

Hengtai Law Offices

Introduction on
Starting Business in
China by Foreign
investors

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24/07/2011

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I. Preliminary information about China

China adheres to the WTO (WORLD TRADE ORGANIZATION) in 2001. By this way, she has been lowering her tariff barriers and to dash gradually towards an opening of her national market.

She is thus in measure to attract a large number of companies, which are situated at the moment, mainly in the industrial domain. However, the other sectors are henceforth buoyant, such as the services, the distribution and the farming sector.

For the first time, the Chinese statistics operated a census of the number of foreigners living in China in 2011. The number amounted to 593 832, among whom 56.62 % of men and 43.38 % of women. According to the statistics published by the ministry of the Human resources and the Social Security, 231 700 foreigners worked in China at the end of 2010 (against 223 000 in 2009). 11.68 million jobs were created last year, and 5.47 million dismissed workers managed to find an employment. Thus, the unemployment rate is established around 4.1 %.

- Population : 1,340 milliard (2011)
- Area : 9,60 millions km²
- Density : 141 hab. / km²
- Working population : 780 million (2010)



Some figures about companies in China

The number of private enterprises in the secondary and services sectors was 39, 21 millions in 2004:

- 5, 887 millions in the secondary
- 33,329 millions in the services

These companies use 94 224 million employees.

Source: National Economic Census China, 2005

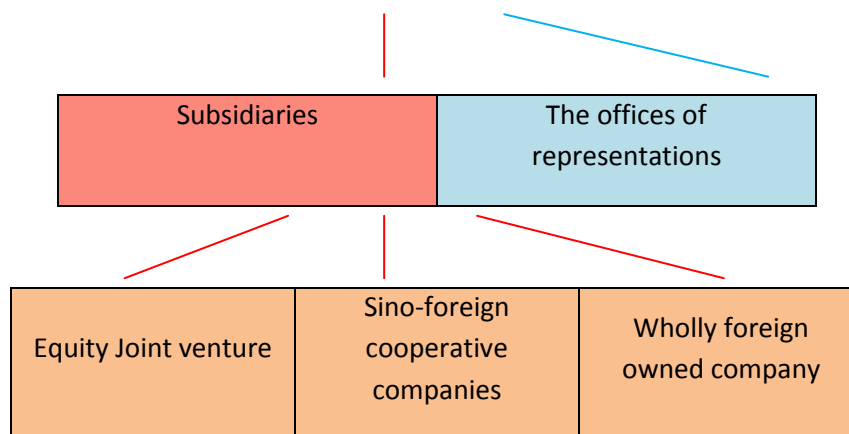
The foreign investment in China

China has now more than 260 000 companies with exclusively foreign capital and Sino-foreign joint-ventures. She has annually more than 60 billion USD of foreign direct investments.

Therefore, 28 % of the Chinese industrial production and 60 % of her foreign trade are realized by companies with foreign capital.

II. Which legal structure to adopt for investment in China?

The forms of investment



The Chinese business law distinguishes the Chinese companies from companies with foreign investments. These last ones can be held by Chinese and foreign or be created in 100 % of foreign capital. Several legal forms are possible during the setting-up, such as company with limited liability and partnership. But a foreign national cannot exercise an activity as individual entrepreneur.

The Catalog of the foreign investments in China specifies according to the business sector, the encouraged, permitted, restricted or forbidden foreign investments. The last modification came into effect on December 1st, 2007. Trading is now a permitted business sector.

Setting-up of companies with foreign investment are subjected to the approval of the Chinese Ministry of Commerce (MOC) or its representation at the local level according to the amount of the investments.

Texts of China's laws about companies with foreign capital do not stipulate minimum registered capital. It is necessary to refer to the local practices of approval and to the sector-based rules.

For a trading company, usually USD 140 000 is required as minimum registered capital.

The term registered capital: refers to capital that investors states in Articles of Association; this registered capital must be paid in normally within two years since the approval for the setting-up of Chinese company and 20 % of it must be paid within one month.

Equity joint venture (EJV)

It is a company of Chinese law established by, at least, 2 shareholders, the one Chinese and the other foreigner. It is a limited liability company: the responsibility of the shareholders is limited to their contributions, and the distribution of profits is made according to the participation in the capital. Minimum foreign investment proportion is 25 %.

The financial year is made on a calendar year. The social accounts must be stopped, audited by an external auditor and subjected to the approval of the Board of directors.

Mixed cooperative company

The Chinese and the foreign party work together according to a contract defining the rights and the duties of every one. But it can involve projects of cooperation fixed by contract by both parties; it can, according to the Law, be a legal entity in China.

This type of companies is rare.

Differences between companies with mixed capital (joint venture) and mixed companies of cooperative nature:

For the mixed company of cooperative nature, the shares are not necessarily shared in proportion to the contributed capital and profits are not necessarily shared in proportion to the shares. It depends rather on modalities of investment and on arrangements suited between both parties.

Wholly foreign owned enterprise (WFOE)

This shape of setting-up is more common and more privileged. It is indeed possible to do without a Chinese partner in most of the branches of industry. It is a company of Chinese law created by foreign investors. The responsibility of the shareholders is still limited to the amount of their contributions.

Shape of capital contribution

The capital contribution can be made in the form of cash, real estates, trademark rights, patent, machines, etc.;

Investor	Shape of capital contribution	Conditions
Foreign investor	The currencies can be freely exchanged	
	Equipments and machines	<ul style="list-style-type: none"> - Indispensable for the production of the mixed company; - Not made in China or not adapted to needs; - Their price cannot exceed the normal rate on the international market
	Intellectual property and technologies	<ul style="list-style-type: none"> - property of the foreign investor; - Allowing the production of non-existent new products on the Chinese market or products intended for the export; - Having a value corresponding to the one of the international market of a total amount not exceeding 20 % of the initial capital of the mixed companies;
Chinese investor	Rights of use of premises	If premises are not considered as a part of the investment of the Chinese part, the company has to settle the expenses of use to the Chinese Government
	Capital in cash; real estates; premises of production; machines; industrial property and technologies	

However, minimum 20 % of any company's registered capital must be paid in cash.

III. What steps to take for investment in China?

Procedures and required documents for incorporation of foreign capital investment companies

Procedure for incorporation of foreign companies

Serial No.	Steps	Authorities	Time required	Remark
1	Pre-approval of the new company's name	Shanghai Administration of Industry & Commerce (AIC)	One week	
2	Approval from Shanghai Commission of Commerce ("SCC")	SCC	One month and a half	
3	Registration with Shanghai AIC to obtain Business License	Shanghai AIC	Two weeks	This marks the official establishment
4	Post-registration procedures	Organization code registration	One month and a half	Can be conducted by established JV itself.
		Carving chops		
		Tax registration		
		Foreign exchange registration		
		Opening bank accounts		
		Customs registration		
		Statistics registration		
		Financial registration		
		Record filing and registration of foreign trade operators		

Documents to be submitted for the Approval/Registration of JV establishment by SCC and Shanghai AIC

- **Pre-approval of the new company's name**

Serial No.	Documents for Pre-approval of the new company's name	Number of Copies	Original/Duplicate	Remark
1	Application form to reserve the new company's name	1	O	- Standard application form of AIC - chopped by the investors
2	Passports of the legal representatives of the Investors	1	D	
3	Incorporation certificates of the Investors	1	D	

- **SCC Approval**

Serial No.	Documents for SCC Approval	Number of Copies	Original/Duplicate	Remark
1	Application letter for establishment of the new company	1	O	- Drafted by Law firm - Signed by the legal representatives of the investors and chopped by the investors
2	Feasibility study report of the new company	1	O	- Drafted by the investors - chopped by the investors
3	Articles of association of the new company	1	O	- Drafted by the investors and Law firm - chopped by the investors and Signed by the legal representatives of the investors
4	Investment contract (if more than one shareholder)	1	O	- Drafted by the investors and Law firm - chopped by the investors and Signed by the legal representatives of the investors
5	Incorporation certificate of the foreign investor	1	D	Notarized by the local competent notary public and legalised by Local China Consulate
6	Bank reference letter of the foreign investor	2	O	

7	Passport of the legal representatives of the investors	1	D	
8	Audit financial report of the last year of the foreign investor	1	O	
9	List of the imported and exported goods	1	O	
10	Letter of appointment of the directors and supervisors of the new company	1	O	- Drafted by Law firm - chopped by the investors and Signed by the legal representatives of the investors
11	Notification of pre-approval of the new company's name	1	O	To be issued by AIC
12	Passports of the directors of the new company	1	D	
13	Passport of the supervisor of the new company	1	D	
14	Lease agreement (for new company)	1	O	
15	The ownership certificate of the leased premises	1	D	Affixed with the company chop of the landlord

***Note:** some investment project may need other pre-approval from relevant authorities; for example, almost all investment involving in manufacturing is required to obtain approval from local Administration of Environmental Protection before going to SCC.

- **AIC Registration**

Serial No.	Documents for AIC Registration	Number of Copies	Original/Duplicate	Remark
1	Application form for registration of the new company	1	O	- Standard application form of AIC; - Signed by the legal representative of the investor and new company
2	Feasibility study report of the new company	1	O	- Drafted by the investor - chopped by the investor and Signed by the legal representative of the investor
3	Articles of association of the new company	1	O	same as the above
4	investment contract (if more than one shareholder)	1	O	- Drafted by the investors and Law firm

				- chopped by the investors and Signed by the legal representative of the investor
5	Incorporation certificate of the foreign investor	1	D	
6	Bank reference letter of the investor	1	O	
7	Passport of the legal representative of the investor	1	D	
8	Audit financial report of the last year of the foreign investor	2	O	
9	List of the imported and exported goods (for trading company who wants to do import and export)	1	D	
10	Letter of appointment of the directors and supervisor of the new company	2	O	
11	Letter of appointment of the General Manager of the new company	2	O	
12	Notification of pre-approval of the new company's name	1	O	
13	Passports of the directors of the new company	1	D	
14	Passport of the supervisor of the new company	1	D	
15	Photo of the legal representative of the new company	4	2 inch colour photo	
16	Lease agreement	2	O	
17	The ownership certificate of the leased premises	2	D	Affixed with the company chop of the landlord

***Note:** please note that the above list is prepared based on relevant regulations and our recent experiences and inquiries with the relevant local government authorities for your reference, and it might be changed at the time of incorporation as per the specific requirements from the relevant local government authorities.

Expenses for incorporation of foreign investment companies

Expenses presented below are calculated on the basis of a company the initial capital of which is 500 000 USD.

	Item	Organization	Sum	Norm
1	Expenses of registration to the Administration of Industry and Commerce	Administration of Industry and Commerce	Around ¥ 3 500	- 0.8‰ of initial capital for the enterprises whose initial capital is ≤ ¥10 millions, with a minimum of 50 ¥
2	Registration of the name of the new company	Administration of Industry and Commerce	¥ 150	
3	Applying for Certificate of approval	Ministry of Commerce or its local organization	¥ 100	
4	Registration with other organizations after setting-up	Including Customs Office, Administration of Foreign Exchange, etc.	Around ¥ 600	For non-trading company, there could be requirement for applying approval of the environmental protection
	Total		Around ¥ 4350	

Other steps

The immigration

In addition to a valid passport 6 months after date planned of return, a visa is compulsory. There are several kinds and the request made to the Embassy of China or consulates.

Work permit and residence permit for the foreign employees are available subject to application to government organizations.

Other formalities

Obtaining of the Seals of the EFCC

Obtaining of the certificate of recording of exchange control

Opening of a bank account

Fiscal recording

Customs registration

IV. Trademarks

The new "law on trademarks" of 2001 and the Application regulation of 2002 aim at fighting in particular against the imitation, which is very important in all the sectors. The Chinese law is in compliance with the agreements and the international practices.

China is signatory of the Agreement of Union of Paris. She thus adopted the international classification of the brands of products and services. The registered trademark does not have to create of confusion with a foreign brand and does not have to be against the good customs. She must be also translated into Chinese characters. The deadline of recording varies from 12 to 16 months.

A brand is protected on the Chinese territory if it was registered in China. The recording of a brand must be made by an agent of brands.

As a defense mechanism, foreign trademark holders may register Chinese character versions of "foreign" trademarks as soon as their product enters the market.

Foreign trademark holders should register and use the following two trademarks:

- (1) The original foreign trademark,
- (2) The newly created Chinese trademark,

The Principle of One Application for One Trademark in One Class

"An applicant for registration of a trademark shall indicate, in accordance with a prescribed classification of goods, the classification of the goods and the designation of the goods in respect of which the trademark is to be used." (Chinese Trademark Law, Article 19).

"Where any applicant intends to apply for registration of a trademark for goods in different classes, application for registration shall be made in accordance with the prescribed classification of goods." (Chinese Trademark Law, Article 19).

"A new application for registration shall be made if a registered trademark is to be used in respect of other goods of the same class than those contained in the registration." (Chinese Trademark Law, Article 19).

Trademark Application Filing Requirement

"Statements made and documents submitted for the purposes of application for registration of a trademark shall be authentic, accurate and complete." (Chinese Trademark Law, Article 26).

"An interested party entrusting a trademark agency with the filing of an application for trademark registration or attending to other trademark matters shall submit a Power of Attorney. The Power of Attorney shall indicate such contents and competence as authorized; the Power of Attorney from a foreign person or foreign enterprise shall, in addition, indicate the nationality of the entrustor.

Notarization and legalization of the Power of Attorney and other relevant certificates from a foreign person or foreign enterprise shall be done based on the principle of reciprocity.

The foreign person or foreign enterprise mentioned in Article 18 of the Trademark Law refers to the foreign person or foreign enterprise which does not have its habitual residence or place of business in China." (Implementing Regulation under Chinese Trademark Law, Article 7).

"The Chinese language shall be used in applying for trademark registration or attending to other trademark matters.

Where the various certificates, certifying documents and proofs submitted under the Trademark Law and these Regulations are in a foreign language, the Chinese translation thereof shall be attached; where the Chinese translation is not attached, the certificates, certifying documents and proofs shall be deemed not to have been submitted." (Implementing Regulation under Chinese Trademark Law, Article 8).

"When applying for the registration of a trademark, a separate application shall be filed in respect of each class of goods or service according to the published Classification of Goods and Services. For each application for the trademark registration, an Application for Trademark Registration shall be filed with the Trademark Office, accompanied by five copies of the reproduction of the trademark; if color is claimed, five copies of the color reproduction of the trademark shall be attached, so shall be a black and white design of the trademark.

The reproduction of the trademark must be clear and easy to paste and shall be printed on smooth and clean durable paper or substituted by a photograph. Its length or breadth shall not be more than 10 cm and less than 5 cm each.

Where an application is filed for the registration of a three-dimensional sign as a trademark, a statement shall be made in the application, and the reproduction capable of defining the three-dimensional shape be submitted.

Where an application is filed for the registration of a combination of colors as a trademark, a statement shall be made in the application, and an explanation thereof be submitted in writing.

Where an application is filed for the registration of a certification mark or collective mark, a statement shall be made in the application, and the certificates of the qualification of the applicant and regulations for the administration of the use thereof be submitted.

Where a trademark is in a foreign language or contains lexical elements in a foreign language, explanation of its meaning shall be made." (Implementing Regulation under Chinese Trademark Law, Article 13).

"Filing an application for the registration of a trademark, the applicant shall submit a copy of effective certificate capable of proving his identification. The name of the applicant for trademark registration shall be consistent with the certificate submitted." (Implementing Regulation under Chinese Trademark Law, Article 14).

"The goods or services shall be listed in the application according to the Classification of Goods and Services. If the goods or services are not listed in the Classification of Goods and Services, a description of the said goods or services shall be attached. The documents relating to an application for trademark registration shall be typewritten or printed." (Implementing Regulation under Chinese Trademark Law, Article 15).

"If an application is jointly filed for registration of the same trademark, a representative shall be designated in the application; if such representative is not designated, the first person listed in the application shall be the representative." (Implementing Regulation under Chinese Trademark Law, Article 16).

Price list of Trademark registration

No.	Item	Unit price (RMB)		
		Pay to government	Pay to agency	total
1	Goods or service trademark Registration	1000	1300	2300
2	collective trademark registration	3000	1300	4300
3	Extension	2000	1300	3300
4	Late extension	500	700	1200
5	change of applicant or his address	500	700	1200
6	Transfer of application right or trademark ownership	1000	1000	2000
7	Recording with government of trademark license agreement	300	600	900
8	Trademark objection filing	1000	4000	5000

9	application for cancellation of trademark due to non-use for 3 consecutive years	1000	1300	2300
10	Cancellation of trademark		700	700
11	withdraw of registration application		700	700
12	Re-issuing trademark certificate	1000	700	1700

V. What taxes for the company?

It is compulsory for any new company to register to the office of the taxes in 30 days which follow the issue of its operating license by the AIC.

The corporate income tax

A reform of the tax regime of companies was adopted. She ends the fiscal advantages reserved for the foreign investors. The new "Law on the tax system of companies ", adopted in March, 2007 thus came into effect since January, 2008.

The main novelty is the harmonization of the imposition on the profits of companies implanted in China, that they are for Chinese or foreign capital. The rate fixed to 25 % is common, with a preferential rate of 20 % for small firms with small income and 15 % for certain high-tech companies.

Value-added tax

The value-added tax, introduced on January 1st, 1994, concerns the sales of goods or services bound to the manufacturing, the repair, the installation or the import of goods in China. The rate is 17 %, but there is a reduced rate of 13 % for staple commodities.

The VAT can be paid every 5, 10, 15 days or monthly, after agreement to the office of the taxes. The VAT in the import is collected by the customs office in seven days following the notification of customs.

Business Tax

The foreign invested companies, who have a service activity other one than the repair, the assembly or the transformation, will pay Business tax instead of VAT. Her rate varies 3 to 20 % according to the sector (on average 5 %), of the turnover.

The stamp duties

This tax applies to all the social documents concluded during the concern of an EFCC (contract of sale and purchase of the assets and the goods, contract of employment, authorizations and administrative licenses).

Certain documents are exempted from the stamp duties and the rates vary according to the nature of the document. This tax is to be seriously taken into account during a project of setting-up in China.

Note:

There are, in addition, other small taxes for the company, such as the taxes on the consumption, the taxes for the registration of vehicles and the land taxes, etc.

The products of import-export are subjected in addition to the customs duties and to the specific taxes.

The persons working in China have to pay income taxes the rate of which varies according to their level of income.

Local government may refund part of paid taxes if amount is big.

VI. Labor law and labor cost in China

The labor cost

Foreign investors are attracted by the rather large and cheap supply of manpower currently available in China. In addition, the labor law and legal rules about employees is not very strict. It is the addition of many national and local laws form the Chinese labor law. The Labor contract law of the People's Republic of China is the most important source and has been adopted by the 28th Session of the Standing Committee of the 10th National People's Congress of the People's Republic of China on June 29th, 2007. It is promulgated and came into force on January 1st, 2008.

Since December 1st, 2004 the protection of employees is regulated centrally by the state. It ensures a better protection of them at a central level. The authorities can thereby better control the adherence to legal regulations for the protection of women and children, the monitoring of working hours and minimum wage and the payment of social security contributions as well as the completion of written employment contracts.

Salaries

Salaries can be negotiated, but there are local minimum wage requirements since 1993. Salaries can be different in Shanghai than a less developed city. For example, since May 2011, the minimum monthly salary in Shanghai is 1280 Rmb and 1140 Rmb in Jiangsu Province. These last years, the tendency is the growing increase of the minimum salary.

The non-wage labor costs (pension, health insurance, insurance against accidents, etc.) can be high, in some cases amounting to up to 40% of the total salary. As an example, an employee in a foreign investor company in Shanghai pays 37% of the contributions and the remainder is paid by the employer. However, the employer's contribution is currently limited.

Social security

Chinese social security law was formed by many different regulations. In rural parts, the social security coverage of employees was not well developed. In the economically stronger areas, there was a difference between employees of state-owned companies and employees of private enterprises.

Now, the new Law of the Social Security in China was approved by the Standing committee of the National Congress on October 28th, 2010 and come into effect from July 1st, 2011. This law marks a step in the Chinese regulations because it strengthens the experiences of the current social system while harmonizing the regulations which were managed until now by various administrative departments.

The basic pension

One part of the contribution is paid directly to pensioners, while the remainder is paid into the individual account of the respective employee. Contributions are paid by the employer and the employee with a maximum amount of 20 % of the employee's salary for the employer and 8 % for the employee.

The unemployment insurance

The employer pays 2 % of the amount of the payroll and the employee 1 % of his individual salary. Every local government adjusts quite freely (Regulation on the unemployment insurance, come into effect on January 22nd, 1999).

The health care insurance

The employer pays 9.2 % of the amount of the payroll in the municipal box (who receives approximately 70 % of this amount) and on the personal accounts of his employees, and the employee pays 2 % of his salary on his personal account. It is necessary to refer to the decision relative to the establishment of a system of basic health care insurance for the urban employees, come into effect on January 22nd, 1999.

The maternity

It is the local governments which fix the amount of the employers' contribution (no more than 1 % of the payroll).

Accident insurance of the work

The Regulation on the accident insurance of the work of January 1st, 2004 stipulates that the amount of employer security contributions is defined by the local rules (the risks in the various sectors being taken into account).

Funds of accommodation

The rate of contribution is the same for the employee and the employer. It represents more than 5 % of the average monthly salary of the previous year.