



RESOLUTION OF DISPUTES ON FILE

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Why do we talk about resolution of FIE dispute?

It is impossible to clarify legal issues in China by western people's legal thinking because Chinese legal system is different from that in western.

The dispute on foreign investment in China is so complicated that it is very difficult to resolve.

This Regulation:

Chinese Name: 最高人民法院关于审理外商投资企业纠纷案件若干问题的规定（一）.

English Name: Provisions Concerning the Trial of Disputes Over Foreign-invested Enterprise Case.

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What is the scope of this regulation?

This Regulation is only applicable to:

Sino-Foreign Equity Joint Venture;

Sino-Foreign Cooperative Joint Venture;

Wholly-owned Foreign Enterprise.

This Regulation is **NOT applicable to:**

foreign-invested joint stock company;

foreign individually-owned business;

foreign-invested partnership enterprise;

foreign-invested BOT;

M&A of Domestic Enterprise by Foreign Investors.



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Does a supplementary agreement of the FIE contract need government's review and approval?

Previously:

The FIE contract can become valid as long as the contract gets approved by the commerce bureau. Therefore, a supplementary agreement with significant or substantial change to the FIE contract can become valid upon the commerce bureau's approval.

Otherwise, this supplementary agreement should not become valid.

Currently:

The Chinese government has made very big changes to the government's approval.

As a result, the FIE contract doesn't need to be reviewed and approved by commerce bureau (*if the industry of foreign investment is encouraged or permitted by the China law and the investment amount thereof is less than 100 million USD in Beijing*), but just needs to be kept for the record by the commerce bureau.

Certainly, the supplementary agreement doesn't need to be reviewed and approved by the commerce bureau. It can become valid as long as it is in line with the laws.

Black Contract & White Contract

In practice, some investors signed a contract that was for the government's approval but also signed another contract that wouldn't be submitted to the government for approval or record.

Chinese people call the contract to be disclosed to the government white contract and the contract not to be disclosed to the government black contract.

The question is which contract is valid, the black contract or the white contract?

Black Contract & White Contract

Generally speaking, the parties' purpose of making white contract and black contract is to realize the illegal benefit by the way of malicious collusion and damaging the interests of the state, other entity or an individual, this contract is invalid. In this case, the black contract is invalid.



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Is the contract approved or kept for the record by the government a valid contract?

If a contract approved or kept for the record by the government is found invalid by the court in the process of litigation, the contract should be deemed invalid by the court according to the law.

If the contract meets the situation of cancellation by law, and the plaintiff applies for cancellation, then the court should support such a claim.



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Does an investor have the shareholder's right before the capital contribution is transferred to FIE legally?

This property as capital contribution has been delivered to the FIE for the FIE's actual use and it is not necessary to transfer the legal right of the property hereof to the FIE.

The legal right of the property hereof has been transferred to the FIE because it is necessary to transfer the legal right of the property hereof to the FIE according to the law.

The Way of Capital Contribution

Cash or substance;

Land use right;

Intellectual property;

Other type of property as capital contribution.



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The transferee participated in operation of the FIE and obtained some benefit but the equity transfer failed. How to handle such situation?

The transferor can:

- claim, by litigation, the transferee to exit the operation and management of the FIE, and;
- claim the transferee to return the income earned during his management after deducting the relevant costs. Such claim should be supported by the court.

Who should provide evidence in such situation?

- For the benefit obtained by the transferee during his management, the transferor should provide evidence.
- If the transferor has quit from the FIE and the transferee has controlled the FIE completely, then the transferor should provide preliminary evidence, and further evidence should be provided by both parties depending on actual situations.



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How can other shareholder(s) handle the situation if one shareholder of the FIE transfers all or part of his/her equity to a third party?

When and if the equity transfer infringes on other shareholders' preemptive right, these shareholders can:

- claim to cancel the equity transfer contract by litigation and the people's court should support such a claim.
- the equity transfer contract should not be revoked if the shareholder fails to claim the preemptive right within one year after the date of signing the equity transfer contract.



Can the actual investor claim to replace the nominal shareholder's status in the FIE?

No. Except where the following requirements are met:

- The real investors have already invested actually;
- Other shareholders other than the nominal shareholder acknowledge the real investor's status as a shareholder;
- The court or the parties have obtained the consent from the government on changing the real investors into shareholders during the litigation.



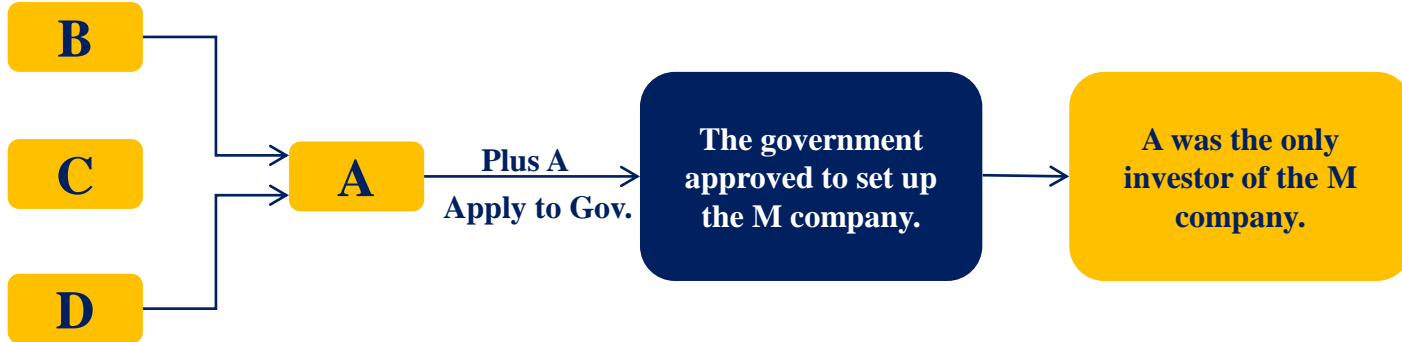
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The contract stipulates that one party invests to a FIE actually and the other party acts as the nominal shareholder of the FIE. Is such a contract valid?

If this contract is in line with the laws and administrative regulations, this contract should be valid.

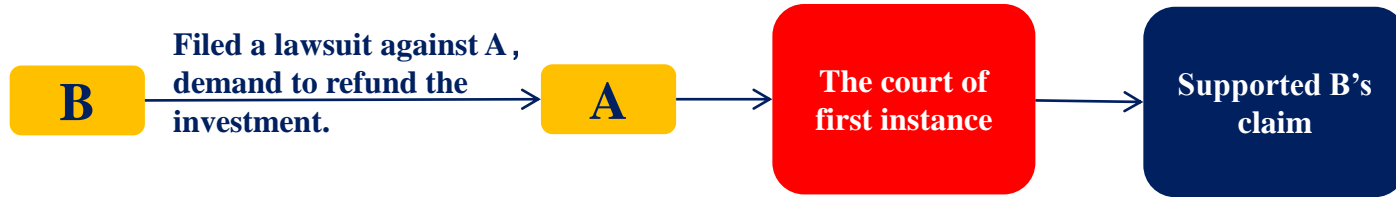
This kind of investment is **undisclosed investment** and its Chinese name is **隐名投资**. As for the undisclosed foreign investment, it should be in compliance with foreign investment policies and laws, for example the **Catalogue for the Guidance of Foreign Investment Industries**.

A Case of Foreign Investment Dispute



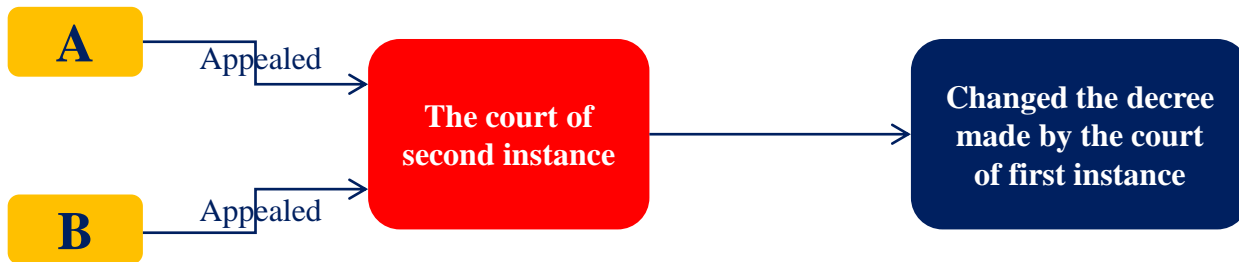
Remark: B, C and D entrusted A to make investment to the M company and signed an agreement with regard to the entrustment of investment between A and B, C, D.

A Case of Foreign Investment Dispute



Remark: the court of first instance thought this agreement among A, B, C and D didn't get approved by the Commerce Bureau, as a result, this agreement was invalid. Due to the invalidation of this agreement, A had the liability to return B's investment according to *the Contract Law of the PRC*.

A Case of Foreign Investment Dispute



Remark: the court of second instance didn't think that this agreement was a FIE contract, but an entrustment investment agreement and thus this agreement didn't need to get approved by the government. This agreement was effective because it was in line with the law. As a result, A didn't have the liability to refund the investment and had the right to hold equity on behalf of B.

About Beijing Minghang Law Firm

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Thank You!