

# Documentation and Due Diligence

文件提供和尽职调查

M&A in China 并购在中国

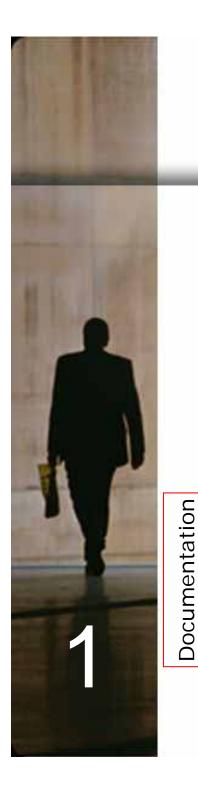




### Prelude 序言

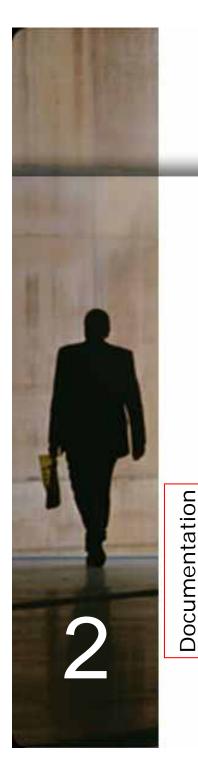
### **Documentation and Due Diligence**

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?



### **CRITICAL DOCUMENTS**

### **Documentation is driven by deal structure:**

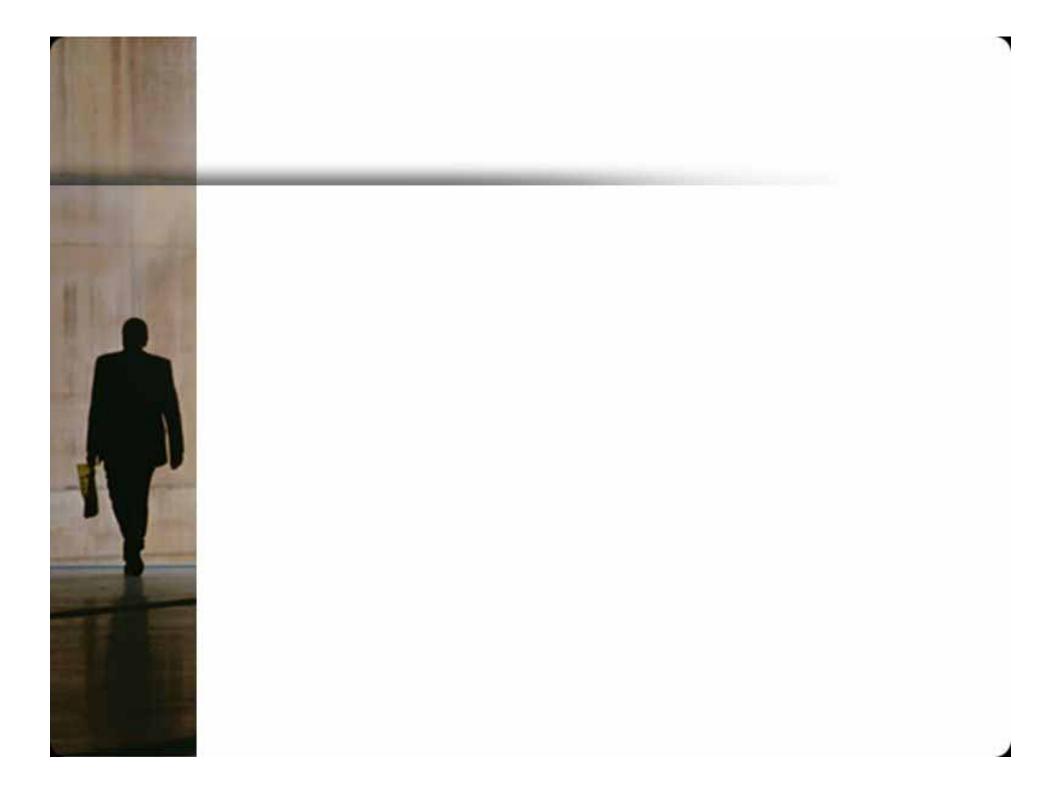
- type of structure
- type of target investment vehicle

### **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





### **CRITICAL DOCUMENTS**

### Type of Target Investment Vehicle

- Wholly-owned foreign enterprise
- Equity joint venture enterprise
- Co-operation joint venture enterprise
- Joint stock company

### **Key Constituent Documentation**

- Articles of association
- Joint venture contract
- Articles of association
- Joint venture contract
- Articles of association
- Articles of association



### 关键文件

目标投资机构的类型:

关键章程文件:

• 外国全资企业

•公司章程

• 合资企业

•合资合同

• 合作企业

•公司章程

• 股份有限公司

•公司章程



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

购买/收购协议

- Requirements under law
- 法律要求



## 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



## 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?



# 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



# 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



# 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



# 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



# 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



# 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



Documentation

# 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



# 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



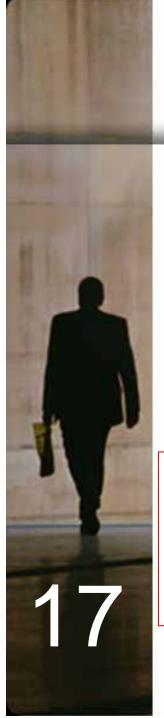
# Establishment Documentation -Essential Terms and Conditions -公司发起的文件准备 --- 必要条款

Sino-Foreign Equity Joint Venture Contract 中外合资经营企业合同



# 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?



### **Establishment Documentation**

### - Total Investment Amount and Registered Capital

### **Mandatory Ratios**

#### **Total Investment Amount**

- ≤ US\$3 million
- > US\$3 million but≤ US\$10 million
- > US\$10 million but≤ 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<sup>1</sup>/<sub>3</sub>% (subject to a min. of US\$12 million where total investment amount is less than US\$36 million)



### 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
- 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)
- 元之间
- 一千万美元到三千万美 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)
- 三千万美元以上

• 331/3% (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)



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



Documentation

### **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



# 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



### 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



### Due Diligence 尽职调查

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

尽职调查一谈判前准备的必要部分

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



### 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



### Due Diligence 尽职调查

Due Diligence Checklist 尽职调查清单

Diligence Due



### **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



## 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 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



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



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。