

# ON SHORE/OFFSHORE EQUITY AND DEBT FINANCING OF OVERSEAS BUSINESS OPERATIONS FOR PRC COMPANIES

*By*

*PETER S K KOH\**

## Types of PRC Companies

### 中国的公司形式

Under the Company Law, there are two types of companies: limited liability company and joint stock limited company.

中国法下存在两种公司形式：有限责任公司和股份有限公司。

For a **limited liability company**, a shareholder will be liable to the company to the extent of his subscribed capital contribution. The shareholders of a limited liability company can be no more than 50.

有限责任公司的股东以其认缴的出资额为限对公司承担责任。有限责任公司的股东人数不能多于 50 人。

For a **joint stock limited company**, a shareholder will be liable to the company to the extent of the shares he has subscribed. A joint stock limited company may be established by the way of promotion (where promoters subscribe all the shares to be issued) or stock floatation (where promoters subscribe only a part of the shares to be issued).

股份有限公司的股东以其认购的股份为限对公司承担责任。股份有限公司可以发起的方式设立（发起人认购公司应发行的全部股份），也可以募集的方式设立（发起人认购公司应发行的一部分股份）。

A joint stock limited company can either be an unlisted company or a listed company. In China, the stocks of a listed company are listed and traded on either Shanghai Stock Exchange or Shenzhen Stock Exchange.

股份有限公司又分为上市公司和非上市公司。在中国，上市公司的股份可以在上海证券交易所或深圳证券交易所上市交易。

Another classification method is based on whether there is foreign investment involved. A foreign invested company (“FIC”) refers to a company with foreign investment and shareholding. A domestic company has no foreign investment or shareholding. The Company Law is applicable

to both a domestic company and a FIC. However, a FIC is also subjected to special laws or regulations for foreign investment.

另一种分类方法则根据是否涉及外商投资。外资企业涉及外商投资及股权，内资企业则不涉及外商投资和股权。公司法对内外资企业皆适用，但外资企业同时还应适用有关外商投资的法律法规。

An FIC is classified either as a wholly foreign –owned enterprise (“WFOE”), a contractual joint venture (“CJV”) or an equity joint venture (“EJV”).

外资企业还分为外商独资企业，中外合作企业，中外合资企业。

A **WFOE** is an enterprise completely owned by foreigners, the establishment and operation of which are under the governance of the *Law of the People's Republic of China on Foreign-invested Enterprises* as well as many other relevant regulations and rules. 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》及其他相关法律法规的管辖。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。

A **CJV** is a joint venture with both foreign and domestic investors, and its corporate structure is not restricted to a limited liability company. The establishment and operation of a CJV 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.

中外合作经营企业是由外国和中国投资者共同设立的企业，可以采取有限责任公司以外的其它形式。其设立和经营由《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。

Like a CJV, an **EJV** is also jointly invested by Chinese Party and Foreign Party. It takes the form of a limited liability company under Chinese law. The parties to the venture share the profits, risks and losses in proportion to their respective contributions to the registered capital of the EJV.

与中外合作经营企业相同的是，中外合资经营企业也是由中国和外国投资者共同设立的企业。在中国法下，中外合资经营企业采取有限责任公司的形式。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。

When foreign investment is involved in a joint stock limited company, it can be classified simply as “**foreign-invested joint stock limited company**”.

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.

如股份有限公司中涉及外商投资，其被视为中外投资股份有限公司。中外投资股份有限公司由中方和中方共同持有股份，外方股东持股在 25%以上。

In the case that a foreign-invested joint stock limited company is listed, the foreign shareholdings are allowed to be less than 25% of the total shareholding, but must not be less than 10%. The Certificate of Approval for FIC will be revoked as the foreign shareholding is less than 25%, which means that the company is no longer treated as a FIC under PRC law.

如果外商投资股份有限公司是上市公司，则外方持股允许低于 25%，但不得低于在 10%。当外方持股低于 25%时，外商投资批准证书也将被收回。该公司在中国法下也不再视作外商投资企业。

In January 2015, MOFCOM published the new draft of Foreign Investment Law for consultation. This new draft is designed to replace the three FIC laws, and also introduces new definition of foreign investors and foreign investment. It is believed that this new law will change China's current foreign investment configuration. However it is still unclear how this draft will be amended eventually and it may take months or even years to pass this draft as a law.

今年 1 月份商务部公布了《外国投资者法草案》征求意见稿。该新法案旨在取代原来的三资法，同时对外国投资者和外商投资进行新的定义。我们相信这部法案将会改变中国现有的外商投资格局。但该草案最终会被修改成什么样子，仍然不清楚，同时，要通过该草案使其正式生效，仍须数月甚至数年的时间。

## **Outbound Direct Foreign Investments**

### **境外外商投资**

For many years, China has been the recipient of massive direct foreign investments from overseas. Its companies and business entrepreneurs have accumulated funds from inbound foreign direct investments and they need to find avenues to invest overseas.

近年来，中国接受大量来自境外的外商投资。中国的公司和企业家从境内外商投资中已经积累足够的资本，现在他们要做的是找到往境外投资的途径。

Hence, China is now ranked as one of the top three countries for both inbound foreign direct investment and outbound foreign direct investment.

Its outbound foreign direct investment is only out-paced by the United States and Japan for 2013 and 2014. Its figure jumped from US\$88bn in 2013 to US\$101bn in 2014. Based on reliable forecasts, China's outbound foreign direct investment will overtake that of its inbound direct foreign investment within the next 3 years.<sup>1</sup> The projected figure will be around US\$140bn.

如今，中国位居全球境内外商投资和境外外商投资的前三名。中国的外商投资总额从 2013 年的 880 亿美元涨到 2014 年的 1010 亿美元，并且分别在 2013 年和 2014 年超过美国和日本。根据可靠消息，中国境外外商投资总额即将在接下来的三年内超过境内外商投资总额，预计总额达到 1400 亿美元。

China's outbound foreign direct investment was geared mainly in Asia, but gradually shifted to places in North America and Europe. Its figure for Asia was reduced from 68% in 2013 to 33% in 2014.<sup>2</sup> The biggest recipients outside Asia are companies located in North America and Europe. Africa and Latin America will see more Chinese investment in resource-based industries.

中国境外外商投资主要集中在亚洲，但逐渐地向北美和欧洲转移。亚洲境外投资比例从 2013 年的 68% 下降到 2014 年的 33%。除了亚洲，最大的投资地是北美和欧洲。非洲和南美洲的资源性产业将吸引更多的中国投资。

Apart from the massive accumulation of funds from years of staggering inbound foreign direct investment over the last 10 years, the cost of production in China is no longer competitive. The Chinese government has also introduced legal measures to encourage outbound foreign direct investment.

除了在过去 10 年间依靠境内外商投资的资本积累，在中国的生产成本不再具备竞争力。目前中国政府已经颁布监管办法来鼓励境外外商投资。

The usual regulatory bodies for approval of outbound foreign direct investment in China are the same with those dealing with mergers and acquisitions. They include National Development and Reform Commission ("NDRC"), Ministry of Commerce ("MOFCOM") and State Administration for Foreign Exchange ("SAFE"). Approval is required for specific industries ranging from China Banking Regulatory Commission ("CBRC") for banking, China Insurance Regulatory Commission ("CIRC") for insurance and China Securities Regulatory Commission ("CSRC") for

---

<sup>1</sup> UNCTAD.

<sup>2</sup> World Resources Institute.

securities. For overseas investment from state-owned enterprises, approval is required from State-owned Assets Supervision and Administration Commission (“SASAC”).

在中国，负责监管境外外商投资的机构与监管跨境兼并与收购的机构相同。其中包括国家发展与改革委员会（“发改委”），商务部以及外汇管理局。涉及银行业、保险业、证券业的境外外商投资需要分别获得中国银行业监督管理委员会（“银监会”）、中华人民共和国保险监督管理委员会（“保监会”）和中华人民共和国证券监督管理委员会（“证监会”）的核准。国有企业进行境外外商投资需要获得国务院国有资产监督管理委员会（“国资委”）的核准。

NDRC introduced the *2014 Measures for the Administration of Approval and Filing of Overseas Investment Projects (Order No 9)*. Under the implications of these regulations, only investments exceeding US\$1bn and investments in sensitive countries and sensitive industries require approval and filing.

发改委在 2014 年颁布了《境外投资项目核准和备案管理办法》（“9 号令”）。根据该管理办法，仅超过 10 亿美元的境外投资和敏感国家或敏感行业的境外投资需要核准与备案。

Sensitive industries include large-scale development of transnational water supply, telecommunications, news media and massive land development. Countries that do not have diplomatic relations with China or subjected to United Nations sanctions are obvious sensitive nations.

敏感行业包括跨境水资源开发利用，基础电信运营，新闻传媒和大规模土地开发。尚未与中国建交和正在受国际制裁的国家为敏感国家。

Regulations from MOFCOM, such as the *2014 Measures for Overseas Investment (“Order No 3”)* contain more or less the same implications as the ones introduced by NDRC.

2014 年商务部颁布的《境外投资管理办法》包含了与发改委颁布的《境外投资项目核准和备案管理办法》相类似的条文。

## **Onshore Equity Financing**

### 境内股权融资

Equity financing refers to raising funds from existing or new shareholders by increasing the registered capital in respect of limited liability companies and issuance of new shares in respect of joint stock limited companies.

股权融资是指有限责任公司通过增加注册资本或股份有限公司通过新发股份，向原股东或新股东筹集资金。

For shareholders that do not want to increase or decrease their shareholdings, the registered capital increase or the issuance of new shares will be carried out among the existing shareholders. If new shareholders are invited to make contributions, the percentage of the existing shareholding will inevitably be diluted.

如股东不愿意提高或降低其持股比例，则增加注册资本或者新发股份可以在原有股东之间进行。如新的股东进行出资，那么原有股东的持股比例将不可避免被稀释。

A joint stock limited company can increase its registered capital with new shareholders. The **Private Equity Investment (“PE investment”)** and **Initial Public Offering (“IPO”)** are the most common methods of equity financing.

股份有限公司可以通过吸收新股东来提高其注册资本。私募股权投资（“PE 投资”）和首次公开发行股票（“IPO”）是股权融资的常见方式。

**PE investment** refers to an equity investment in non-public listed companies by investing institutions (usually set up as limited partnerships in overseas financial centres). It is not unusual for a company that aims at IPO to consider attracting PE investment as a pre-requisite. PE investment will result in an increase of capital for the invested company.

PE 投资是指投资机构（一般为在海外金融中心设立的有限合伙）对非上市企业进行的股权投资。如果公司想要进行 IPO，一般也会先行考虑引入 PE 投资。PE 投资可以增加被投公司的资本。

Example 1: China Mengniu Dairy Company Limited <sup>3</sup>

*In November 2002, Morgan Stanley China, Actis Investment China, and CDH Investment China jointly invested US \$26 million in China Mengniu Dairy Company Limited. That was the first round investment, followed by the second round in May 2004 where the same three PE investors injected another US \$35.23 million.*

---

<sup>3</sup> Source: “Investtide”, official website of Dragon Brilliant Capital dated 15 July 2013:  
<http://www.investide.cn/db/event/eventDetail.do?enterpriseEventId=112303>  
<http://www.investide.cn/db/event/eventDetail.do?enterpriseEventId=11849>

### 案例一：蒙牛乳业有限公司

2002 年 11 月，摩根史丹利中国、英联投资中国以及鼎辉投资中国联合向蒙牛乳业有限公司投资 2600 万美元。这仅仅是第一轮投资，第二轮投资是在 2004 年 5 月，这三家 PE 投资公司再次注资 3523 万美元。

### Example 2: Alibaba Group<sup>4</sup>

*Founded in 1999 as a small company, Alibaba Group is now a global name in consumer e-commerce, business-to-business marketplace, on-line payment, and other Internet-related business, especially after its IPO on NYSE in 2014. In 1999 and 2000, Alibaba Group raised US \$5 million mainly from Goldman Sachs China and then another US \$20 million from Softbank China and other institutions. It was then at the nadir of its business operations.*

### 案例二：阿里巴巴集团

阿里巴巴在 1999 年成立时仅仅是一个小公司，但现在已经成长为一集个人消费电子商务、企业电子商务、在线支付、以及其他互联网相关产品的全球性公司，其在 2014 年在纽约证券交易所上市。1999 年和 2000 年，阿里巴巴分别从高盛中国募集 500 万美元以及从软银及其他机构募集 2000 万美元。当时正是阿里巴巴业务经营的低潮时期。

**IPO** means the initial sale of a company's common shares to public investors. The main purpose of an IPO is to raise capital for the company. **IPO** 是指公司首次将其股份向公众出售，**IPO** 的主要目的是为公司筹集资金。

Companies in China may choose onshore IPO or offshore IPO. In the past years prior to 2012, Chinese domestic stock market was a big pool from which listed companies had no difficulty in raising capital. For example, in 2011, 281 companies listed on A stock market and a total of US \$ 43.719 billion was raised. Each listed company raised US \$ 156 million on an average from the A stock market in 2011.<sup>5</sup>

中国企业可以选择境内 **IPO** 或赴境外 **IPO**。在 2012 年之前的几年，中国国内的股票市场是一个巨大的资金池，上市公司可以很容易就

---

<sup>4</sup> Source: "Company Overview", official website of Alibaba Group, dated 15 July 2013, website: <http://news.alibaba.com/specials/aboutalibaba/aligroup/index.html>

<sup>5</sup> National Business Daily dated 4 Jan 2012, see <http://www.nbd.com.cn/articles/2012-01-04/626869.html>

募集到资金。例如，2011 年共有 281 家公司在 A 股上市，共募集资金 437.19 亿美元，平均每家上市公司从 A 股市场募集 1.56 亿美元。

The IPO market in 2012 turned out to be sluggish due to some new and stringent rules and the backlog of applications for domestic share sales. Such backlog lasted until the end of 2013. In 2014, 125 companies were listed on A stock market and a total of around 67 billion RMB was raised<sup>6</sup>.

但 2012 年 IPO 市场变得不景气，这主要是由于出台了更为严格的规定，国内 IPO 的申请出现了大塞车的现象。这一现象持续到 2013 年底。2014 年共有 125 家企业上市，IPO 募集金额近 670 亿元。

## **Onshore Debt Financing**

### 境内债务融资

Debt financing refers to loans from financial institutions such as commercial banks. Commercial banks rarely provide loans or credit facilities without provision of securities by corporate borrowers. Commercial banks require companies seeking loans to provide Letters of Guarantee or Promissory Bonds or Standby Letters of Credit together with acceptable collaterals such as mortgages or pledges. Credit worthiness or financial standing of the corporate borrower will be taken into consideration in their risk evaluation.

债务融资是指向商业银行等金融机构借款。如果借款公司不提供担保，商业银行很少会提供贷款或其他信贷安排。银行可能会要求借款公司提供保函、履约保函、备用信用证，以及其他的担保，如抵押或质押。在进行风险评估时，还会考虑借款公司的信用状况和财务状况。

**Letter of Guarantee** or a Performance Bond can either be provided by a domestic financial institution (for example, a domestic bank) or a non-financial enterprise with credit worthiness (for example, the shareholder of the company). When the Letter of Guarantee is provided by a bank, the corporate borrower is usually required to deposit a substantial amount of cash as fixed deposit.

保函或履约保函可由国内的金融机构（如国内的银行）提供，也可由信誉较好的非金融机构提供（如公司的股东）。当保函由银行提供时，该银行一般会要求借款公司在该银行有一定数额的定期存款。

---

<sup>6</sup> Sina Finance, dated 29 Dec 2014, see <http://finance.sina.com.cn/stock/newstock/zxdt/20141229/150021188111.shtml>



Properties such as real estate, land use rights, machines and equipments<sup>7</sup>, transportation vehicles<sup>8</sup>, either owned by the company itself or by a third party, can be used as collateral properties. **Mortgage** is always the most desirable security for a bank because of its safety and simple value appraisal. 公司自己所有的或其他第三方所有的财产如不动产、土地使用权、机器设备、交通工具等，都可以用作抵押物。抵押这种担保方式因其安全性及估值方便性一直为银行所青睐。

The properties that can be used for **pledge** are mainly the movable properties, for example, inventory such as raw materials or goods in the warehouse, and instruments including bills of exchange, promissory notes/bank notes<sup>9</sup>, cheques, bonds, bills of lading, negotiable shares or stocks. Other properties include negotiable rights to the exclusive use of trademarks, patents and copyrights can be pledged as well.

可以用作质押物的财产一般为动产，如：放在仓库里的原材料或商品的存货，汇票、期票/银行短期债券、支票、债券、提单、可转让股份或股票等证券。其他可转让的权利如商标、专利、著作权等的独家使用权等也可以作为质押物。

However, it is not easy for some companies, especially small and medium sized companies, to get loans from banks, partly due to the credit crunch faced by the banks from time to time, and partly due to the stringent requirements set by banks in respect of the credit worthiness or security provided by the companies. As a result, many companies turn to debt financing from non-financial institutions and non-banks, such as private credit companies.

但是，对于一些公司、特别是中小型公司来说，要从银行贷款并非易事，这一方面是因为银行经常面对的银根紧缩的情况，另一方面也是银行对公司的贷款信誉和提供的担保有较为严格的要求。因此，一些公司会转而向一些非金融机构或非银行机构借款，如私人贷款公司。

Private credit companies are legal entities in China. They can be either structured as limited liability companies or joint stock limited companies. No special license is required for the establishment of such companies, but there is a need for approval by local government and registration with China

---

<sup>7</sup> A mortgage contract will be signed and shall be registered with the local AIC. The title documents attached to such machines and equipments will be marked "under charge".

<sup>8</sup> A mortgage contract will be signed and shall be registered with the local transportation authority. The title documents attached to such vehicles will be marked "under charge".

<sup>9</sup> Under Article 73 of the Negotiable Instrument Law of the PRC, a promissory note is an instrument written and issued by a drawer, promising to pay unconditionally a fixed amount of money to a payee or holder at the sight of the instrument. The term "promissory note" used in this law refers to the bank note.

Banking Regulatory Commission (“CBRC”) and People’s Bank of China (“PBOC”).

私人贷款公司在中国是合法的。它们既可以是有限责任公司，也可以是股份有限公司。设立这种公司不需要取得特别的许可证，但需要当地政府的批准，同时还需要向银监会和中国人民银行登记备案。

The permissible interest rate has to be no lower than 9/10 of the benchmark loan rate published by People’s Bank of China, and the maximum is 4 times the benchmark loan rate.

允许的利率应当不低于中国人民银行公布的基准利率的 9/10，最高不得超过基准利率的 4 倍。

Security may be required. Private credit companies can grant loans with higher interest rates and shorter loan periods without the provision of security by the borrowers. Companies have to be very careful when they raise funds from private credit companies as not every private credit company carries its money lending business within the legal framework. Private credit companies are not allowed to raise funds from the public, they may charge high interest rate in the guise of commission or other fees.

贷款仍可能需要提供担保。借款人向小额贷款公司借款也可不提供担保，但利率会更高，期限也会更短。向小额贷款公司借款时，公司需要特别谨慎，因为某些小额贷款公司可能并未在合法的范围内进行贷款。小额贷款公司也可能会议手续费或其他费用的名义，实质上收取高额利息，有一部分原因是因为它们不得吸收公众存款。

In recent years, there are so many of such companies in China, and most of the local governments have set up rules governing this type of companies. Shenzhen and Wenzhou are the example cities in respect of private credit companies’ administration.

最近几年，中国出现了大量这种公司，大部分的地方政府也都出台了相应的管理规定。深圳和温州在私人贷款公司管理方面是两个比较典型的城市。

Shenzhen has its own local rules regulating the qualification, establishment, operation, risk management and other aspects of private credit companies. The rules are becoming stricter in recent years. For example, Shenzhen government issued *Temporary Measures of Shenzhen for the Pilot Management on Small Credit Companies* in 2009, under which the maximum registered capital will be RMB50 million in respect of a limited liability company and RMB 80 million in respect of a joint stock limited company. In 2011 the new *Temporary Measures of Shenzhen for the Pilot Management on Small Credit Companies*

was issued, under which the standard for the registered capital was increased to RMB100 million and RMB200 million respectively for a limited liability company and a joint stock limited company. These *Measures* also have strict provisions regarding the investors/fund distributors to ensure the legality of their financial sources.

深圳当地的法规对小额贷款公司的准入、设立、运营、风险管理和其他方面作了规定。而且，近年来的规定呈越来越严格的趋势。例如，深圳市政府于 2009 年发布了《深圳市小额贷款公司试点管理暂行办法》，根据该暂行办法，小额贷款公司形式为有限责任公司的，注册资本不得低于 5000 万人民币，为股份有限公司的，注册资本不得低于 8000 万人民币。但 2009 年深圳市政府发布了新的暂行办法，将小额贷款公司的最低注册资本提高至 1 亿元人民币（公司形式为有限责任公司的）和 2 亿元人民币（公司形式为股份有限公司的）。同时，这些暂行办法还对投资者以及出资人做了严格的规定以保证其资金来源的合法性。

Wenzhou is the pilot city for the financial reform starting from 2012. Some private credit companies will be re-structured as small rural banks, and the remaining will be placed under stricter supervision. It has been more than 3 years since the financial reform. However, it seems the reform has not yet achieved a satisfactory result. Previously a financing scandal regarding illegal fund raising was reported to take place in Wenzhou and its neighboring cities. Large amount of funds were raised by all kinds of companies including private credit companies from the public at exorbitant interest rates. In the end most of the lenders were not repaid.<sup>10</sup>

温州从 2012 年开始成为金融改革的试点。一些私人贷款公司将会被重组为农商银行，其他的也将会被置于更严格的监管之中。自金融改革实施至今已有 3 年，但似乎并未取得人们预期的满意成果。此前，温州及其相邻城市爆出非法集资丑闻。众多公司包括私人贷款公司以畸高的利率吸引民间资金，最终大部分民间资金的贷款人未能得以偿还。

Another source of debt financing for companies is issuance of corporate bonds<sup>11</sup>.

---

<sup>10</sup> See the "Wu Ying" case. Wu Ying was given a suspended death sentence because of credit financing fraud. She established the Bense group and was its Legal Representative. In 2006, she was ranked No 68 in the Hurun Rich list with her total wealth of RMB3.8bn. It was reported that she raised more than RMB773m from the public of which around half was not repaid.

<sup>11</sup> In China, there also exists "enterprise bonds" that are different from corporate bonds, mainly in that enterprise bonds are issued by SOEs or state holding companies, the raised funds usually being invested in specific constructions of railway, highways or power station.

Compared with bank loans, issuance of corporate bonds allows a company to use the raised funds in a way not limited or interfered by creditors. Also, the company does not have to repay the debts in a shorter term and face cash liquidity. The company will be financially burdened with higher payments upon maturity of the bonds.

公司进行债务融资的另一个途径是发行公司债券。相较于银行贷款，公司债券所筹集的资金不受限于债权人所限定的用途。并且，公司不必面临短时间还款和现金流的问题。但公司在债券到期时面临着更高的还贷责任。

Other concerns that may impact a company's decision in issuing corporate bonds include the complicated and strict procedure in obtaining approval from authorities.

另一个影响公司是否发行公司债券的因素是获取有关机构核准的手续和程序非常复杂和严格。

Issuance of corporate bonds must be approved by CSRC. Agents including underwriters and sponsors must be employed by the company. This is a heavy expenditure to be borne by the company. The company has to comply with conditions set by relevant laws, for example, the net assets shall not be less than RMB30 million in respect of a joint stock limited company or RMB60 million in respect of a limited liability company.<sup>12</sup>

发行公司债券必须获得证监会的核准。公司必须聘用承销商和保荐人。这对于公司来讲是一笔极大的经费。并且公司发行债券必须符合相关的法律法规，比如股份有限公司的净资产不低于三千万元人民币，有限责任公司的净资产不低于六千万元人民币。

Almost all the companies approved with issuance of corporate bonds during the past years were listed companies.

在过去这些年里获得核准发行公司债券的，绝大部分属于上市公司。

## **Off-shore Equity Financing** **境外权益融资**

As a global economic engine, it is normal for companies in PRC to establish overseas subsidiary or associate companies. Such overseas companies require to raise capital for their business operations. The methods of obtain financing is the same as their holding or parent companies in the PRC. They can use equity and debt financing instruments to raise funds.

---

<sup>12</sup> Article 16 of Securities Law of the P.R.C.

Raising capital directly from the Chinese holding company is sometimes not considered because of China's policy on foreign exchange control. A spate of financial scandals and auditing irregularities overseas have been daunting factors for overseas companies to engage in equity financing of their business operations.

作为一个全球经济体，中国的公司在境外设立海外子公司和关联公司已经成为普遍现象。这些海外公司也需要为其商业经营筹集资金。海外公司筹集资金的方式与他们的中国母公司一样。他们同样可以通过权益融资和债务融资的方式。

### **Off-shore Debt Financing** **境外债务融资**

The off-shore debt financing is more about “an overseas loan under domestic guarantee” than a direct overseas loan extended to Chinese overseas subsidiaries.

相较于对境外金融机构对海外子公司的直接贷款，境外债务融资更多地以一种“内保外贷”的形式存在。

Debt financing can always be an avenue for Chinese overseas subsidiaries as they can also provide acceptable securities such as mortgages of real estate or commercial or industrial properties. Sometimes, directors and shareholders can also provide their residential properties overseas plus their personal guarantees to enable their companies to have lines of credit. However, they often face difficulties in raising funds directly from the overseas financial institutions, because of credit worthiness.

债务融资一直以来倍受中国海外子公司的青睐，因为中国母公司能够提供可接受的担保，例如抵押房地产或工商业资产。甚至公司董事和股东也会以其自身居住的海外物业加上他们个人保证作为担保，使公司顺利获得信用贷款的最高限额。然而，中国海外子公司经常因其商誉的问题在向海外金融机构筹集资金时遇到阻滞。

In this context, “an overseas loan under domestic guarantee” was defined in 2014 by the State Administration of Foreign Exchange (“SAFE”) in *Provisions on the Foreign Exchange Administration of Cross-border Guarantees* (“*Cross-border Guarantees Provisions*”), for the purpose of giving support to Chinese overseas subsidiaries.

“内保外贷”在外汇管理局 2014 年发布的《跨境担保外汇管理规定》（“《跨境担保规定》”）中被明确定义，用以鼓励中国海外子公司的融资活动。

Such policy literally means overseas financial institutions granting loans or credit to overseas subsidiaries with the provision of security by its parent or holding company in PRC. This can be facilitated by an internal arrangement between a domestic bank and its overseas branch or bank. However, subjected to Art 3 of the *Cross-border Guarantees Provisions*, the guarantors must be incorporated within China while the debtors and creditors must be incorporated outside China. In addition, in accordance with Art 6, overseas loan under domestic guarantee has to be registered with the SAFE.

这个制度是指海外金融机构在中国境内母公司提供担保的情况下向海外子公司发放贷款的行为。此项融资可以由境内银行和境外分行签署内部协议来完成。但是，《跨境担保规定》第三条明确规定，担保人必须在中国注册成立且债权人和债务人均为境外注册成立。另外，根据第六条的规定，内保外贷必须在外汇管理局进行登记。

For example, XYZ is an overseas subsidiary or associate company established in Singapore by its Chinese holding company ABC. ABC provides security to a local Chinese bank, say, Bank D, such as pledging of shares, mortgage of real estate properties, fixed deposits and personal guarantees by substantial credit worthy shareholders. The Bank E in Singapore, will extend a line of credit to XYZ.

例如，XYZ 是一家在新加坡注册成立的中国海外子公司，其母公司为中国注册成立的 ABC 公司。ABC 公司中有良好信誉的股东向中国境内的 D 银行提供担保，比如股份质押、房地产抵押、定期存款或个人保证。同时，在新加坡的 E 银行为 XYZ 公司提供最高额度贷款。

Between Bank D and Bank E, there will be an internal arrangement, usually by way of documentary standby letter of credit. The documentary standby letter of credit is issued by the Chinese domestic bank, Bank D, under which XYZ is the beneficiary. With the endorsement by a fully licensed bank in the PRC, the Singapore bank, Bank E, will extend a line of credit to XYZ.

在 D 银行和 E 银行之间有内部协议，通常表现为备用信用证。备用信用证由中国境内银行开出，以 XYZ 公司为受益人。在新加坡的 E 银行会因信用证上有中国境内具备资质的银行的背书而向 XYZ 发放最高额度贷款。

In lieu of Bank E, it can also be the overseas branch of Bank D or the agent bank that has a regular business relationship with Bank D.

除了 E 银行，D 银行的海外分行或者与 D 银行有海外业务联系的代理行也可以进行此项目。

In conducting such arrangement, company ABC has to consider the following major factors:

在签署该协议时，ABC公司应当注意以下几个问题：

Firstly, Bank D issues the documentary standby letter of credit to the extent not exceeding the amount associated with the line of credit given to XYZ.

第一，D银行开出的备用信用证中的总额不得超过E银行将发放给XYZ公司贷款的最高额度。

Secondly, Art 9 of *Cross-border Guarantees Provisions* require the domestic guarantors to complete registration after signing guarantee contract. If the guarantors are banking institutions, they have to file data about the guarantee with SAFE through the data interface program. For non-banking guarantors, they will directly register with SAFE within 15 working days from the conclusion of the contract.

第二，《跨境担保规定》第九条要求国内境内担保人必须在签订担保合同后进行登记。担保人为银行的，由担保人通过数据接口程序或其他方式向外汇局报送内保外贷业务相关数据；担保人为非银行金融机构或企业的，签订合同后15个工作日内到所在地外汇局办理内保外贷签约登记手续。

Thirdly, Art 10 requires both banks and non-banking institutions providing onshore guarantees for offshore loans to comply with the criteria for operating guarantee business from authorities.

第三，《跨境担保规定》第十条规定，银行、非银行金融机构作为担保人提供内保外贷，应具有相应担保业务经营资格。

Subject to Art 11, the fund under domestic guarantee is limited to the scope of normal business operations. Debtors are prohibited from engaging in transactional arbitrage or conduct speculative trading. In addition, unless approved by SAFE, the fund cannot be transferred back to China in a form of loan, equity investment or securities investment.

第十一条规定，内保外贷所筹集的资金仅限于用于公司正常经营范围。债务人不得进行套利行为或投机行为。另外，除非经外汇管理局的批准，资金不得以借贷、股权投资或证券投资的形式转回中国境内使用。

Lastly, the domestic guarantors, in accordance with Art 12, should be responsible for conducting due diligence on the background of the debtors and supervising the use of fund.

最后，根据第十二条，境内担保人需要对债务人的背景进行尽职调查和监管资金用途。

\*Acknowledgements:

The writer is a practicing lawyer/accredited CIETAC arbitrator based concurrently in Singapore and Vancouver. He is deeply indebted to the research assistance of the following:

Ms Mary Zhu Miaoli and Gloria Yan Liang (both PRC qualified lawyers and post-graduate students in Hong Kong University),

Ms Zhu Wen (a law graduate of Renmin University in Beijing and a legal counsel in Bank of China Beijing) and

Ms Liu Yiwei (a foreign registered lawyer with an international JV firm in Singapore and qualified to practise law in PRC and England and a former law graduate of Renmin University in Beijing and NUS in Singapore)