



# Documentation and Due Diligence

文件提供和 尽职调查

M&A in China  
并购在中国



STAMFORD LAW  
CORPORATION



# Prelude

## 序言

### **Documentation and Due Diligence**

#### 文件提供和尽职调查



## A Case For Proper Documentation 案例：适当提供文件

- **A Gentleman's Agreement?**  
• 君子协定?
- **Respect for the Rule of Law in China**  
• 遵守中国法律
- **Documentation – mandatory under law?**  
• 提供适当文件：法定义务?

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# CRITICAL DOCUMENTS

Documentation is driven by deal structure:

- type of structure
- type of target investment vehicle

## Type of Transaction

- Asset acquisition
- Equity interest acquisition
- Equity interest acquisition (by way of new subscription of equity interest)

## Key Acquisition Documentation

- Sale and purchase agreement (sometimes known as “asset acquisition agreement”)
- Sale and purchase agreement
- Subscription agreement

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# CRITICAL DOCUMENTS

## Type of Target Investment Vehicle

## Key Constituent Documentation

- Wholly-owned foreign enterprise
  - Equity joint venture enterprise
  - Co-operation joint venture enterprise
  - Joint stock company
- Articles of association
  - Joint venture contract
  - Articles of association
  - Joint venture contract
  - Articles of association
  - Articles of association

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## 关键文件

目标投资机构的类型：

- 外国全资企业
- 合资企业
- 合作企业
- 股份有限公司

关键章程文件：

- 公司章程
- 合资合同
- 公司章程
- 公司章程





# Acquisition Documentation

-Essential Terms and Conditions  
-收购协议中的必要条款

## Sale and Purchase / Acquisition Agreement ("S&P Agreement") 购买/收购协议

- Requirements under law
- 法律要求

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Documentation

# Acquisition Documentation

## -Essential Terms and Conditions

### -收购协议中的必要条款

### Sale and Purchase / Acquisition Agreement ("S&P Agreement")

购买/收购协议

#### What needs to be included in an S&P Agreement?

收购协议的内容:

- ❖ **Contracting parties**  
❖ 合同缔约方
- ❖ **List of assets**  
❖ 资产清单
- ❖ **Equity interest**  
❖ 股份
- ❖ **Acquisition completion procedures**  
❖ 完成收购程序

# Acquisition Documentation -Essential Terms and Conditions 收购协议中的必要条款

## Sale and Purchase / Acquisition Agreement ("S&P Agreement") 购买/收购协议

- ❖ **Rights and obligations**  
❖ 权利 和责任
- ❖ **Breach – liquidated damages?**  
❖ 约定违约赔偿金
- ❖ **Dispute resolution**  
❖ 争议解决
- ❖ **Date and place of execution**  
❖ 执行的时间 和地点

**Governing law?**  
法律适用?

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# Acquisition Documentation

-Essential Terms and Conditions  
-收购协议中的必要条款

## Sale and Purchase / Acquisition Agreement ("S&P Agreement") 购买/收购协议

### Key Provisions in an S&P Agreement 收购协议中的关键条款

- ❖ Representations and Warranties
- ❖ 陈述和保证条款

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# Acquisition Documentation

## -Essential Terms and Conditions

### -收购协议中的必要条款

### Sale and Purchase / Acquisition Agreement ("S&P Agreement") 购买协议/收购协议

#### Key Provisions in an S&P Agreement 购买协议中的重要条款

- ❖ **Undertakings**
- ❖ 承诺

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# Acquisition Documentation

## -Essential Terms and Conditions

### -收购协议中的必要条款

### Sale and Purchase / Acquisition Agreement ("S&P Agreement") 购买协议/收购协议

#### Key Provisions in an S&P Agreement 购买协议中的重要条款

- ❖ **Asset listing – in the case of asset acquisition**
- ❖ **资产清单——在资产收购的情形下**

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Acquisition Documentation  
-Essential Terms and Conditions  
-收购协议中的必要条款

**Sale and Purchase / Acquisition Agreement  
("S&P Agreement")**  
购买协议/收购协议

**Key Provisions in an S&P Agreement**  
购买协议中的重要条款

- ❖ **Consideration, Payment/Capital Injection**
- ❖ 对价, 支付/注资条款
  
- ❖ **Group structure – in the case of equity interest acquisition**
- ❖ 集团结构—在股份收购的情况下

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# Acquisition Documentation

-Essential Terms and Conditions  
-收购协议中的必要条款

## Sale and Purchase / Acquisition Agreement ("S&P Agreement") 购买/收购协议

### Key Provisions in an S&P Agreement 购买协议中的重要条款

- ❖ Indemnity / Compensation provisions
- ❖ 补偿/赔偿条款

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# Acquisition Documentation

## -Essential Terms and Conditions

### -收购协议中的必要条款

### Sale and Purchase / Acquisition Agreement ("S&P Agreement") 购买/收购协议

#### Key Provisions in an S&P Agreement 收购协议的重要条款

- ❖ **Governing Law and Dispute Resolution**
- ❖ **争端解决和法律适用**

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# Acquisition Documentation

-Essential Terms and Conditions  
-收购协议中的必要条款

## Subscription Agreement ("Subscription Agreement") 增资协议

**Key differences between a Subscription Agreement and an S&P Agreement**  
增资协议和购买协议的重要区别

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# Establishment Documentation

-Essential Terms and Conditions

-公司发起的文件准备

--- 必要条款

## Sino-Foreign Equity Joint Venture Contract

中外合资经营企业合同

- Requirements under law
- 法律要求

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# Establishment Documentation

-Essential Terms and Conditions

-公司发起的文件准备

--- 必要条款

**Sino-Foreign Equity Joint Venture Contract**

中外合资经营企业合作合同

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## Establishment Documentation

-Chinese and English versions

-公司发起的文件准备

---中英文文本

**English and Chinese versions - which should prevail?**

英文和中文文本-哪份有优先效力?

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# Establishment Documentation

## - Total Investment Amount and Registered Capital

### Mandatory Ratios

#### Total Investment Amount

- $\leq$  US\$3 million
- $>$  US\$3 million but  $\leq$  US\$10 million
- $>$  US\$10 million but  $\leq$  US\$30 million
- $>$  US\$30 million

#### Ratio of Registered Capital to Total Investment Amount

- 70%
- 50% (subject to a min. of US\$2.1 million where total investment amount is less than US\$4.2 million)
- 40% (subject to a min. of US\$5 million where total investment amount is less than US\$12.5 million)
- 33 $\frac{1}{3}$ % (subject to a min. of US\$12 million where total investment amount is less than US\$36 million)

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# 公司发起的文件准备 - 投资总额和注册资本

## 法定比例

### 投资总额

### 注册资本占投资总额的比例

- 小于等于三百万美元
  - 三百万美元到一千万美元之间
  - 一千万美元到三千万美元之间
  - 三千万美元以上
- **70%**
  - **50%**（例如：当投资总额少于4.2百万美元时，注册资本不得少于2.1百万美元）
  - **40%**（例如：当投资总额少于12.5百万美元时，注册资本不得少于5百万美元）
  - **33 $\frac{1}{3}$ %**（例如：当投资总额少于36百万美元时，注册资本不得少于12百万美元）

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Documentation

## Establishment Documentation

- Capital Injection
- 公司发起的文件准备
- 资本注入



## Establishment Documentation

-Essential Provisions

-公司成立的文件准备

--- 必要条款

### Articles of Association

公司章程

- **Provisions closely track those in the Joint Venture Contract**  
合资经营企业中与公司章程紧密相关的条款
- **Board composition and decision-making procedures**  
董事会的组织和决策程序

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Establishment Documentation  
-Sino-Foreign Co-operation Joint Venture  
-公司发起的文件准备  
---中外合作企业

**Special Features**  
特别之处

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# Other Documents

## 其他文件

### In the context of an acquisition

#### 在收购中的文件内容

- ❖ **Resolutions**
- ❖ 决议
- ❖ **Audited financial report**
- ❖ 财务审计报告
- ❖ **Technical services agreement or technology transfer agreement (if relevant)**
- ❖ 技术服务协议或者相关的技术转让协议
- ❖ **Employees**
- ❖ 雇员

Documentation



# Due Diligence 尽职调查

**Due Diligence – an essential part of pre-negotiation preparation**

尽职调查—谈判前准备的必要部分

- ❖ **Why is due diligence essential?**
- ❖ 为什么必需尽职调查?

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# Due Diligence

## 尽职调查

### Scope of Due Diligence

#### 尽职调查的范围

- ❖ **Due diligence can be broadly categorised into legal due diligence and financial due diligence**
- ❖ 尽职调查可以广泛地分为法律尽职调查和财务尽职调查
- ❖ **The main focus of the legal due diligence**
- ❖ 法律尽职调查的主要关注点

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# Due Diligence 尽职调查

## Due Diligence Checklist 尽职调查清单

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# Due Diligence 审慎调查

## Corporate Investigations 公司调查

- ❖ **Are these necessary and when do you obtain them?**  
❖ 是否需要和何时获得?
- ❖ **To what extent can the reports be relied upon?**  
❖ 报告在多大程度上可信?
- ❖ **Instructing the corporate investigators**  
❖ 公司调查的说明

## Securing Your Right to Documents and Information 保证获取文件和信息的权利

- ❖ **Typical issues and difficulties faced**  
❖ 典型问题和难点

# Due Diligence

## 审慎调查

### Securing Your Right to Documents and Information 保证获得文件和信息的权利

- ❖ **Hiding behind the clout of confidentiality**  
❖ 隐藏在机密背后的信息
- ❖ **When all attempts fail...**  
❖ 当所有的尝试都失败时。。。
- ❖ **Beware of “back-door” qualifying of the representations and warranties through the use of Disclosure Letter**  
❖ 注意到披露函中陈述与保证条款中所含的“后门”

### What do you really need to know? ‘Must-have’ vs. ‘Good-to-have’

什么是你真正需要知道的？“必须知道”还是“最好知道”？

- ❖ **Determination often driven by availability of time, resources as well as size of the deal**
- ❖ 决定取决于可供利用的时间、资源以及交易规模

# Due Diligence 审慎调查

## Due Diligence Methodology 审慎调查的方法

- ❖ **Organising Your Team**  
❖ 组织你的团队
- ❖ **Organizing the Due Diligence Process**  
❖ 组织调查程序

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# Due Diligence 审慎调查

## Working Your Due Diligence Into Negotiation 审慎调查中的协商活动

- ❖ Pre-negotiation strategizing
- ❖ 协商前的战略安排

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# Due Diligence

## 审慎调查

### Working Your Due Diligence Into Negotiation

#### 审慎调查中的协商

- ❖ Who is to draft? Purchaser or Seller?
- ❖ 谁来规划？购买者还是规划者？

### Defensive Measures

#### 防御措施

- ❖ Key is to effectively use Representations, Warranties, Undertakings and Indemnities
- ❖ 关键是有效地利用陈述、保证承诺、补偿条款。