中，对于因某位或某几位合伙人的故意或者重大过失行为所产生的合伙企业债务，有过错的合伙人承担无限或无限共同连带责任，其他合伙人仅仅以其在合伙企业中的财产份额为限承担责任；²⁷

(4) 特殊的普通合伙企业应当建立执业风险基金、办理职业保险。执业风险基金用于偿付合伙人执业活动造成的债务。除以上提到的几点外，特殊合伙与普通合伙企业所适用的法律规定相同。

Other than those stated above, the provisions governing the special general partnership are the same as those governing the general partnership.

除上述规定以外，关于特殊的普通合伙的其他规定与普通合伙相同。

Under PRC law, the conversion between partnerships and limited liability companies/joint stock limited companies, due to the immense discrepancy between these two types with respect to their structure and liabilities of partners/shareholders, is not possible under the PRC law.

由于在企业架构方面以及合伙人/股东对企业债务的承担方面，合伙企业都与有限责任公司和股份有限公司的情况非常不一样，目前中国法下合伙企业和有限责任公司或股份有限公司之间不能互相直接转换。

BUSINESS INDIVIDUAL

商个人

PRC Sole Proprietorship Enterprise Law mainly regulates an individual proprietorship business in China while an individual industrial and commercial business is regulated by *Regulations on Individual Industrial and Commercial Business*. They are identical to sole proprietorships in English law and the proprietors do not enjoy limited liability.

在中国，个人独资企业主要由《个人独资企业法》调整，个体工商户主要由《个体工商户条例》调整。商个人与英国法中的个人独资相对应。它们与英国的个人独资相同，所有人承担无限责任。

FOREIGN BUSINESS ENTERPRISE

中国的外商投资企业

In China, enterprises with foreign investment are called foreign investment enterprises ("FIEs"). FIEs are established in accordance with Chinese law and they can be Sino-foreign joint ventures or wholly foreign-owned enterprises. They are categorised as Sino-foreign equity joint ventures ("EJV"), Sino-foreign contractual joint ventures ("CJV"), wholly foreign-owned enterprises ("WFOE") and Sino-foreign joint stock limited company.

在中国，外商投资企业（“FIEs”）是指根据中国法律设立的，由外商投资的企业。包括中外投资合作的企业和外商独资的企业。具体分为：中外合资经营企业（“EJV”），中外合作经营企业（“CJV”），外商独资企业（“WFOE”），中外投资股份有限公司。

A Sino-foreign equity joint venture takes the form of a limited liability company under Chinese law. The

proportion of the investment contributed by the foreign investor will generally not be less than 25 percent of the registered capital of a joint venture. Chinese and foreign parties set up this kind of enterprise in line with the Law of the PRC on Chinese-Foreign Equity Joint Ventures. They share investment and management responsibilities. They also share profits and bear losses and risks in proportion to their contributions to the registered capital.

根据中国法，中外合资经营企业采取有限责任公司的形式，外国投资者在注册资本中的投资比例一般不少于 25%。中国合营者与外国合营者依照《中外合资经营企业法》设立这种类型的企业。他们共同投资、共同经营，按照注册资本中的投资比例分享利润和承担损失与风险。

The establishment and operation of a Sino-foreign contractual joint venture falls under the regulation of the Law of the PRC on Chinese-Foreign Contractual Joint Ventures. The Chinese party and foreign party share the profits and bear the losses and risks based on the terms of the CJV agreement. This provides more flexibility in the sharing of profits and losses than the rules governing the EJVs. Unlike the EJVs, the corporate structure is not restricted to a limited liability company.

中外合作经营企业的设立和经营由《中外合作经营企业法》调整。中方与外方按照签订的合作合同分享利润和承担损失与风险，对于利润分配和损失的承担比中外合资经营企业的规定更具有灵活性。与中外合资经营企业不同，这种类型的企业可以采取有限责任公司以外的其它形式。

Wholly-owned foreign enterprises are enterprises completely owned by foreigners, the establishment and operation of which are under the governance of the Law of the PRC on Foreign Invested Enterprises. Chinese law allows a WFOE to be structured as a limited liability company and other forms approved by the relevant authorities.

外商独资企业完全为外国投资者所有，其设立和经营受到《外资企业法》的管辖。中国法律允许外商独资企业采取有限责任公司的形式，经批准也可以为其他责任形式。

With the limited liability companies involving foreign investment mentioned above, the PRC Company Law is only applicable when the Law on Chinese-Foreign Equity Joint Ventures, the Law on Chinese-Foreign Contractual Joint Ventures, and the Law of the PRC on Foreign Invested Enterprises are silent on the legal issues involved.

对于上述外商投资设立的有限责任公司而言，在涉及的法律问题上，只有当《中外合资经营企业法》、《中外合作经营企业法》、《外资企业法》缺少相关规定时，《公司法》才有适用的空间。

The Chinese party and the foreign party hold the shares in a Sino-foreign joint stock limited company. The shareholding of foreign party will be more than 25 percent. In the past the minimum registered capital used to be RMB 30,000,000. The present situation is confusing. The existing Company Law amended in 2013 has removed the threshold for registered capital of a joint stock company. However, the *Provisional Regulations on the Establishment of Sino-foreign Joint Stock Limited Companies* has maintained the requirement of at least RMB 30,000,000 of registered capital. At least 25 percent of the registered capital has to be contributed by foreign investors. Also, the Ministry of Commerce ("MOFCOM") issued a notice in June 2014, stating that the threshold for registered capital for FIEs should be removed. Such notice, in terms of the hierarchy of laws, is subordinated to the above Provisional Regulation. However, in practice, its local branches always uphold any notice issued by MOFCOM. It is our submission that the minimum registered capital of RMB 30,000,000 has been removed.

中外投资股份有限公司由中方和外方共同持有股份，外方股东持股在 25% 以上。在过去，它的最低注册资本为人民币三千万，这是很确定的。但现在这个问题有点模糊。一方面，2013 年修订的《公司法》取消了对股份有限公司的最低注册资本要求，但《关于设立外商投资股份有限公司若干问题

的暂行规定》却以依然保留该三千万的最低注册资本要求，其中外方持股不低于 25%。同时，商务部在 2014 年 6 月发布了一则通知，明确取消对外商投资企业的最低注册资本要求。从法律级别来看，这则通知的效力要低于上述暂行规定。但从实践中来看，各地的商务部门一般倾向于根据商务部的通知来执行。因此，我们认为将不再要求该三千万的最低注册资本。

According to the *Provisional Regulations on the Establishment of Sino-foreign Joint Stock Limited Companies*, EJV, CJV and WFOE, Chinese joint stock limited companies, State-owned enterprises or collective-owned enterprises can apply for conversion into Sino-foreign joint stock limited companies provided that they meet the conditions set out in the provisional regulations. The PRC Company Law is applicable to issues that are not stated in the provisional regulations.

《关于设立外商投资股份有限公司若干问题的暂行规定》，中外合资经营企业、中外合作经营企业、外商独资企业、中国国内的股份有限公司、国有企业、集体企业在满足以上提到的暂行规定的条件时可申请转变为中外投资股份有限公司。该暂行规定未作出规定的地方适用《公司法》。

If a Sino-foreign joint stock limited company is listed, and the foreign shareholdings are between 10 to 25 percent, the Certificate of Approval for FIEs will be revoked and the joint venture re-structured as a non-FIE under PRC law.

如果外商投资股份有限公司是上市公司，且外方持股在 10%到 25%之间，则外商投资批准证书也将被收回。该公司在中国法下也不再属于外商投资企业。

Further, according to the *Administrative Measures on Establishment of Partnerships by Foreign Enterprises or Individuals within the Territory of China*, foreign investors can also set up partnerships in China. Such foreign invested partnerships must be set up by at least two foreign enterprises or individuals, or jointly by foreign enterprises or individuals and Chinese individuals, legal persons or other organizations.

此外，根据《外国企业或者个人在中国境内设立合伙企业管理办法》，外国投资者还可以在中国设立合伙企业。外商投资合伙企业须由 2 个以上外国企业或个人设立，或者由外国企业或个人与中国自然人、法人或其他组织共同设立。

Foreign enterprises may also set up permanent representative offices in China, which can engage in such activities as market investment, display, promotion or liaisoning relating to the products or services of such foreign enterprises. A permanent representative office does not enjoy a status of a legal person, and is not allowed to undertake profit-making operations. A foreign enterprise may also directly, without the establishment of commercial presence in China, carry out certain business activities and operations in China, upon approval by the competent authorities and subsequent registration by the same.³ In England, a registered foreign company can conduct business in England. In China, approved and registered foreign enterprises can only carry out certain limited business activities.

外国企业还可以在中国设立常驻代表机构，从事与该外国企业产品或服务有关的市场调查、展示、宣传活动或者相关的联络活动。常驻代表机构不具有法人资格，不能够进行盈利性的经营活动。此外，外国企业经主管机关批准和登记，可以直接在中国境内从事生产经营活动而无需设立商业存在机构。²⁸ 在英国，经登记的海外公司在英国进行经营活动。在中国，该批准和登记的外国企业仅限于从事某些特定的生产经营活动。

³ *Measures for the Administration of Registration of Enterprises from Foreign Countries (Regions) Engaging in Production and Business within the Territory of China*