



# Vehicles for foreign investment in China

eiger

Eiger Law

艾格峰外國法事務律師事務所

**Tian XU**

**Shanghai, July 13, 2012**

[www.eigerlaw.com](http://www.eigerlaw.com)

# Chinese "Eldorado"?

---



# Choosing your investment vehicle...

---

- **Representative Office (RO)**
- **Equity Joint Venture (EJV)/ Cooperative Joint Venture (CJV)**
- **Wholly Foreign-Owned Enterprise (WFOE)**
- **Foreign Invested Company limited by Shares (FICLS)**
- **Foreign Invested Partnerships (FIPs)**
- **Acquisitions of domestic enterprises by foreign investors**

# What to do... Where to go?

---



## Foreign Investment Industrial Guidance Catalogue (2011)

### 1. Encouraged Categories

- preferential treatment
- e.g. high-end. equipment manufacturing, biotechnology, new compound pharmaceuticals, new information technology, new energy power, etc.

### 2. Permitted Categories

- neutral treatment
- foreign investment projects that are not categorized as encouraged, restricted and prohibited projects

### 3. Restricted Categories

- face more strict scrutiny from the government or require approval from higher levels of the government
- e.g. transportation service, banking, insurance, telecommunications, etc.

### 4. Prohibited Categories

- not open to foreign investment
- e.g. news agency, publishing of books, newspapers and periodicals, gambling, mining of radioactive materials, air traffic control, social research, etc.

# What is determined by Guidance Catalogue

---

- Establishment procedures (difficult/easy, fast/slow)
- Authorities involved: e.g. MOFCOM, SAIC, SFDA (pharmaceuticals), PBC (banking), etc.
- Certain tax incentives: e.g. import tax exemption for certain equipments of encouraged projects, etc.
- Necessity of Chinese Partners (academic educational institutions, railway lines, market research)

MOFCOM: Ministry of Commerce of the People's Republic of China;  
SAIC: State Administration of Industry and Commerce;  
SFDA: State Food and Drug Administration;  
PBC: The People's Bank of China;

# Representative Office (RO)

---

First step to enter the Chinese market ?

<b>Advantages / Permitted Activities</b>	<b>Inconvenients</b>
- No capital requirements	- No commercial operations/ not-profitable
- Simplified registration procedures	- HR limitation ( $\leq 4$ representatives, HR agency)
- Establishing business contacts	- Duration limitation (1 year)
- Market research	- Taxation issue
- Promotion of foreign parent company	- Registration and exit is almost equally time-consuming

**becoming less attractive...**

# Equity Joint Venture (EJV)/ Cooperative Joint Venture (CJV)

---

- **Initial investment vehicle since 1979**
- **Joint ownership of foreign and Chinese investors**
- **Share management, profits and losses**
- **Benefits from Chinese partners**
- **Potential risks**

# Equity Joint Venture (EJV)/ Cooperative Joint Venture (CJV)

---

## Comparison between EJV & CJV

	<b>EJV</b>	<b>CJV</b>
<b>Form</b>	- LLC	- LLC or other form
<b>Registered capital</b>	- At least 25%	- No requirement
<b>Management</b>	- Two-tiered management	- No requirement
<b>Profit &amp; loss sharing</b>	- In proportion to equity contribution	- Contractual agreement



# Equity Joint Venture (EJV)/ Cooperative Joint Venture (CJV)

---

## Joint Venture

Advantages	Inconvenients
- Less capital expenditure compared with WFOE	- Shared management and profits
- Various support from Chinese partners (financial, market, culture, networks, etc.)	- IP, Know-how & technology risks
- Access to the industries merely open for JVs	- Conflict between partners, side business

# Wholly Foreign Owned Enterprise (WFOE)

---

**Most popular investment vehicle!**

- **Introduction since 1986**
- **Wholly owned by foreign investors (individual or entity)**
- **Typically in the form of LLC (limited liability company)**
- **Receive all profits and bear all risks**
- **Non-listing vehicle**

The logo for 3M, consisting of the letters '3M' in a bold, red, sans-serif font.The logo for Siemens Schneider Electric, featuring the word 'SIEMENS' in blue, 'Schneider' in black, and 'Electric' in black, with a green circular icon containing a white 'E' symbol.

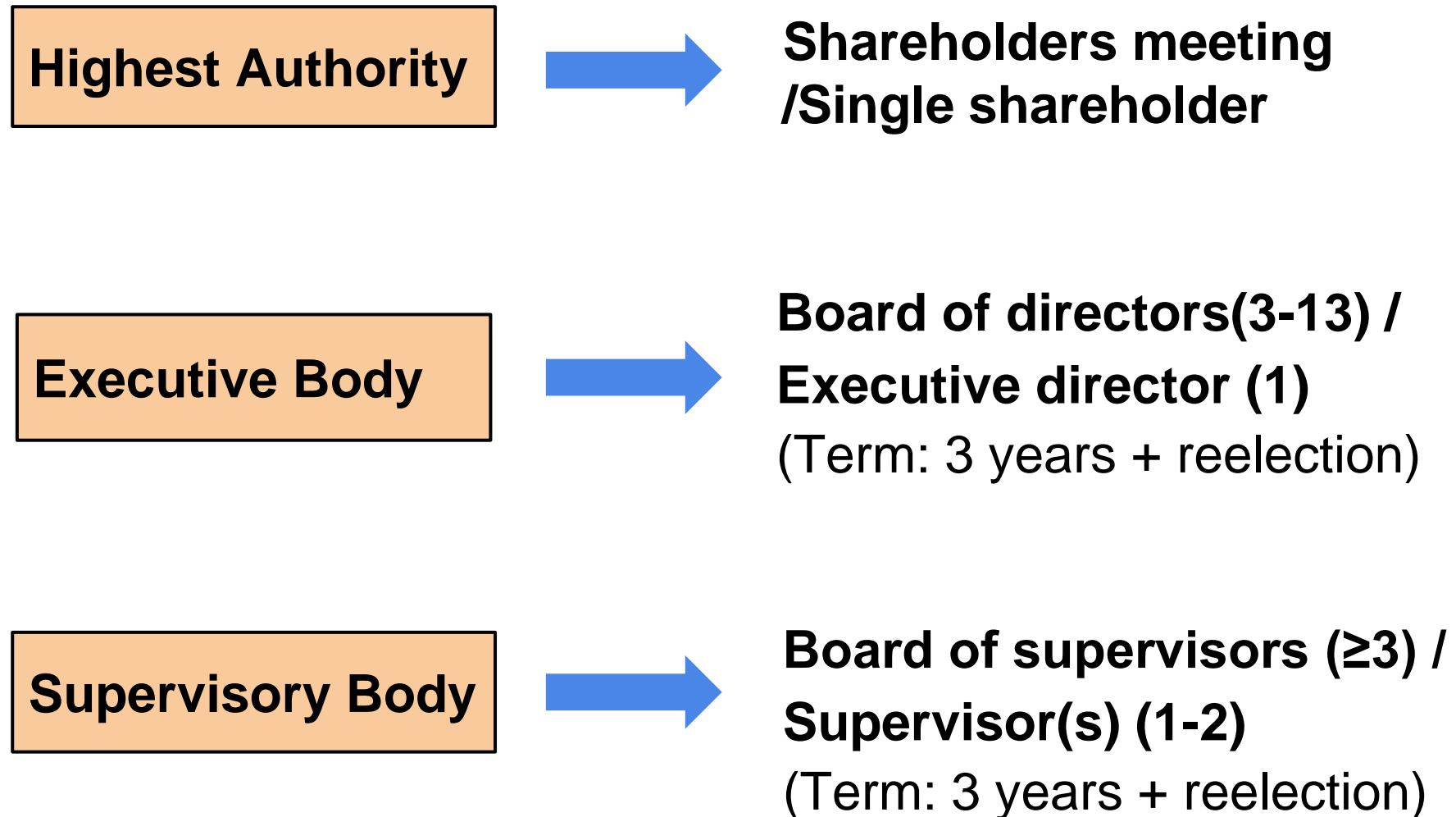
# Wholly Foreign Owned Enterprise (WFOE)

<b>Advantages/ Permitted Activities</b>	<b>Inconvenients</b>
- Maximum flexibility & independance	- Capital requirements
- Limited liability	- Complicated registration procedures (compared with ROs)
- Profit-making operations	
- More effective know-how & IP protection (compared with JVs)	
- Capability of profit repatriation	
- Direct HR management (compared with ROs)	

# Wholly Foreign Owned Enterprise (WFOE)

---

## Management Structure



# RO vs. WFOE

	RO	WFOE
<b>Registration Complexity</b>	- Incorporation documents and bank statement of credibility (3-4 months)	- Requires business plan, forecasts and name approvals process (3-6 months)
<b>Tax Treatment</b>	- Simplifies tax compliance (~11% on expenditures)	- Tax optimization - Expenses deductible
<b>Duration of entity</b>	- 1 year (annual extension necessary)	- 15-30 years, max. 50 years (renewable)
<b>Capital investment</b>	- N/A	- Min. investment dependent upon industry and WFOE location
<b>Liability</b>	- Liability assumed by parent company	- Limited Liability Company
<b>Scalability</b>	- Not scalable	- Potential for branch offices and subsidiaries
<b>Overhead</b>	- Minimal	- Increased overhead due to additional compliance requirements

# Foreign Invested Company limited by Shares (FICLS)

---

- Real introduction since 2001 (merely overseas shares during 1995-2000)
- Purpose: access to CN capital market (A, B Shares)
- Min. registered capital - CNY 30 million (CNY 5 million for domestic CLS)
- Joint holding by Chinese and foreign shareholders
- Foreign equity no less than 25% (10% after IPO)
- Promoters: 2-200, at least one promoter as foreign shareholder
- Promoters' shares are subject to a 3-year lock-up period
- Board of directors (5-19), Board of supervision ( $\geq 3$ )

# **Foreign Invested Partnerships (FIPs)**

---

- **Introduction since 2010 (domestic partnerships since 2006)**
- **Feature: unlimited joint and several liability**
- **Types: General Partnership (GP), Special General Partnership (SGP), Limited Partnership (LP)**
- **Advantages:**
  - **Individuals and legal persons as partners**
  - **No MOFCOM approval required**
  - **Taxation at partner level (no double taxation)**
  - **Independent management of general partners**

# Foreign Invested Partnerships (FIPs)

SGP	LP
- General partners (unlimited liability to intentional or serious wrongful acts, otherwise only limited liability to the extent of capital contribution)	- General partners + limited partners
- Fault-based system	- 2-50 partners, at least one general partner
- Professional service providers, e.g. law firms, accounting firms	- Private Equity (PE) Funds

- 2008 SAFE Circular 142
- Restrictions on equity investment lead to approval of each specific PE project
- WFOE became infeasible for PE Funds
- Since then LP has become the main vehicle for PE Funds in China

(SAFE: State Administration of Foreign Exchange)



# **Acquisition of domestic enterprises by foreign investors**

---

- **Target company: private or state-owned enterprises**
- **Acquiring market shares or accessing restrictive industries**
- **Equity or asset deal**
- **Subject to MOFCOM approval and SAIC registration**
- **Anti-Monopoly/Market Concentration Examination**
- **National Security Review**

Footnote: MOFCOM- Ministry of Commerce of the People's Republic of China;  
SAIC - State Administration of Industry and Commerce

# Acquisition of domestic enterprises by foreign investors

Market Concentration Examination	National Security Review
<ul style="list-style-type: none"><li>- Total global turnover &gt; CNY 10 billion</li><li>- Each CN turnover &gt; CNY 400 million (at least two parties)</li><li>- During last financial year</li></ul>	<ul style="list-style-type: none"><li>- Sectors: military equipment, key agricultural products, energy, infrastructure, transport, etc.</li></ul>
<ul style="list-style-type: none"><li>- Total CN turnover &gt; CNY 2 billion</li><li>- Each CN turnover &gt; CNY 400 million (at least two parties)</li><li>- During last financial year</li></ul>	<ul style="list-style-type: none"><li>- Authority in charge: MOFCOM and NDRC</li></ul>
<ul style="list-style-type: none"><li>- Victim: Coca Cola acquiring Huiyuan</li></ul>	<ul style="list-style-type: none"><li>- Victim: ?</li></ul>

(NDRC: National Development and Reform Commission)

# Summary

---

- 
- **RO, EJV, CJV - becoming less attractive**
- **WFOE - the most popular vehicle**
- **FICLS - listing purpose**
- **FIPs - mainly PE Funds**
- **Acquisition - acquiring market shares or accessing restrictive industries**

# Major Practice Areas of Eiger Law

---

**Eiger is a full service law firm with offices in Greater China Area, we are specialized in the following practice areas:**

- Establishment of commercial presence (including set-up of various investment vehicles, legal due diligence, etc.)
- Corporate
- Merger & Acquisitions
- Finance & Restructuring
- IP filing, licensing, infringement (i.e. Trademark, Copyright, Patent, Domain Names and know-how)
- Cross-border and domestic taxation and customs law
- Real estate and construction laws
- HR management, compliance and labor dispute settlement
- Dispute Resolution (Arbitration & Litigation)

# Contact us...

---

**Nathan KAISER**

[nathan.kaiser@eigerlaw.com](mailto:nathan.kaiser@eigerlaw.com)

Mobile: (+886) 926 181 004

**Tian XU**

[xu.tian@eigerlaw.com](mailto:xu.tian@eigerlaw.com)

Mobile: (+86) 1300 317 1619

**...Or visit us!**

[www.eigerlaw.com](http://www.eigerlaw.com)

**Taipei**

Bldg. A, 12F,  
25-2 Ren Ai Rd, Sec. 4  
Taipei 10685  
Taiwan

**Shanghai**

Suite 1805-1806, I Mansion,  
the North, 106 Zhongjiang Rd.  
Shanghai 200062  
China

**Thank You!**