

# Concepts of Trust and Ethics in the Business Between China and Europe:

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November 14, 2014 Crossroad Culture and Donghua University organized a seminar for Chinese companies and investment groups on the road towards the business between China and Europe. This theme number contains background articles, seminar summaries and information about the meetings and initiatives.



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Rule by Economic Law Along the New Silk Road***

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## Foreword by the Editor: Drs. Mariska Stevens, founder and owner of Crossroad Culture Research and Training Agency.



And it is my pleasure to devote this first special issue of Crossroad Culture Business Magazine is a cooperation with the International Cultural Exchange School from Donghua University in Shanghai. It is a unique project. In 2013 both organizations created a seminar together around the central topic of inter-cultural business communication between China and Europe. Since then a number of organizations joined the initiative and now, only one year later, already 12 organizations have joined the initiative. The aim is to create a platform which is open to all and stimulates the exchange of knowledge and contact to increase both cultural and commercial enterprises.

The platform is a network founded on absolute non-profit principles. We feel that in order to stimulate economic exchange it is important to open doors and not close them through high entrance fees. All organizations are very grateful that Donghua University Shanghai, Peoples Republic of China has given us the opportunity to establish this initiative. Next to the experts and learned professionals this platform also houses promising and hardworking students in Business Administration and International Trade.

Donghua International Cultural Exchange School has excellent students from all over the world, they master the English language and most also master Chinese. They are invaluable ambassadors in cross cultural communication and an energetic eager new generation. In this I want to extend my appreciation to its director, Mrs Yiling Ge, as without her organizing capacity work and efforts this conference would not have been possible. I would also like to thank the president of Donghua University Mr. Jiang Changjun

Not all contributions in this issue could be translated in Chinese, but we did so were possible. During the seminar we worked with Chinese English translators for the round table discussion and questions and answers rounds. The results of these have been summarized were possible.

I would like to thank the following persons for their help and cooperation for the conference, Professor Sean C, Xia for his support and stimulating advise, Bart Kasteleijn, Jerry Shaw and Jack Wu. Last but not least I want to thank my students, as listed at the end of his magazine for their great support and help.

马利思咖•史蒂芬斯

*Mariska Stevens*



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***SINO/EURO BUSINESS DEVELOPMENT: A GLOBAL OUTLOOK ON TRUST AND ETHICS.***

***DRS. MARISKA STEVENS, CROSSROAD CULTURE***

**INTRODUCTION**

The historical cultural backgrounds of law systems partly determine approaches to trust and ethics in business communication. For instance: Contract value within Western cultures comes from a tradition of written laws, while the contract value within Chinese culture comes from a tradition of building relations of trust, negotiation and renegotiation. When in Western culture a contract is established, that is "it": no change afterwards. Within Chinese culture sometimes the established contract is viewed as the beginning of negotiations.

To give a concrete example, in the West, in business communication, a written contract is binding, in theory, so is an oral agreement, yet oral agreements have become the laughing stock of the jurisprudence. In China, an oral agreement many times is the result from a long period of acquaintance or friendship and therefore many times just as reliable as a written contract.

Written contracts between a Western and Chinese companies can take a very long time to establish and sometimes they end up in a “bad marriage” in which participants from both sides plead to divorce usually as a result of ongoing cultural misunderstandings from both sides.

Now, from an anthropological perspective comparisons are not simple recipes for backing a pizza, nor do they aim to explain that the moon is made of butter-milk. The economic laws of both China and Europe are frequently viewed with eyes of beholders. High expectations about Western credibility and impartiality of Western law systems are not always justifies. Within all cultures expectations about the impartiality of one’s own law system are usually overrated.

The current day speedy economy hardly seems to allow for time to first get acquainted in a business relation. This would suggest the Chinese way of doing business is outdated and China should modernize as quickly as possible to enter the century in which, according to some overrated historians, history has come to an end (this is frequently addressed by the historian Francis Fukuyama and it is almost a syndrome, which I consider a senseless attempt to reduce every economic system to the matrix of the all American culture).

Reality is more complicated than a simple free-market economy model or simplistic transitions of the rule of law. All forms of creating sustainable economic growth, and through it, increasing international economic cooperation, involves both trust and ethics. These two concepts are not so easily defined. Nevertheless I would like to propose they are at the center of our responsible and sustainable way of dealing with increasing global social, economic and environmental problems facing the world today.

## **TRUST AND ETHICS FROM A CULTURAL PERSPECTIVE**

From a cultural perspective the concepts of trust and ethics consist of language, social habits and communication habits and shared believes and values. Culture can also be compared to a prism, light comes in, but the colors of this light, that which can be seen, especially its beauty, is bended by the looking glass. It shows cultural ideals and it makes those belonging to one culture feel that one’s own culture is best. And of course this “best” has consequences for the conceptualization of trust and ethics. Ironically it implies that people of one culture have the tendency to trust people of their own culture more than those from other cultures. What do these concepts look like from a cross cultural perspective?

Beginning with the connection between language and culture we will look at the Chinese concept first. From this, a sound definition from the work of Professor Sean Xia will help us. His book, unfortunately is still only available in Chinese. Professor Sean C. Xia writes:

“The Chinese word for credibility is 信用 (xìn yòng). Literally, 信 (xìn) means ‘to trust’, 用 (yòng) means ‘to take measure or action’. Put together one can also comprehend the meaning of 信用 to be actions or behavior created on the basis of trust or confidence in someone.”

An important part of the Chinese concept shows that there is an element which focusses on action, and this immediately reveals the linguistic difference in Chinese and Western concepts. Without mentioning all languages of Europe, two examples:

- In English: Trust: (as in The Trust) which in legal business terms also functions according to its definition as: the basis for a relationship in which a property of some kind is being protected for the benefit of one or more individuals by certain duties.
- In Dutch for example trust means “Vertrouwen”: in which the word “trouwen” refers to loyalty (trouw), equaling the contractual marriage between partners (getrouwd).
- Spanish: French Confiance/ Confiarse: compare to a fiancé (partners being legally engaged to get married in Spanish, English and French. These terms originate from the source of all legal language in Europe, which is Latin.

These are just some short examples. It would take of course an entire book to analyze all concepts involved, but the above example shows that the European idea of trust is built upon a preliminary formal contract (being engaged), or a final contract (being married). It implies as a matter of fact that trust is compiled in Western Europe, mostly by the lack thereof between business partners. And it signifies that without the law, there is no economic trust.

Personally I would define trust more in the sense of action. If you want to know if a person can be trusted, their actions speak louder than their words, contract or no contract. If basic ethics and trust absent, the rest of the actions, with or without a contract, will also be unreliable. As such I am more inclined towards the Chinese concept.

## **PROBLEMS WITH TRUST AND ETHICS IN BUSINESS NEGOTIATION**

Europe is more complicated than one might think at first sight. The 28 countries of the European Union have 24 different languages, an equal amount of cultures, and on top of that many subcultures.

As an example of the complications: DCG Debt Collectors recently created a platform to serve SME's and small, as well as large investors to Europe who are in need of claiming their unpaid invoices. View enterprises know all countries of the EU have different regulations on the presentation of invoices and debt collection. Even if there is a EU directive, individual member states will operate under their own laws. In case of a credit insurance, this would not pose a problem, but as soon as transactions take place with partners who are not included in the credit insurance, the entire process of billing, invoicing, term of delivery differs per country.

As mentioned before, it is also highly important to understand that the historical cultural backgrounds of law systems determine approaches to trust and ethics in business communication. As said, the contract value within Western cultures comes from a tradition of written laws, while the contract value within Chinese culture comes from a tradition of negotiating and petitioning laws. This peculiarity results in an approach from Western cultures, which is a lot less flexible than Chinese usually expect in business communication. Many times the Western idea of : “No way around this rule”, is met with a Chinese “Well, let's try another way around it”. The Western European approach is also focused on establishing a contract as quickly as possible, while the Chinese approach establishes relations of trust before a contract is signed.

The same goes for planning. In Western Europe the general thought on planning is, if you do not plan the circumstances, the circumstances will dictate you. Chinese ideas on planning are much more hands-on, focused on momentary practical solutions and their flexibility in that sense drives the Western European entrepreneur quit crazy.

Within such complexity I will limit explanation here to a new idea on cooperation between East and West. I will limit myself explain some important factors which, beyond culture, govern our idea of trust and ethics.

## **THE ROLE OF GEOGRAPHIC DISTANCE IN TRUST**

Some factors in culture definitely influence trust between business partners, but they are not so much the result of culture, but of distance. In terms of geographical distance, the wider the distance the more difficulty in creating trust. This is not a matter of culture or ethnic background, but sometimes also of spatial differences. I found many times that it is more difficult for Chinese companies from China's mainland to work with Chinese companies from Singapore and vice versa. And that Chinese mainland companies rather prefer to work with foreign businesses than with Chinese partners from a different region. The fact that companies from PRC and Singapore both are Chinese does not make cooperation easier.

Geographical distance explains a bit more also within cultural anthropology. As we know there always is a geographical distance in culture between countryside and city life, but within China many times certain geographical countryside areas have their representation in the city, as is the case with organizations which support migrant workers from 'back home'.

But in smaller areas this representation does not exist. The distance is anthropologically reinforced even more when one deals with small places and for instance islands. Populations of isolated spaces have more problems with trusting outsiders than wider geographical areas. Island cultures have a tendency to become sub-cultures. Like countryside villages they experience more quickly a sense of invasion in dealing with strangers. So too with small countries, they feel easily overrun by large countries as well as large migrant population movements.

## **LEARNING OR BUYING**

Within Western Europe the current attitude of Chinese delegations to learn from the West is misinterpreted. It has resulted in the believe that the Chinese "only" come to look, not buy. Also, needing information before you buy something this size in terms of sizable transfers of technology is quite normal. Yet in the West, momentarily there are many service providers who negotiate between parties, and they require payment. Such usually seems redundant for Chinese investors.

They think f.i. that service providers as law firms, mediators and business researchers in the West are overpaid and overrated, yet they do not realized legality cannot be negotiated. For instance, with concern to Dutch entrepreneurs, companies with high rates of overseas business are more dependent on contracts than companies in the same region.

When Chinese companies continue to globalize more, they will experience this necessity as well. Not all cultural and geographical distances can be overcome by understanding and

communication, especially when the distance are large. Research is also necessary, yet it takes time investment and if a Chinese company cannot do this yourself, such services need to be paid, obvious, and it is better not to underestimate the complexity of such processes.

## **THE ROLE OF CONTROL IN BUSINESS INFORMATION**

When a service provider does not actually performs a service but cooperates on the basis of contact networking, without project plans, research or direct purchase of services, trust becomes an absolute marker for cooperation. Without the possibility of trust and the ethical choice of both parties not to damage the interests of the other party on might as well not begin the entire business. Here Chinese culture itself provides the ethics for conduct.

We might even quote one of the Chinese classics, the 易經 Yi Jing (the book of Changes) which explains:

已事喘往，无咎，酌損之 (易經: 四一: 損, 初九)

It means that in accepting services, the party who receives should also wonder how much to accept without actually damaging the party who is giving. Only if such sensitivity exists one is safe to fully give oneself in the service of the other party.

With regard to information and networks there is always the question of control. Such control seems to escape from the prism of culture, it basically also exists everywhere in the world. From both Dutch and Chinese partners many times information is withheld because it is considered such information needs to be bought and/or sold. Many times I encounter this particular distrust from both sides, but also, many individuals in both China and the West seem to think that it will be good for business to sit tightly on information which could actually lead to business. The fear of being robbed or equally being too serviceable (implying you are an idiot), becomes so big, that actually no-one benefits in the end. Being too serviceable refers to the story of the chicken and the pig, in which the chicken proposes: Let's make breakfast together, I provide the eggs and you provide the ham! Sitting on your contact networks and possibilities too tight out of fear implies, again refers to one of the explanation from the book of changes: 莫益之，或击之，立心勿恒，凶。(易經: 四二: 益, 上九) No one benefits and it might even come to harm to oneself.

## **BUILDING A RELATION OF TRUST AND THE NECESSITY OF EQUAL REPRESENTATION IN GLOBALIZING BUSINESS.**

So many cultural differences, or more precisely, expectations, can stand in the way of building a relation of trust, yet, nowadays we are confronted with a global situation in which it is impossible for any economy to remain traditional. For instance:

- The old economic contradictions between socialist and capitalist economic systems have prevented the world to overcome cultural barriers within international representation (such as exist within the UN, WTO, World Bank and such).



- The concepts of rule by and of law are many times dominated by Western concepts of private property which can (in the hands of merciless opportunists) be easily manipulated as a means of economic exclusion and irresponsible economic practices.

The cause of this problem partly lies within the lack of economic governance in the world's financial sectors, partly in the powerful legal status of international corporations and partly in the absence of a clear idea on global economic governance and development.

For instance, recently in the West, the international financial world has been shocked by Western bank practices which are destructive to the world economy. Products like derivatives, bonus culture on faulty financial products sales caused the world crisis of 2008, while still shielding exorbitant rewards for managers with no sense of social responsibility, which has changed public opinion.

Meanwhile a newly published report on the audit commission of the United Nation's World Bank again warned that the World Bank is still unaware, as it was in 2013, that 40% of its money lending through the IFC portfolio does not undergo any assessment on the environmental and social requirements concerning the results of its projects[i]. Also, the work of Thomas Piketty and others (Piketty, 2014)[ii] shows that the income gap between the superrich and the very poor will have increased exponentially by 2030.

Next Western SME's, which could bridge this growing gap, in spite of their innovative role experience increasing problems on receiving bank loans for small projects (loans of the IMF, IFC start with 500.000 or higher). As a result for Western SME's procurement and bidding on large infrastructural projects can only be accomplished through complicated business cooperation structures, or projects are too small to guarantee a return on investment. From the individual to the state level to international organizations and international corporations the distances are becoming incomprehensible. Maybe by now it is time to face the real problem, which is: commercial opportunity inequality resulting from volume and network dependency.

As a result of this problem it is justified to conclude that within the Western world financial sector transparent governance is missing almost completely. States may govern, but international corporations travel to avoid taxes and do so successfully and with the help of business banks. Many times the legal status of corporate actions seems determined by law, but not of law. Yet the West has a tendency to claim laws are impartial. Public opinion in terms of stakeholders have very little effect on the decisions of large corporations neither operating in the West it seems nor in the Brics and Asian regions ( the case of Monsanto is still out, but it does not look good). Consequently large international corporations seem to overhaul the structure of state legislation and therefore escape not only taxes, but also the processes of civil representation. International corporations can legally pretend to be acting as responsible civilians, but their stockholders remain shielded from the public eye.

## **CULTURAL ASPECTS IN THE ORIGIN OF THE CORPORATE MODEL**

We tend to forget is the legal status of corporations originates from the United States. The corporation as a legal entity dates back to the implementation of the 14th amendment, which states: "14th amendment; 1868: No state can deprive any person of life, liberty or property without due process of law". Basically this amendment implied protection of the private property of African Americans against misappropriation of by the state. Ironically, only 1890-

1910 from the 307 cases brought to the courts, 288 were in by corporations only 19 cases were brought forward by African Americans. Since then corporation have a legal status of a person, a corporate citizen.[iii] This legal status is of cultural descend is by no means 'of law', as it stems from a very distinct U.S. economic culture.

Within our perception of business styles economically, the West has become so used this Americanization that lawyers even think an economy without this legal structure would be unthinkable. Yet, the concept of a corporations pertaining the same rights as 'ordinary' citizens has enormous consequences for the division of wealth, income inequality and, equally important, environmental and social corporate responsibility. Investors can legally claim their right, in spite of the consequences for the pursuit of "live, liberty and happiness" and investors warn that leaving behind this legal structure would result in 'no investment ever in any business endeavor". Developmental projects therefore have become the domain and "economic responsibility" of the development banks, which, ironically, have a great return on investment, implying that other organizational principles are indeed possible. Why would investors not be responsible for the chain of production?

### **INITIATIVES FROM CHINA IN GLOBALIZING GENERAL ETHICS: THE NEW ASIAN INFRASTRUCTURE INVESTMENT BANK (AIIB).**

With the new AIIB first of all the founding members have the right to establish the rules guiding the banks activities, which implies Western countries do not need to fall "victim" to whims and quirks of the non-Western countries. But there could be more advantages to this Chinese initiative. China is at this moment developing a law system which is called "a Socialist Rule of Law with Chinese Characteristics".

Now such system is a bold and daring enterprise and it is, of course, condescendingly diminished by many "liberal" economists. Yet, without the necessity of following China's developments, it might be a healthy idea to review our own so called "positive" law system and within that, especially the status of corporate organizations in terms of legal entities. Why not have the courage to ask questions about the position of investors, their right to claim profit at all cost as well as their right to strive away from social corporate responsibility? Why not introduce the principle of 'production chain' responsibility?

The AIIB seems at least striving towards a new format: as Huang Wei writes in China Daily:

"One of the ultimate aims of the AIIB is to better reallocate resources, and this will no doubt improve the efficiency of capital utilization. On top of that, the AIIB also shoulders responsibilities in pushing for reforms in the international monetary system and improving the international governance of the world financial system." [viii]

Will China make a difference? Even if the non-Asian countries only have 25% of the shares of the new AIIB, this implies the responsibility to be honest in their motives for participation. Why participate if you believe the AIIB is only about the international politics of China as a super-

power? Rather, be an active partner in to making a difference, that would be a challenge, would it not?

Yuan Gangming, a researcher at Tsinghua University's Center for China in the World Economy, told the Global Times: "But China will not dominate the AIIB, since China has criticized the US dominance of the World Bank. China will not do a similar thing," Yuan told the Global Times. "The AIIB will give more weight to the opinions and benefits of developing countries[xii]." If this is the case, the balance of world economic power would truly shift towards equal representation.

## CONCLUSION

The concepts of trust and ethics in the business between Europe and China are not based on differences of culture alone, yet mayor Western organizational aspects steam from both a Western cultural idea of private property in terms of the rights of corporations, which could do harm to healthy economic representation in todays globalized business context. It takes an international true effort to create a rule of law which encompasses the representation of all parties involved. Initiatives on global economic governance appeared in 2011 from the UN in 2011. It seems the most difficult barrier to overcome implies facing the decline of the dominating cultural role of the Unites States within the world economy [ix]. China gave its views in a public reply to the UN proposals in the following manner:

"It is in the shared interests of the international community to improve global economic governance and to ensure robust institutional underpinnings for stable and healthy global economic development. The new system of global economic governance must reflect changes in the world economy, and incorporate the following three principal features.

**First**, it must be representative. It must ensure the wide participation of all members and, as a matter of priority; it must boost the representation and the voice of developing countries, thus enabling them to play a greater role in global economic governance.

**Second**, it must be equitable. All countries should participate on an equal footing both in setting the agenda and in policymaking, to ensure a balanced reflection of the views and concerns of all parties.

**Third**, it must be effective. The system should be results-oriented, focused on tangible outcomes and geared towards problem-solving and it should eschew empty rhetoric." [x]

Such could form the beginning of a truly balanced idea on trust and ethics in the world of business. Maybe the New Silk Road initiative can bring changes as it would not just connect commercially, but also in terms of economic law. We hope that our seminar on November 6 will support these efforts.

[i] Retrieved from: <https://www.oxfam.org/en/pressroom/pressreleases/2013-02-08/world-banks-private-sector-financing-arm-doesnt-know>

[ii] Thomas Piketty: 2014: Capital in the 21th century: President and Fellows of Harvard College

[iii] <http://www.thecorporation.com/>

- [iv] Retrieved from: <http://thediplomat.com/2015/04/chinas-aiib-the-final-tally/>
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# OUTBOUND INVESTMENT TO EUROPE: CULTURAL DIFFERENCES IN COMMERCIAL ACQUISITION

Bart Kasteleijn

**BY: BART KASTELEIJN**

## THE MERGER AND ACQUISITION PROCESS IN EUROPE

**Merger:** two companies merge together in a new structure

**Acquisition:** one company or investor buys part or the whole of another company

The reasons for mergers and acquisition are of a huge variety. It could be the process is simply an investment and nothing more, or that a Chinese company wants to buy a European company, or wants to merge with a European companies to relocate part of its production etc. This variety in reasons can become quite complicated, especially when it concerns cross border transactions. In Europe lawyers usually are involved in the whole process of M&A, including financial and tax. This process consists of 4 steps.



**First** of all the target need to be screened. Many time Chinese investors are inclined to seek out these targets for merging, or complete acquisition, but in the process it is easy to overlook its complexity. In order to find good partners a professional agency, eg a law firm, is many times a better way to find reliable cooperation and help them find the right target for acquisition. The search usually focusses on creating a "Letter of Intent".

During the target screening process, the function of law firm include:

- ❖ Defining search criteria according to the needs of client: this of course depends on the type of industry the Chinese investor is interested in, the expected type of turnover etc., but also the reasons for focusing on Europe specifically.
- ❖ Prioritizing potential targets: these could be different for the partners involved and it is therefore important in this stage to weigh a win-win situation for both sides.
- ❖ Once these targets, be it companies or partners, are established a Letter of Intent, or a Memorandum of Understanding is signed by both parties. This letter shows both parties are in agreement on the intend to cooperate. It does not hold any obligation yet and leaves the outcome still open.

**The second** step in the process is the due diligence investigation; this process needs to establish the value of the company, or partner, with concern to the upcoming possibility for acquiring the company, or for the merger of two companies. Normally, the due diligence investigation includes following aspects of the corporation:

- ❖ Title compliance: on order to establish any merger or acquisition obviously it is necessary to verify who the owners (or shareholders) are, and what the structure the shareholders compose within the company, how is the percentage in shareholding divided, who runs the company, how is the board of directors composed etc.
- ❖ Employment: How many employees has the company, what is the duration of the employment contracts, what are the preconditions of those contracts etc.
- ❖ Assets (IP, collateral, debtors)
- ❖ Litigation, how effective does the company function, what is its dynamic potency, are there any hidden obstacles, past problems, reputation etc.
- ❖ Operation information (license and certificate, main customers and suppliers); Financial information (financial statement, accounting report); Tax (tax rate, tax holiday)

**The third** step implies that after all the former steps have been established the transaction can be executed. In this part of the process negotiations will begin. Here the letters of intent are transformed towards a transaction draft. The process will develop in a draft. Such a draft consists of:

- ❖ A Sales & Purchase Agreement or Assets Transfer Agreement
- ❖ Shareholding Participation Agreement ( in case of a joint venture.

**The final step** would be the post stage of the M&A. In this process the details and prerequisites of the deal are checked and executed. It consists of the following parts

- ❖ Escrow: in which the terms and conditions of the purchase are secured
- ❖ Earn-out: when part of the purchase price is paid only after the company has proven its target efficiency
- ❖ Representations & Warranties
- ❖ The corporate governance needs to be well designed so the Chinese party can fully control the company while the acquired company keeps good running.
- ❖ Normally, the Chinese will assign at least one director to supervise the operation of the acquired company. It involves work and residence permits application.
- ❖ If Chinese party want to transfer IP to China, IP registration and transfer/license agreement would be necessary.

## **HOW IMPORTANT IS LEGAL DUE DILIGENCE INVESTIGATION?**

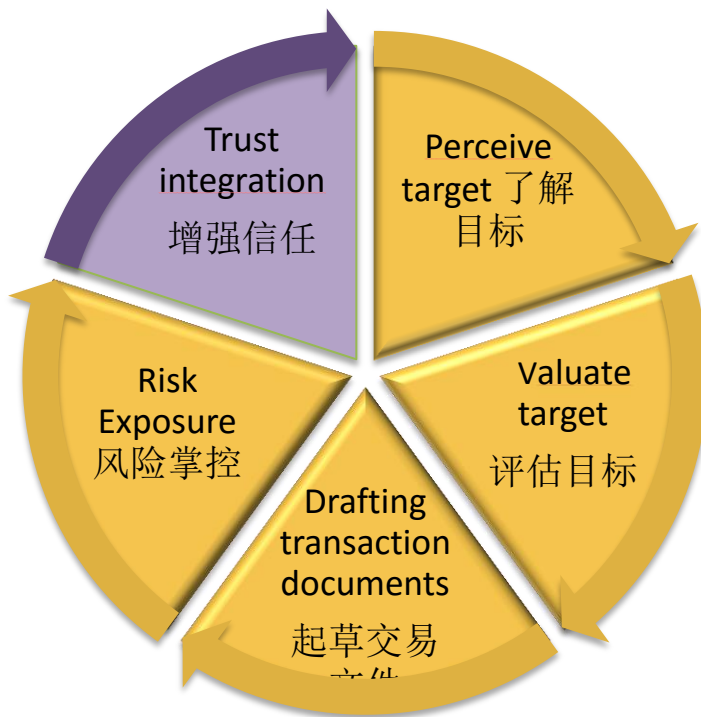
A legal due diligence provides the buyer with a view of the legal aspects as well as the compliance of the target. This exercise involves an examination of the legality of asset ownerships such as licenses, property rights, titles, and land leases; compliance of the target company with relevant laws and regulations; and outstanding legal issues as well as certain other areas. This can only be done by lawyers, any other approach would create an unnecessary high risk in the purchase process. Yet many times this is not yet self-evident for Chinese investors.

Here the cultural difference between expectations of trust become very explicit. In the European context trust has to be documented to ensure the safety of the investment. It composes a unbreakable circle in the entire process.

Chinese parties prefer to gain the trust through more private and personal communication. The assumption here is that, provided the relationship is good, parties will find a way to cooperate with each other and make a profit. They further believe that few parties will honestly share business ideas and details without a good personal relationship.

The reasons for difference are cultural origin and legal understanding. The imperfect legal environment in China causes people to put greater trust and emphasis in personal relationships than in contracts or regulations. In this process they have a tendency to:

- ❖ Rely on operational experience with the target company rather than compliance
- ❖ Rely on good personal relationship with owner or manager rather than legal documents
- ❖ Rely on settlements rather than litigation for non-conformity



**Figure 1: Trust Integration**

The reasons for involving legal counsel and legal drafts are not just a safety precaution: It ensures the perceived target is a safe merger or acquisition within the legal structure of Europe, for the following reasons:

- ❖ Legal due diligence is necessary to give the buyer the information that it needs to learn about your target company and to structure its purchase of the target company.
- ❖ It is also necessary in order to validate the target. The buyer will use the information learned in the legal due diligence process to determine how much to pay for the target company.
- ❖ The lawyers are the only ones who are sanctified to draft the transaction documents

according to the law.

Also, the information learned in the legal due diligence process will be helpful for both the buyer's counsel and the target company's counsel in drafting and negotiating the merger or acquisition agreement and related ancillary agreements. Lawyers are also the only ones who can formally assess the exposure to legal risks. Therefore legal due diligence helps buyer to identify and avoid potential legal risks.

## **The importance of IP Due Diligence**

The technology and IP assets in EU are very attractive and important to Chinese investors. However, legal issues surrounding the transfer and licensing of IP in foreign countries is an area of difficulty for technology-hungry Chinese acquirers. It is essential that Chinese acquirers understand the ownership of the IP assets as well as their enforceability and transferability in the target country. The following list is should make the reader aware of the regulations which could complicate the process, if a law firm is not involved.

### ❖ IP Legal Environment in EU

It is necessary to pay much attention to the concerning IP regulations, administrations and judiciaries in EU.

### ❖ Right Holder

It is necessary to identify the IP work is duty or personal and the distinction of different rights, then check whether it is owned solely by the target enterprise or jointly with others.

### ❖ Territoriality & Temporality

The territory where the IP registered and protective periods left for the IP rights.

### ❖ Cleanness

That means the target IP rights should be fully protected and not be unexpectedly restricted or limited as imposed by other third parties.

On the other end of the process transferability to China, for instance under the Provisions on Administration of Technology Import and Export of the People's Republic of China effective from January 2002, the technologies, which would be imported through various ways such as trade and investment, are classified as following three kinds: prohibited, restricted and permitted:

- (1) For the prohibited technology, the investor cannot bring such kind of technologies into China;
- (2) For the restricted technology, before making formal negotiation of the technology transfer, a prior technology import license should be granted by the MOFCOM.
- (3) For the permitted technology. Technology importer can sign the technology transfer agreement with the foreign party and the technology transfer agreement becomes valid without government approval.

## **CONCLUSION: THE ROLE OF LAWYERS IN THE SALES & PURCHASE AGREEMENT (S&P)**

Lawyer are generally responsible for drafting, reviewing and finalizing the definitive S&P Agreement based on the agreed terms from the negotiation process. S&P Agreements can be



lengthy as they will often include clauses that address all the key issues raised during the due diligence process.

## **IMPORTANT ELEMENTS OF S&P AGREEMENTS**

The representations/warranties and indemnifications sections are two of the most important elements of S&P Agreements. It is essential for the buyer to ensure that sufficient representations/warranties and indemnifications are obtained to minimize unexpected liabilities (financial, tax or otherwise) that may arise upon or after completion of the transaction. In addition, accountants and legal advisors should also be involved in structuring of any purchase price adjustment mechanism. It consists of the following parts:

- **Representations and warranties**

The representation and warranties section represents the foundation of the transaction. They make reference to other documents and information such as financial statements, patents, pending litigation or outstanding liabilities. This section lists what the buyer and seller are aware of concerning the business at the time of the transaction.

From the buyer's point of view, the representations are clauses to achieve maximum disclosure about the seller's business and operations. If the buyer discovers a material fact that was not represented, he may be relieved from the obligation to close the transaction or claim for indemnification.

From the seller's point of view, providing a full disclosure may be time-consuming and difficult to achieve. The seller will want to minimise the number of representations to limit indemnity exposure. Materiality limits are often established by qualifying representations "to the best of the seller's knowledge".

- **Indemnifications**

The indemnification section specifies the damage and rights the buyer and the seller can claim if the representations and warranties are misrepresented or any terms of the S&P Agreement are breached. It clarifies each party's responsibilities and obligations.

In addition, various transaction type taxes may be payable by each party to the S&P Agreement and the amount of some of these taxes may be quite substantial, especially in an asset acquisition with real properties involved. Assistance from professional advisors may be needed to make sure that the seller is responsible for his/her own tax liabilities and that these are not passed on to the buyer because of ambiguous wording in the S&P Agreement.

These conclusions are not static, they are dynamic, yet for Chinese companies it is important to realize that the venture the take on in Europe needs to be safeguarded against the failure due to cultural business differences.

# *CHINA'S OUTBOUND DIRECT INVESTMENT IS FOR THE FIRST TIME SET TO EXCEED INVESTMENT INTO THE COUNTRY, HIGHLIGHTING THE ONGOING SHIFT OF GLOBAL ECONOMIC INFLUENCE TO THE EAST.*

**BY JACK WU**

Outbound direct investment rose 21.6 per cent in the first nine months compared with last year to \$75bn and on current trends it would probably exceed inbound investment by the end of the year. There are major reasons behind the China investment outflow, current market situation in Europe provides foreign investors opportunities to find health assets at a reasonable price. Advanced technologies invented by European companies also attract Chinese investors to acquire and then apply these technologies to their products that are sold in the massive mainland China market. After years of success in the home market, some Chinese investors also want to bring their products to Europe, and to establish their brand in the new market.

## **WHY INVEST IN THE NETHERLANDS**

The Netherlands provides a strategic location to serve markets within Europe, the Middle East and Africa. The central geographical position of the Netherlands, combined with accessibility and an excellent infrastructure, are only some of the reasons why numerous European, American and Asian companies have established their facilities in the Netherlands.

The Netherlands has Extensive double tax treaty network with EU and non-EU-jurisdictions. For domestic business advanced Tax Rulings (ATR's)/ Advanced Pricing Agreements (APA's) with Dutch Revenue available to obtain advanced certainty

The Netherlands is proud to have a high standard of living, whilst maintaining an affordable life for its residents. The costs of living, housing, education and cultural activities are lower than in most Western-European countries.

## **CORPORATE STRUCTURE IN THE NETHERLANDS**

The most popular corporate form in the Netherlands are BV or COOP in short. "Besloten vennootschap" or BV in Netherlands is the limited liability company. The Dutch cooperation association (COOP) is a common vehicle for acting as a group holding company, due to its favorable tax treatment it receives and its flexibility from a Dutch legal perspective.

This table shows the characters in a COOP and a BV

**COOP**

**BV**

Existing >100 years	Existing >100 years
Legal personality	Legal personality
The coop does not have a capital divided into shares. The shares in a coop are referred to as membership rights	BV does have a capital divided into shares
No minimum capital requirement.	No minimum capital requirement.
Members (minimum of 2) with voting rights	Shareholders with voting rights and or dividend rights
Usually the members of the coop are entitled to the profits of the coop pro rata their contributions. Deviation is possible	The shareholders are entitled to the profit of the BV
Members not personally liable for actions performed on behalf of coop or obliged to contribute for losses of coop. The name should in this case contain the letters UA (excluded liability)	Shareholders not personally liable
Fully subject to Dutch Corporate Income Tax	Fully subject to Dutch Corporate Income Tax
The Dutch participation exemption applies to the COOP	The Dutch participation exemption applies to the BV
<b>Not subject to Dutch dividend withholding tax</b>	<b>BV is subject to Dutch Dividend withholding tax</b>

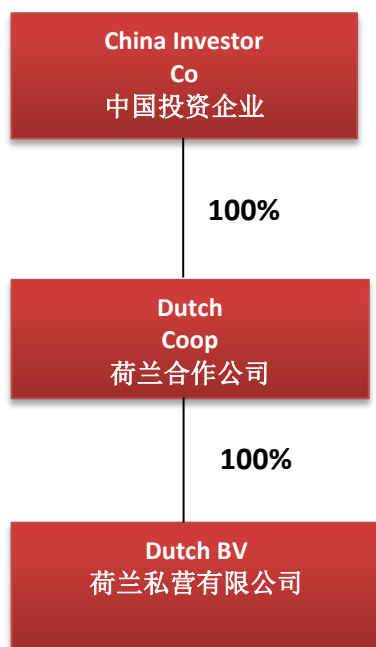
A Coop can be set-up practically similar to a Dutch BV. From a tax perspective, a Dutch resident Coop is fully subject to Dutch corporate income tax (“CIT”), similar to a Dutch BV. The important differences between a BV and a COOP is that the Coop does not have a capital divided into shares. There are no minimum capital or equity requirements for the Coop. As a consequence, the Coop is not subject to Dutch dividend withholding tax.

## WHY IS IMPORTANT TO SETUP GLOBAL CORPORATE STRUCTURE

A well designed corporate structure provides great flexibility and protection to investors before and after an investment is made. Investors can quickly enter into an unfamiliar market through holding structures to capture opportunities while cost for investments can be managed at a reasonable level. For companies trading products worldwide, global offices can ensure they have control over the supply chain, fast customer responses, effective operating capital in multi currencies and an efficient logistic network.

Investors can use proper corporate structure to decrease customs tariff when doing business between countries, and to utilize Double Tax Treaty or Bilateral Trade Agreement to avoid same revenue to be double taxed in two different countries.

### China-The Netherlands structure



### COOP and BV structure

The COOP and BV structure has been the most popular corporate structure for Chinese companies investing in the Netherlands. A COOP as a holding company with a BV as subsidiary creates a flexible structure with a number of advantages:

- No 15% Dutch dividend withholding tax upon repatriation of net profits as dividend to the foreign owner of the COOP membership rights.
- Flexibility: capital gain upon sale of share in BV will be exempt from 25% corporate income tax. This can for example be relevant in case sale of BV to a third party or entering into joint venture in the Netherlands or other forms of cooperation in the Netherlands through shares.

- Coop and BV can form one tax group for corporate income tax and VAT. Profit distributions from BV to COOP are exempt from corporate income tax.
- Employees: special wage tax facility for employees seconded to the Netherlands: 30% of gross wages can be paid tax free.

## **CHINA NEW INCOME TAX TREATY WITH THE NETHERLANDS**

On May 21, 2013 the Netherlands and China signed a new income tax treaty. The treaty will replace the current treaty of 1987 and has been improved and updated on certain topics.

### **Dividends**

Under the Treaty, the source state may tax dividends at a rate of 10 percent on the gross amount of the dividends if the recipient qualifies as the beneficial owner. A rate of 5 percent applies if the beneficial owner is a company (other than a partnership) which holds directly at least 25 percent of the capital in the company that is paying the dividend. No withholding tax is levied on dividends if the beneficial owner is the government of the other contracting state. In line with the recently updated Dutch tax treaty policy, the treaty introduces a “main purpose test”. Pursuant to this test, the provisions of the dividend article do not apply if it was the main purpose to take advantage of the dividend article.

### **Interest and Royalties**

Interest payments may be taxed by the source state at a rate of 10 percent if the recipient qualifies as the beneficial owner. No withholding tax is levied on interest paid to a government or a local authority, the central bank or certain designated financial institutions wholly owned by the Netherlands or China, or on loans guaranteed or secured by them.

Royalty payments may be taxed at a rate of 6 percent or 10 percent respectively, if the recipient qualifies as the beneficial owner. The 6 percent rate applies to payments of any kind received as a consideration for the use of or the right to use industrial, commercial or scientific equipment. In all other cases, the 10 percent rate applies.

### **Capital Gain on Shares**

Under the treaty capital gains derived from an alienation of shares in a company may be taxed only in that company’s country of residence if it considers the alienation of (i) a participation of at least 25% or (ii) shares in a real property company. An exception applies for the alienation of shares quoted on a recognized stock exchange, provided that on an annual basis the total of alienated shares does not exceed 3 percent of the quoted shares. A more important exception applies for shares held by a government or any other entity wholly owned by the Netherlands or China: only the shareholder state will be allowed to tax a capital gain.



# ARE YOU READY FOR OUTBOUND INVESTMENT?

中国企业走出去，您真的准备好了吗？

**JERRY SHAW**

There have been several decades since the start of Chinese enterprises' overseas investment in 1979. Although Chinese enterprises have accumulated experience during the process of reaching out to the world, many Chinese enterprises paid a heavy price and failures of International mergers and acquisitions (hereafter M&A) are not uncommon. This paper sets the European market as an example to discuss 'what kind of preparations should be conducted before entering into an International M&A.' This paper is composed of four parts: firstly, understanding the Chinese enterprises' overseas investment, the basic situation of International M&A and discovering business opportunities in the European market; secondly, analyzing successes as well as failures in cases of M&A to find out possible reasons for the different results; thirdly, summarizing four stages of an International M&A; and fourthly, analyzing what kind of preparations should be conducted before entering an International M&A.



自 1979 年起，中国企业启动对外投资至今已有几十年的历史。诚然，中国企业在走出去的过程中确实累积了一定的经验，但中国企业在海外并购过程中也付出了许多相当惨重的代价，并购失败的案例并不鲜见。本文将以欧洲市场为背景，针对中国企业在海外并购中要做好哪些准备进行分析。本文共分四个部分，首先，介绍中国企业海外投资、跨国并购的基本情况，探寻欧洲市场的商机所在；其次，通过梳理中国企业海外并购的成功案例和失败案例，分析并购成功和失败的原因；再次，剖析跨国并购需要经历的四个阶段；最后，总结跨国并购应当做好的前期准备工作。

## THE BASIC SITUATION OF CHINESE OVERSEAS INVESTMENT

### 中国企业海外投资、跨国并购的基本情况

In 1979, the second year of Chinese economic opening-up reforms, Beijing Friendship Community Service Firm entered into a joint venture with Tokyo Maruichishoji Company Limited to establish China's first overseas joint venture enterprise, called 'Jinghe Joint-Stock Company Limited, which was the starting point for Chinese overseas investment. Since China

joined the WTO in 2001, many opportunities have been created for Chinese enterprises to go global. Furthermore, in the outbreak of the global financial crisis in 2008, Chinese enterprises led the way in the 6<sup>th</sup> global wave of International M&A. As the European debt crises continued, International M&A conducted by Chinese enterprises reached a peak period. The total amount of International M&A in 2011 was almost 10 times compared with 2010 and the total value of these transactions surpassed \$70 billion. At the beginning of 2013, there were 7,148 Chinese enterprises conducting direct overseas investment in Europe and the total assets of those enterprises reached €87.8 billion. In 2013, 120 Chinese companies conducted International M&A with European enterprises, breaking historical records. According to data provided in the '2013 – 2014 China- Europe Investment Report', Chinese private enterprises have become the main force in International M&A. According to current statistics, International M&A and trade conducted by Chinese enterprises in Europe were mainly involved in industries such as energy, mining, public facilities, industrial products, retail and consumer goods, high-tech industries and knowledge intensive industries. Hence, it is evident that the investment of Chinese enterprises in Europe has become very diversified and has gradually expanded to all industries.

1979 年，改革开放的第二年，北京市友谊商业服务公司便与日本东京丸一商事株式会社合资建立了中国第一家国外合资企业“京和股份有限公司”，拉开了中国企业海外投资的序幕。2001 年中国加入 WTO，进一步给中国企业走向世界创造了机遇。2008 年，全球金融危机的爆发，中国企业抄底式的海外并购引领了全球第六次海外并购浪潮。而随着欧洲债务危机的持续，中国企业在欧洲的并购交易达到了顶峰时期。2011 年中国企业在欧洲的并购金额几乎是 2010 年的 10 倍，交易总金额超过 700 亿美元。截止至 2013 年初，中国在欧洲直接投资企业总数达到 7148 家，企业资产总额更是达到 878 亿欧元。2013 年，中国企业收购及兼并欧洲企业达 120 家，突破历史最高水平。根据 2013-2014 中欧投资报告的数据显示，中国民营企业已然成为跨国并购的主力军。另外，根据目前的统计数据，中国企业在欧洲进行跨国并购交易主要涉及能源、矿业、公共设施、工业产品、零售和消费品、高科技产业以及知识密集型产业等。不难看出，中国企业在欧洲投资实现了多元化，并已逐步扩展到各个行业。

Where are the available business opportunities in the Europe market? Having suffered the global financial crisis and the European debt crisis, each of the European countries lost massive funds which led to lack of liquidity problems. Secondly, the severe economic situation in Europe has forced many European governments to make a series of policy adjustments. For example, the Greek government implemented policies from 2012 to 2013 in the infrastructure, manufacturing and various other fields that will result over €15 billion worth of state-owned enterprise privatization, and it is planned that in 2015 the privatization GDP will reach €50 billion. In 2013, the Portuguese government allowed €6 billion worth of privatization in the airline and railway industries and other infrastructure construction fields, such as paper manufacturing. Other European countries also sought other available methods to sell or lease assets in order to achieve financial balance. As a result, the favorable policies set by European host countries have supported and ensured the smooth carrying out of International M&A by Chinese enterprises and to a large extent, have allowed these enterprises to avoid restrictions set by the host country.



那么，中国企业投资欧洲市场的商机在哪里呢？首先，受全球金融危机和欧洲债务危机的影响，大规模资金的流失导致欧洲各国均出现缺乏流动资金的问题。其次，严峻的经济形势迫使欧洲各国做出一系列政策调整。例如，2012年至2013年，希腊将基础设施以及制造业等多个领域的国有企业私有化，总价值超过150亿欧元，并计划在2015年将私有化总值扩大到500亿欧元。2013年，葡萄牙也将价值60亿欧元的航空公司、铁路等基础设施建设领域的企业和纸张制造企业私有化。同时，其他欧洲国家也在寻求以出售或出租国有资产来实现财政平衡的道路。因此，欧洲各国的开放政策保障并支持了中国企业海外并购在东道国的顺利实施，并在很大程度上避免了东道国的市场准入限制。

The Consul-General of Greece in Guangzhou made a statement that ‘the biggest problem facing Greece during the economic debt crisis is the lack of current assets.’ He welcomed foreign companies to invest in Greece and stated that companies bringing current assets into Greece would be able to conduct business without any restrictions. As such, it is obvious that the European market is one of the best destinations to conduct International M&A.

希腊驻广州总领事曾有过这样一段表述，他说“此次债务危机，希腊最大问题就是缺少流动资产，所以如果你们带着流动资产来，我们无限欢迎，可以在这里畅通无阻的做生意，因为你们拥有的就是我们缺乏的。”所以不难看出，目前欧洲市场是中国企业进行跨国并购的最佳目的地之一。

## **ANALYZING SUCCESSES AND FAILURES IN CASES OF INTERNATIONAL M&A**

### **海外并购的成功案例和失败案例**

#### **(1) Successful cases**

In 2004, Lenovo Group purchased IBM’s PC business for \$125 million, which resulted in Lenovo Group’s ranking in the PC business jumping to No. 3 in the world. Lenovo Group’s acquisition not only successfully enhanced its brand, but also achieved its goal of safely passing through the adaptation period. In 2009, Geely purchased the world’s second largest automatic transmission manufacturing enterprise, Drivetrain Systems International (DSI). Consequently, Geely’s core-competitiveness has been dramatically improved. In 2010, Geely also purchased Volvo for \$180 million, and has become a forerunner in the car industry in conducting International M&A.

#### **1. 关于成功的案例**

2004年，联想集团用12.5亿美元收购IBM的PC业务，此次并购使联想集团跃至全球PC业务第三位。联想集团的此次收购不仅成功地实现了品牌提升，更是安全地度过了磨合期，实现了并购目的。2009年，吉利汽车收购全球第二大自动变速器制造企业澳大利亚DSI公司，大大增加其核心竞争力；2010年，吉利又以18亿美元成功收购沃尔沃汽车，一举成为我国汽车行业走出去的先行者。

From the aforementioned 3 successful cases, it is clear that the success of International M&A is not accidentally occurred. The reason for success can be summarized in the following 4 points. Firstly, those enterprises understand their advantages, disadvantages and brand position accurately and constantly optimize branding techniques, management and awareness of products, sales, and channels of communication. Secondly, comprehensive analysis has been

made toward diverse relevant data and information. In addition, a team of professionals provide the company with valuable suggestions and guidance. Thirdly, those enterprises take appropriate integration methods to ensure both parties would successfully go through the adaptation period. Fourthly, after contract acceptance those enterprises are able to smoothly integrate the new and old employees.

从上述成功的并购案件当中，我们可以发现成功实现海外并购的目的绝非偶然，成功的原因主要归纳为以下四点：首先，企业能够充分地了解自身的优势和缺陷，准确地进行品牌定位、拥有不断优化品牌技术、管理、产品及销售渠道的意识。其次，能够全面地分析各项数据信息，并有专业团队提供全过程的咨询顾问服务。再次，采取了合理的整合措施，双方的品牌和企业文化顺利融合并度过了磨合期。最后，通过承诺、保留、安抚新老员工，顺利完成人才的整合。

## **(2) Failed cases**

The first International M&A in the automotive industry in China was SAIC Motor's acquisition of SsangYong Motor in October 2004. Shortly after, however, SAIC Motor was caught in a dilemma due to the endless striking of employees. 3 years later, SAIC Motor declared the failure of this acquisition. In 2007, Ping An Insurance (Group) Company of China spent \$1.8 billion in total to purchase the share of Belgium's Futong Group Co. Ltd to become the largest shareholder in Futong Group Co. Ltd. However, the outbreak of the global financial crisis negatively affected the stock price causing Ping An Insurance (Group) Company to lose more than \$15.7 billion. In 2009, the Australian Rio Tinto Group refused a financing agreement worth \$19.5 billion provided by Aluminum Corporation of China Limited, in favor of the world's largest mining company, BHP Billiton. The failure of reaching this agreement caused heavy losses to Aluminum Corporation of China Limited.

### **2. 关于失败的案例**

作为国内车企海外并购第一案，上汽集团在 2004 年 10 月与韩国双龙汽车达成收购协议。但不久后，上汽集团就深陷于无休止的罢工风波，3 年后上汽集团便宣告并购失败，损失高达 5 亿美元。2007 年，中国平安耗资 18.1 亿欧元陆续收购比利时富通集团，成为富通集团最大的股东。然而，受到全球金融危机影响，富通集团股价大跌。短短几个月，中国平安对富通集团的投资浮亏高达 157 亿人民币。2009 年，澳大利亚力拓集团拒绝与中国铝业达成价值 195 亿美元的融资协议，转而与其本国的、世界最大的采矿公司必和必拓联姻，导致中国铝业损失惨重。

Clearly, failure of International M&A is not accidentally occurred. From the 3 aforementioned cases of failure in International M&A, 4 main reasons for failure can be concluded. Firstly, Chinese enterprises are often impulsive investors, and blindly expand in the pursuit of maximal scale even when the enterprise doesn't have the capacity for international integration and comprehensive management capability. Secondly, many Chinese enterprises ignore professional consultant services and directly apply experience accumulated in the domestic market directly to the international market. Many enterprises have many successful achievements in domestic M&A, however upon entering the international market, fail utterly, primarily due to their overconfidence and ignorance of differences between the domestic environment and

international environment in areas such as culture, law, and policy etc. Thirdly, the failure to conduct an accurate and comprehensive analysis of risks involved in International M&A such as the market access risk is another significant reason contributing to the failure of International M&A. After completing International M&A, many Chinese enterprises discover that the host country is not suitable for conducting business. Finally, after the completion of International M&A, Chinese enterprises ignore risks during the operation of business such as risks generated from labor unions and labor organizations. These problems are easy for Chinese enterprises to ignore, however, once these problems arise, will result directly in the failure of the International M&A.

同样的，海外并购的失败也不是无因可寻，从上述三个失败的并购案例中，可以总结四点失败的主要原因。首先，中国企业家往往属于冲动投资，盲目扩张，一味追求规模最大，实际上根本不具备国际化整合和综合管理的能力。其次，轻视专业团队的咨询顾问作用，把在国内积累的并购经验直接套用到国际市场上。实际上，很多企业家们在国内并购市场可谓身经百战，硕果累累，而一旦进入国际并购市场，却一败涂地、体无完肤，究其原因就是因为这些企业家们过于自信，漠视国际与国内之间存在着众多差异，例如文化理念差异、法律政策差异等等。再次，未能准确、全面地分析跨国并购中存在的各类风险，如市场准入风险，也是导致海外并购失败的一个重要原因。海外并购中，很多中国企业在完成并购后，在实际经营过程中，才发现中国企业在当地国家是无法开展相关业务的。最后，忽略并购行为完成后经营阶段的风险，如工会和劳工组织的风险，这是很多中国企业容易忽视的问题，而此类问题一旦发生，将直接导致并购的失败。

## **INTERNATIONAL M&A COMPLETION STAGE**

### **跨国并购完成阶段**

In International M&A, many Chinese enterprises focus on the agreement and believe that the International M&A is completed once the agreement has been signed. However, the International M&A's success is dependent on whether it can bring about the desired effect, rather than just the simple reaching of an agreement. Therefore, a successful International M&A should go through four stages. The first stage is the 'completion stage' and is merely the completion and signing of an International M&A agreement. The second stage is the 'exploration stage' in which both parties should focus on comprehensively understanding differences between the two companies and formulate plans for integration. These should be considered when negotiating clauses of agreement. The third stage is the 'collision stage, also called the 'elimination stage' in which conflicts in culture, staff and philosophies between the two parties would occur. The final stage is the 'integration stage' in which the culture, staff, philosophies and other aspects of the two parties would be gradually integrated and progressively head towards harmony.

很多中国企业家在跨国并购中，只把焦点放在了并购协议的商业条款中，并且认为，协议签订好之后就完成了并购，但其实不然，并购成功的关键在于并购完成后该并购行为是否能够带来预期的效应，而非单纯地完成并购行为。因此，一个成功的并购需要顺利地经过四个阶段。第一阶段为“完成期”，即并购行为的单纯完成，或者说是并购协议的签署完成；接下来是“探索期”，并购双方充分认识彼此之间的差异，且依此制定整合方案，这部分工作甚至可以在商定并购协议条款时一并考虑；之后进入“碰撞期”，或者说是“排斥

期”，即并购双方企业文化、人员、理念的相互冲突；最后进入“磨合期”，即并购双方企业文化、人员及理念逐步走向融合的阶段。

## **INTERNATIONAL M&A PREPARATION**

### **跨国并购前期准备**

The most significant part of preparation is to accurately understand and consider the company's position, and analyses your own firm's advantages and disadvantages in order to avoid blind expansion. Secondly, it is necessary to appoint a team with the ability to operate an international business. TCL's careless acquisitions of the French company Thomson Color TV Service and Alcatel Firm resulted in severe losses. The Chairman of TCL, Mr. Li, stated that his biggest regret was that before entering the joint venture with Alcatel, he didn't hire professional consultants to design a plan for the acquisition. This resulted in unexpected problems arising in the process of operation. In previous cases of International M&A, the domestic executives of many private companies, especially state-owned enterprises, would simultaneously manage both the domestic and overseas enterprise and continue to apply to same business strategies to both enterprises. After the International M&A, local executives were not appointed again, a big mistake which led to a failure in International M&A.

首先，前期准备的重中之重是做好定位，应正确考量、分析自身情况及优劣势，切忌盲目扩张。第二，需要做好人才的任用及调配，应拥有具备跨国公司管理能力的人才和团队。TCL 在草率收购法国汤姆逊彩电业务和阿尔卡特公司之后，损失严重，其董事长李东生说过，他最后悔的一件事就是与阿尔卡特合资之前没有聘请专业的咨询公司参与设计收购方案，以致在经营过程中遇到了意料不到的问题。此外，在以往的案例中，我们发现很多民营企业，特别是国有企业，在完成跨国并购后，通常还会委任国内企业的高管来同时管理国外的企业，仍然沿用国内的一套班子，两个牌子的做法。不要说在被并购企业的当地聘请高管，就连被并购企业原来的高管也不再任用，这是导致海外并购最终失败的一个硬伤。

Thirdly, it is necessary to set objectives, prudently select an appropriate takeover target and avoid pursuing target companies abandoned by their owner. In reality, many Chinese enterprises involved in International M&A purchase businesses and assets which the host country or opposite party is prepared to abandon. Therefore, Chinese companies should carefully choose a takeover target to conduct International M&A. Finally, Chinese enterprises should conduct a comprehensive evaluation of risk, and pay attention to the International M&A host country's market access restrictions, policy changes, as well as conduct investigative work in advance, such as market research and policy investigation.

第三，需要设定好目标，应谨慎选择并购对象，避免“人弃我取”。实际上，中国企业在海外并购时，很多情况下都是收购一些人家本来就不想要的，或是想抛弃的资产和业务，所以，中国企业应慎重选择。最后，需要全面评估风险，应密切关注被并购企业所在国的市场准入限制及政策变化，要提前做好各项调查工作，如市场调查、政策调查等。

# *THE SINO-SWISS FREE TRADE AGREEMENT AND HOW IT IMPACTS CHINESE DIRECT INVESTMENT IN SWITZERLAND*

**Editorial:** Maurus Adrian Radelow is one of Donghua's BA students who has taken the time to give a short introduction from his home country Switzerland, which is constitutes an exception within the European community, as it is not part of it. We wanted to ensure you received this information as well. With special thanks for Maurus his contribution.

**MAURUS ADRIAN RADELOW**

## **INTRODUCTION**

Although frequently commented on in foreign media, the recently come-active free trade agreement (FTA) between China and Switzerland has gotten relatively little media attention concerning its benefits for Chinese companies. Even among the information that is publicly available, a lot is biased and even more unspecific when it comes to less trade related issues such as investment promotion, one of the declared goals of the FTA.

In reality the FTA itself actually only covers the topic of investment promotion and forgoes new investment regulations on base of the recently established bilateral investment treaty (BIT), according to Swiss State Secretariat for Economic Affairs.

Despite this lack of new regulations concerning FDI in Switzerland, the FTA does offer a range of benefits making Switzerland more attractive to Chinese direct investment.

## **SWITZERLAND AS A GATEWAY TO THE EUROPEAN MARKET**

The real value of the FTA goes beyond goods exclusively manufactured and traded between China and Switzerland. Article 3.4 of the FTA covers what is called "substantial transformation". If there are materials of foreign origin used in the production, the product can still be applicable for tax exemption. This applies if the value of the non-originating materials stays below a certain product-specific percentage of its ex-works value. Considering that Switzerland, although not a member of the EU, is a member of the European Free Trade Association (EFTA) and that China forms a comprehensive free trade Area with the ASEAN community and is on its way to further expand this in the Asia Pacific region, this can enable a company to span its operations over both the European and ASEAN market. Through intelligent adjustments of its value chain, a company can still meet the requirements for substantial transformation and benefit from significant duty savings.

However, the FTA is currently facing the main problem that both partners of the FTA are unwilling to accept goods that passed through ports of a third country without appropriate documentation. Unfortunately, the majority of goods originating from Switzerland transfer through European ports, which are currently not issuing the certificates of non-modification for transferring goods. Given the fact that Switzerland has no ports, this currently excludes the

applicability of the FTA to ship freight but experts expect this to change within reasonable time due to pressure from the industry.

Besides this, there are currently minor issues related to third party invoicing due to the disclosure of invoices necessary for application for the FTA. In some cases this might lead to disclosure of sensitive information to customers.

The recent complications of Sino-European trade relations gave the FTA with Switzerland even further importance, due to Switzerland's function as a gateway to the European market. According to WTO regulations, China can export parts of or unfinished products to Switzerland and then assemble them there, disabling objections from side of the EU member states. In combination with the FTA this makes Switzerland even more attractive to investment from Chinese companies.

The actual impact on FDI in Switzerland is hard to estimate but first Chinese enterprises are already acquiring Swiss companies to enter the European market. One such example would be the Cixing group's acquisition of the Swiss sewing machine producer Steiger, hoping to use the brand to introduce Chinese products to the European market. There have also been reports on Chinese solar panel manufacturers establishing subsidiaries in Switzerland as a reaction to recent trade sanctions from side of the EU, hoping to benefit from the FTA.

At the moment the future development is still unclear and has yet to be seen but the Sino-Swiss FTA is certainly an opportunity for both Chinese and Swiss companies to gain access to the European or ASEAN markets and a grand success in the development of Sino-Swiss relations in general. Now only time is needed to give involved authorities time to establish the necessary procedures and provide appropriate documentation.

Below SME's representatives



# CONTRIBUTORS PROFILES AND COMPANIES



马利思咖·史蒂芬斯(MARISKA STEVENS)是文化语言人类学家，她的研究领域涉及社会

心理学，医学社会学，视觉人类学以及民族心理学。

学术背景：阿姆斯特丹大学政治与社会科学院（社会学和文化人类学机构；15年）

专业领域：社会科学的研究方法和技术，非西方社会学和各种新颖的人类学观点以及中国讲座，民族区域制度，移民社区，海外华人社区，跨文化交流和当代国际发展主题。

目前，她为许多机构提供基于中国文化的企业和培训研讨会，同时为中国和其它亚洲公司提供关于荷兰商业文化的咨询服务，并对各种政府和非政府机构的政策议程，中国跨文化交流演讲以及正处于起步阶段的跨国公司提供各种建议。



由她 发起的蓝水龙基金会是一个非营利性基金会，该基金会旨在通过信息，项目和讲座的方式加强推进跨文化交流。 同时与同一个研究领域的专业人士合作为在亚洲的外国人提供心理学， 社会和文化的支持与服务。

## MS. YILING GE

Ms. Yiling Ge is the director of Center of International Programs, International Cultural Exchange School of Donghua University. She studied Management in the United States and used to work as the assistant professor in the university in US. Her studying and working experience in USA and China gave her own understanding about university education. With the dream to introduce the western education methods to China, Yiling chose to work for her mother school, Donghua University, when she decided to be back to mother country. She recruited and works with a group of foreign teachers from around 10 countries on integrating education methods of the East and the West. After 5 years operation, CIP is now having about 300 students from over 70 countries. Diversity has become the uniqueness of the program. Recently, Yiling and her team is working on the projects to help international students fulfil their “Chinese dream” while support corporations with resources and knowledge they need for globalization, which is part of the plan to build CIP into one of the best English-taught programs in China in the near future.



葛逸凌女士现任东华大学国际文化交流学院国际项目中心主任。葛逸凌在美国学习管理多年，并曾在美国大学担任过助理教授。在美国大学的学习与工作经验让她对于教育有着自己的理解。怀揣着将国外优秀的教育方法介绍给中国的梦想，葛逸凌回国以后回到了母校东华大学，并组建并带领着一只来自于不同国家的 10 多名外籍教师组成的国际团队尝试将中西方教育的优点在国际项目中尝试有机融合。经过 5 年的运作，国际项目中心已经拥有来自 70 个国家的近 300 名学生。学生如此多元化的项目在国内外都属少见。现在，葛逸凌与其团队正努力为将国际项目建设为中国一流的全英语授课项目而奋斗，而如何通过增强校企联系，帮助留学生实现其“中国梦”的同时为企业提供其国际化所需要的知识和资源是葛逸凌及其团队近期努力的方向之一。

Center of International Programs (CIP) was founded in 2009, which is offering English taught bachelor's program in business majors to foreign students. The program introduces Chinese economics and business environments to international students through specially designed courses, such as Chinese Language, Chinese Culture, Chinese economics, Chinese Culture & Etiquette, and etc., with required knowledge on business.

Variety of academic activities, such as seminars, workshops, fieldtrips, research projects and competitions have been offered to widen students' horizon, help them connect theory with reality, and prepare them for their future development. Based on the needs of the students and the market, CIP concentrates on developing in three directions: innovation and entrepreneurship, service learning and familiarity of Chinese society and economy. Till now,



except those who continue to pursuing their graduate degrees, majority of CIP graduates are working in the position somehow related to China. Some devote themselves to increase the trade between China and their home countries. Some are hired by companies to facilitate the cross-culture communication and cooperation for the company. Others have already had their own company running in China successfully. Please visit university website at [www.dhu.edu.cn](http://www.dhu.edu.cn)

国际项目部成立于 2009 年，主要针对海外留学生开设全英语授课的本科商务专业。在教授学生基本的商业理论的知识的的同时，项目针对留学生设计了汉语、中国文化、中国经济、中国商务礼仪等多门帮助学生了解中国的经济与商务环境的课程。项目还通过各种讲座、研讨会、企业参观、研究小课题、比赛等多种形式开拓学生的眼界，帮助学生理论联系实际，为学生未来的发展储备资源。国际项目根据学生的需求和特点以及市场的需求，将学生未来发展的重心放在创业创新、服务学习以及对中国社会与经济的熟悉。目前国际项目的毕业生中除了一部分学生选择在国内外研究生院继续深造的。有相当一部分学生选择了从事与中国相关的工作：有学生回国后致力于开拓中国及其本国之间的贸易往来，有学生被外资、合资或国资企业聘用在跨国沟通与交流中担当重任的，也有不少学生已经在中国创业成功。

## BART KASTELEIJN

Currently: Hil International Lawyers and Advisers

### Biography & Expertise:

Bart graduated in civil and international law at the University of Utrecht. He was a trainee at the European Commission in Brussels, Directorate General Internal market.



Admitted to the Amsterdam Bar, he was a junior and senior associate at Stibbe law firm in Amsterdam, became a partner at Wieringa in Amsterdam and subsequently at Van Mens & Wisselink, Amsterdam in the corporate and tax law section. He joined HIL mid 2009. Bart specializes in international company and commercial law and is conversant in tax law. Transactions, corporate restructuring and financing are a major part of his work. He is also involved in green technology including carbon credits. He acts for a range of multinational corporates worldwide. One of his focus countries is China.

Bart is chairman of the China Table of IGC in Amsterdam, the leading Dutch business club, Board member of the Netherlands Hong Kong Society and Advisory Board member of the Dutch Chinese Chamber of Commerce. He is a member of the Dutch Bar Association (NOVA), International Bar Association (IBA), Inter Pacific Bar Association (IPBA) and the Chinese European Arbitration Centre in Hamburg (CEAC).

Bart is working from Amsterdam. He is in command of Dutch, English, French and German. He has frequently been a speaker on several international legal and business fora, a guest lecturer at the University of Utrecht and a deputy member of the China committee of Holland Financial Centre (HFC) in Amsterdam. He is also a member of the Advisory Board of

Euro-Asia Comparative Business & Law of the University of Maastricht Law Faculty, leads HIL's corporate services affiliate HTM and sits as nominee director on the board of several multinational companies.

Recent events are:

- Lecture on Chinese law at the Nyenrode University, Campus Chengdu (Sichuan, China) on 26 June 2013;
- Speaker during the FENEDEX China symposium on Producing and/or Selling in China on 13 May 2012;
- Guest lecturer on Chinese Law at the University of Utrecht Law school (2010);
- Inter Pacific Bar Association conference in Singapore on carbon emission credits (May 2010);
- Workshop on Chinese Law at OSR Post academic Lawyers trip, Shanghai (2010)
- Lecturer at Dirkzwager, Arnhem, The Netherlands, about Investing in China;
- Expert panel on Corporate Social Responsibility in China and India at Felix Meritis, Amsterdam (2011);
- Lecturer in the Masters course at Chinese Food Law on Food at Wageningen Univeristy (2011).

## **Publications**

CDM Projects under the Kyoto Protocol in China/India

Foreign Acquisitions and Joint Ventures in China

Work

- Restructuring of China operations through HongKong for a Dutch seller in several sectors
- Standard sales contract and general sales conditions in The Netherlands and Europe for several Chinese multinationals
- Agency contract for a Dutch crane manufacturer (€ 3 to 6 million per crane) in China
- Dutch joint venture between a Chinese electronics manufacturer and a Dutch distributor with a projected annual turn-over of € 25 million
- Sino-foreign joint venture with € 15 million annual turnover between a Dutch wind energy tech company and a state owned Chinese company for manufacturing in China
- Acquisition of a \$ 200 million real estate project in China
- € 100 million umbrella agreement between a Dutch chemical producer and a Chinese state owned company for co-manufacturing and distribution in China
- Attended Inter Pacific Bar Association's 22nd Annual Meeting & Conference in New Dehli.

办公室：阿姆斯特丹

职业背景

高仕林毕业于荷兰乌特勒支大学民法及国际法专业，并曾在布鲁塞尔的欧盟委员会内部市场总署接受培训。

成为阿姆斯特丹律师协会成员后，其在阿姆斯特丹的 **Stibbe** 律师事务所任职初级律师与高级律师，然后在阿姆斯特丹的 **Wieringa** 律师事务所担任合伙人，之后在阿姆斯特丹的 **Van Mens&Wisselink** 律师事务所公司及税法部门担任合伙人，并于 2009 年中期加入浩达。

高仕林精通国际公司法和商事法，精通税法，主要从事交易、公司重组和融资业务。他在环保技术（包括碳排放交易）领域也有所涉猎。高仕林从业以来为全球大量的跨国公司提供了法律服务，中国是其重点关注的国家。

高仕林担任了荷兰顶尖商务俱乐部 IGC 中国部的主席、荷兰香港协会董事及荷兰中国商会顾问。他还是荷兰律师协会(NOVA)、国际律师协会（IBA）、环太平洋律师协会（IPBA）以及汉堡中欧仲裁中心（CEAC）会员。

高仕林的工作地点在阿姆斯特丹。高仕林的工作语言为荷兰语、英语、法语和德语。

高仕林曾多次在国际法学和商事论坛上受邀成为讲演者，是乌特勒支大学的客座讲师以及荷兰金融中心基金会中国分会的代理委员。他还是荷兰马斯特里赫特大学法学院欧亚商业及法律比较课程的咨询委员会成员，并负责浩达信托业务，以及担任多家跨国公司的名誉董事。最新活动包括：

- 于 2012 年 5 月 13 日，担任 FENEDEX 中国在华生产和（或）销售研讨会发言人；
- 于 2010 年，担任荷兰乌特勒支大学法学院中国法客座讲师；
- 于 2010 年 5 月，参加环太平洋律师协会在新加坡举办的碳排放配额会议；
- 于 2010 年，在 OSR 荷兰律师访华代表团中在上海发表关于中国法的演讲；
- 于 在荷兰 Dirkzwager 和 Arnhem 作关于在中国投资的演讲；
- 于 2011 年 9 月，在位于阿姆斯特丹 Felix Meritis 中国和印度企业社会责任的专家组成员；
- 于 2011 年，担任荷兰瓦赫宁根大学中国食品法硕士课程教师。

## JACK WU

Jack Wu leads the Orangefield team in Shanghai with a solid background in international taxation and accounting as well as a keen eye for international business. He possesses extensive knowledge in a multitude of Chinese business operations including legal structure setup, China market entry, human resource strategy, taxation, accounting, import/export, sourcing, production and fund flows.

Educated in the USA, Jack works closely with foreign invested enterprises (FIE) as well as state-owned enterprises (SOE) and small-medium enterprises (SME) in areas of corporate management, finance and restructuring with a broad international perspective while taking domestic requirements into practice. He is deeply involved as one of the initiators for Orangefield's China strategy and is also entrusted to look after all clients' interests throughout mainland China.

Jack's professional goal is to facilitate foreign investors to settle and grow in China and concurrently to assist Chinese investors to explore the world.

Jack Wu 现在领导欧捷公司上海团队。他在国际税务和会计方面具有良好的背景，且在国际商务方面具有睿智和独到的眼光。他对各类中国业务之运作具有广泛的知识，包括法律



结构搭建、外企进入中国市场、人力资源策略、税务、会计、进出口、采购、生产和资金流量管理等各个方面。

凭借其海归的专业优势，**Jack Wu** 与外资企业、国营企业及中小企业密切合作，在公司管理、融资与重组等方面具有广阔的国际视野；同时，他又能把各种中国要素融于实践之中，贯通中外。作为发起人之一，他深度参与欧捷中国策略的制定，并受命照顾整个中国大陆所有客户的关切。

**Jack Wu** 矢志为客户提供全面的专业服务，帮助外国企业在中国设立企业，发展壮大，同时，帮助中国的投资者走向世界，在海外拓展业务。

## **The Orangefield Group**

Orangefield is a global corporate service provider and fund administrator, providing a wide range of services to corporate clients, fund managers, and private clients from all over the world. We demand of ourselves the same excellence you expect from an international leader in outsourced business services with more than 40 years of experience.

With a team of more than 500 professionals, Orangefield operates through its own offices in The Netherlands, Luxembourg, Germany, United Kingdom, Austria, Spain, Malta, Cyprus, Greater China, Singapore, The United States, Canada, Mauritius, Curacao, Aruba, British Virgin Islands, Brazil, and South Africa.

Within the Hong Kong and Mainland China offices, Orangefield is uniquely positioned to offer an integrated approach utilising Hong Kong as a two-way gateway to doing business with China and the rest of Asia.

Orangefield 集团为遍及全世界的个人客户、公司客户和信托经理人提供全球化的专业服务，包括公司服务、信托管理服务以及其他各种专业服务。我们已经有四十余年的专业服务经验，并坚守服务质量，为我们的客户提供高品质服务。

本集团拥有 500 多名各领域的专业精英，集团子公司遍布荷兰，卢森堡，德国，英国，奥地利，西班牙，马耳他，塞浦路斯，大中华区，新加坡，美国，加拿大，毛里求斯，库拉索岛，阿鲁巴岛，英属维京群岛，巴西及南非。集团以集团内香港公司和中国大陆公司为依托，协助客户将香港作为一个双向通道，来开展与中国及亚洲其他国家的业务。Orangefield 集团在帮助客户开展业务中扮演着独特而重要的角色。

## **JERRY SHAO**

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Mr. Shao is the founding partner and executive director of Beijing S&P (Shanghai) Law Firm. He was honored as “the Excellent Young Lawyer of Zhabei District” and “Outstanding



Lawyer of Zhabei District” .He is a CPPC member of Zhabei District.

Mr. Shao specializes in foreign investment, M&A, financing business, OTC listing, company legal matters, international trade and FIDIC. He serves as perennial counsel to many domestic corporations, Sino-foreign joint ventures, and wholly foreign owned enterprises. He has experience in negotiating and conducting due diligence in transactions such as international investment and financing, equity transfer and M&As. He advises on the legal issues arising out the daily production, operation, management of businesses.

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#### 执业领域

邵开俊律师，北京尚公（上海）律师事务所创始人、高级合伙人。曾被评为闸北区优秀青年律师、闸北区优秀律师。现任闸北区政协委员。

邵开俊律师业务专长于外商投资、企业并购及投、融资项目、OTC挂牌、公司法律事务、国际贸易及大型国际工程（FIDIC）项目等法律事务。长期担任多家大型国企、内资企业、中外合资经营企业、外商独资企业的常年法律顾问；参与公司国际间的投、融资、股权转让以及兼并收购项目的谈判及尽职调查；为公司日常的生产、经营、管理等事项提供法律意见。

## Beijing S&P (Shanghai) Law Firm

Founded in 2010, Beijing S&P (Shanghai) Law Firm (hereinafter referred to as “S&P Shanghai”) is the largest scale branch office of S&P Law Firm, a National Excellent Law Firm. S&P Shanghai is a member of Shanghai Equity Exchange, which was granted “Excellent Law Firm of Zhabei District” and “Model Unit of Zhabei District”.

S&P Shanghai has built a professional team with competitive business ability and service ability since the very beginning of the establishment. The core of the management of S&P Shanghai is composed of senior lawyers who have oversea practice experiences and abundant experiences in the management of large-scale law firms. Currently, S&P Shanghai has nearly 30 lawyers and senior consultants, meanwhile paralegals and apprentice lawyers in S&P Shanghai are all graduated from famous domestic and foreign law schools and have obtained law practice qualification, which are capable to provide professional bilingual service for clients.

On the basis of tenet of “Cooperation, Dedication, High-Efficiency and Development”, S&P Shanghai adopts professional division and cooperation mode internally, and emphasizes on the combination of the practice and theory, and aims at providing our clients with

professional and effective legal services. S&P Shanghai is completely capable to provide domestic and overseas clients with all-sided, in-depth and professional legal services in all kinds of business activities including but not limited to Foreign Investment in China, M&A, International Trade, OTC listing, Financial Investment, Intellectual Property, Labor disputes, Estate, FIDIC and all types of Litigation and Arbitration.

### 北京尚公（上海）律师事务所

北京尚公（上海）律师事务所成立于 2010 年，是全国优秀律师事务所——尚公律师事务所旗下规模最大的分所，是上海股权托管交易中心专业服务机构会员。曾荣获闸北区优秀律师事务所、闸北区文明单位等称号。

北京尚公（上海）律师事务所从成立伊始就建立了具有强劲业务能力和服务能力的专业团队，由富有大型事务所管理经验、同时拥有海外留学背景的资深律师组成管理核心。截至目前，已拥有的执业律师及资深顾问近三十名，律师助理、实习律师均毕业于国内、外著名的法律院校并取得相应学位和律师从业资格，能够为客户提供双语法律服务。

北京尚公（上海）律师事务所本着“合作、敬业、高效、发展”的宗旨，在内部采取专业分工合作模式，强调实践操作与理论研究相结合，以为客户提供专业有效的法律服务为目标。致力于为境内外客户的在华投资、兼并收购等公司业务；国际贸易业务；OTC 挂牌业务；金融投资业务；知识产权业务；劳动法律业务；房地产、国际工程项目（FIDIC）招投标业务；以及各类诉讼、仲裁代理业务等提供全面、深入、专业的法律服务。

## PROFILES OF THE OUR CO-ORGANIZING STUDENTS:

### SUZIE SASIMON CHERTANARAJ

My name is Suzie or Sasimon Chertanaraj. I am obtaining a Bachelor Degree of Business Administration from Donghua University's International Program. Currently, I am an intern at Crossroad Culture, and I would like to pursue a career in marketing and advertising.



### PAVLIUSHCHENKO KSENIA

My name is Ksenia Pavliushchenko. I'm fashion-obsessed and my goal is to get a career in the fashion industry. At present I'm majoring in Economics and International Trade in Donghua University's International Program and assisting for Crossroad Culture.

## **HEDAYAT ARABNIASAR**

"My name is Hedayat Arabniasar. I am majoring Bachelor degree of International Trade in Donghua University's International Program. Currently, I am working in Bosi company, and I am assisting for crossroad culture as well."



## **MAURUS RADELOW**

A keen interest in the development of Sino-European relations combined with experience on Sino-Swiss governmental joint-projects and major international events, set me on the course to pursue a Bachelor of Economics in International Trade at Donghua University in Shanghai. For my future I only wish to feed my curiosity and see more of the strings that pull the world.

**AND WITH SPECIAL THANKS TO NICOLAS MUNOZ AND TAYSEER AYMAN AS WELL!!! SEE YOU ALL  
NOVEMBER 6, 2015**