

# 中国法通讯 China Law Newsletter 跨境贸易与投资 Cross-border Trade and Investment

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编者按：本刊旨在报道与中国有关的跨境贸易与投资的最新动态与我们的实务经验，但本刊不可替代个案的正式法律意见。若您重复收到本刊或者要订阅、退订或进一步了解本刊的内容，请与大成的有关律师联系。

Editor's note: the purpose of this publication is to report the most recent developments in the field of cross-border trade and investment in connection with China, as well as our practical experience therein. However, this publication should not be treated as a substitute for a formal legal opinion in individual cases. If you have received this publication more than once, or would like to subscribe or unsubscribe to this publication, or follow up on any issues raised in this publication, please be in contact with the lawyer you usually deal with at Dacheng Law Offices.

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## **立法新闻** **LEGISLATIVE NEWS**

- 国务院公布《对外劳务合作管理条例》（来源：[www.gov.cn](http://www.gov.cn)，2012 年 6 月 11 日）  
**State Council Promulgates Administrative Regulations on Foreign Labor Service Cooperation (Source: [www.gov.cn](http://www.gov.cn), June 11, 2012)**

6 月 4 日，国务院办公厅公布了《对外劳务合作管理条例》（《条例》），自 2012 年 8 月 1 日起施行。《条例》所称对外劳务合作，是指组织劳务人员赴其他国家或者

地区为国外的企业或者机构工作的经营性活动。国外的企业、机构或者个人不得在中国境内招收劳务人员赴国外工作。《条例》规定了从事对外劳务合作的企业与劳务人员申请对外劳务合作经营资格应当具备的条件。任何单位和个人不得以商务、旅游、留学等名义组织劳务人员赴国外工作。

On June 4, the General Office of the State Council promulgated the Administrative Regulations on Foreign Labor Service Cooperation (the "Regulations"), effective as of August 1, 2012. For the purpose of the Regulations, the "Foreign Labor Service Cooperation" means the business services provided by the laborers who are arranged to go to other countries or regions to work for the foreign enterprises and organizations. Foreign enterprises, organizations or individuals are prohibited from recruiting laborers to work abroad. The Regulations set forth the conditions that the enterprises and laborers engaging in foreign labor service cooperation shall meet in applying for the qualification of foreign labor service cooperation. Entities or individuals are not allowed to arrange for laborers to work abroad in name of business, travelling, foreign study, etc.

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- 国家外汇管理局下发《关于鼓励和引导民间投资健康发展有关外汇管理问题的通知》（来源：上海证券报，2012 年 6 月 15 日）

**SAFE Issues Circular on Issues Concerning Foreign Exchange Control to Encourage and Guide the Healthy Development of Private Investment (Source: [www.cnstock.com](http://www.cnstock.com), June 15, 2012)**

近日，外汇局下发了《国家外汇管理局关于鼓励和引导民间投资健康发展有关外汇管理问题的通知》（《通知》），力破“走出去”企业在境外融资难的问题。之前境内企业进行境外放款，一直按照 2009 年颁布的《国家外汇管理局关于境内企业境外放款外汇管理有关问题的通知》，其仅允许境内企业在一定限额内使用自有外汇资金、人民币购汇资金以及经外汇局核准的外币资金池资金向借款人进行境外放款。《通知》放宽境外放款资金来源，允许境内企业使用境内外汇贷款进行境外放款。境内企业境外放款可以作为境外债权的一部分，共同构成境外投资。

Recently, the State Administration of Foreign Exchange (the "SAFE") issued the Circular of State Administration of Foreign Exchange on Issues Concerning Foreign Exchange Control to Encourage and Guide the Healthy Development of Private Investment (the "Circular") to try to resolve the difficulties in overseas financing faced by enterprises "going global". Previously, domestic enterprises' overseas financing was carried out in accordance with the Circular of the State Administration of Foreign Exchange on Foreign Exchange Administration of Overseas Lending by Domestic Enterprises released in 2009 which only permitted a domestic enterprise lender to use its own foreign exchange fund, foreign exchange fund purchased with RMB and foreign currency pool fund verified by the foreign exchange bureau in overseas lending. The Circular has loosened the restrictions on the types of the funds for overseas lending, permitting domestic enterprises to use domestic foreign exchange loans in overseas lending. Overseas lending of a domestic enterprise may be regarded as its overseas creditor' rights which constitutes a part of its overseas investment.

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- 两部委发布《限制用地项目目录（2012 年本）》《禁止用地项目目录（2012 年本）》（来源：国土资源部，2012 年 6 月 19 日）

**Two Departments Issue the Catalogue of Restricted Land Use Projects (2012) and the Catalogue of Banned Land Use Projects (2012) (Source: www.mlr.gov.cn, June 19, 2012)**

6 月 18 日，国土资源部印发了 国土资源部 国家发展和改革委员会关于发布实施《限制用地项目目录（2012 年本）》和《禁止用地项目目录（2012 年本）》的通知，明确限定住宅项目容积率不得低于 1.0。两目录自发布之日起实施，此前发布的 2006 年本和 2006 年本增补本目录同时废止。《通知》规定，目录适用于新建、扩建和改建的建设项目。凡列入《限制目录》的建设项目，必须符合目录规定条件，国土资源管理部门和投资管理部门方可办理相关手续；凡列入《禁止目录》的建设项目或者采用所列工艺技术、装备、规模的建设项目，或采用《产业结构调整指导目录（2011 年本）》明令淘汰的落后工艺技术、装备或者生产明令淘汰产品的建设项目，国土资源管理部门和投资管理部门不得办理相关手续。

On June 18, the Ministry of Land and Resources (the "MLR") and the National Development and Reform Commission (the "NDRC") jointly printed and distributed the Circular on Issuing and Implementing the Catalogue of Restricted Land Use Projects (2012) and the Catalogue of Banned Land Use Projects (2012), clarifying that the floor area ratio of residential projects shall not be less than 1.0. Both catalogues shall become effective as of the date of issuance, and the previously announced the 2006 version and 2006 revised version of the catalogues shall be repealed simultaneously. As specified in the Circular, the catalogues are applicable to the construction projects of newly establishment, renovation and expansion. A construction project included in the Catalogue of Restricted Land Use Projects shall fulfill the conditions set forth in the Catalogue before the land and resource authorities and investment authorities go through the relevant formalities. For a construction project which is included in the Catalogue of Banned Land Use Projects, or employs the technologies or equipment or has the scale specified in the Catalogue of Banned Land Use Projects, or employs the obsolete technologies or equipment or is used to manufacture the out-of-date products as specified in the Industrial Restructuring Guidance Catalogue (2011), the land and resource authorities and investment authorities shall not go through the relevant formalities.

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- 商务部鼓励民间投资实施意见出台（来源：商务部，2012 年 6 月 28 日）

**MOF Releases Implementing Opinions on Encouraging and Guiding Private Capital to Enter the Trade Distribution Industry (Source: www.mofcom.gov.cn, June 28, 2012)**

商务部于日前发布了《商务部关于鼓励和引导民间资本进入商贸流通领域的实施意见》（以下简称《实施意见》），明确鼓励和引导民间资本进入商贸流通领域特种行业，包括成品油市场、融资租赁业务、典当业务、拍卖业务以及直销经营。

Recently, MOF released the Implementing Opinions on Encouraging and Guiding

Private Capital to Enter the Trade Distribution Industry (hereafter referred to as the Implementing Opinions), and clarifies the need to encourage and guide private capital in entering specific industries in the trade distribution industry, such as the refined oil market, financial leasing business, pawn business, auction business and direct marketing business.

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- 两部门发布对外派海员等劳务免征营业税的通知（来源：[www.mof.gov.cn](http://www.mof.gov.cn)，2012 年 6 月 29 日）

**Two Ministries Release Circular on Business Tax Deduction for Labor Services such as Dispatching Sailors (Source: [www.mof.gov.cn](http://www.mof.gov.cn), June 29, 2012)**

2012 年 6 月 15 日，财政部、国家税务总局联合发布了《关于外派海员等劳务免征营业税的通知》（以下简称《通知》）。《通知》自 2012 年 1 月 1 日起执行。按照该《通知》规定应予免征的营业税，在通知到达之日前已征收的应免征的税款，允许自纳税人以后应缴的营业税税款中抵减或予以退税。

On 15 June 2012, MOF and SAT jointly released the Circular on Business Tax Deductions for Labour Services such as Dispatching Sailors (hereafter referred to as the Circular). The Circular came into effect on 1 January 2012. According to the Circular, BT within the scope of tax exemptions paid before the issuance of the circular should be deducted from the business tax due, or be refunded.

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- 税务总局澄清税收规定，外国公司受益（来源：[www.chinatax.gov.cn](http://www.chinatax.gov.cn)，2012 年 6 月 29 日）

**State Administration of Taxation Clarifies Tax Rules, Foreign Companies Benefit (Source: [www.chinatax.gov.cn](http://www.chinatax.gov.cn), June 29, 2012)**

近日，国家税务总局公布《关于认定税收协定中“受益所有人”的公告》，并将于 6 月 29 日生效。该规定允许更多总部位于中国大陆之外的公司仅需缴纳 5% 的预提税即可将其股息从中国遣返本国，而来自与中国没有税收协定之国家的公司则适用 10% 的税率，前者仅为后者的一半。在此规定对现行税收法规加以澄清之后，将有更多外国公司能够以较低的税率将源自中国的利润遣返回本国，这也是中国持续放宽资本限制的最新举措。该规定将适用于香港、新加坡等地区，但不适用于美国，尽管美国与中国之间亦存在避免双重征税协定，但该协定规定的预提税率为 10%。

Recently, the State Administration of Taxation issued Announcement of the State Administration of Taxation on the Determination of "Beneficial Owners" in the Tax Treaties and took effect June 29. It allows more companies based in some places outside mainland China to pay as little as 5% withholding tax on dividends sent home from China, half the 10% rate that companies from countries without a tax treaty need to pay. More foreign companies will be able to repatriate their profits from China at a lower tax rate after State Administration of Taxation clarified existing regulations. The new rules would apply to places such as Hong Kong and Singapore, Mr. Ho said. But it wouldn't apply to the U.S. even though it also has a double-taxation treaty with China, he said, because that treaty sets the withholding rate at 10% anyway.

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## **投资动态**

### **INVESTMENT DEVELOPMENTS**

- 《澳大利亚在华金融机构 2012 年白皮书》发布（来源：国际商报，2012 年 6 月 5 日）  
**White Paper on Australian Financial Institutions in China in 2012 Promulgated**  
(Source: [www.shangbao.net.cn](http://www.shangbao.net.cn), June 5, 2012)

日前，《澳大利亚在华金融机构 2012 年白皮书》在京交会澳大利亚开放日上发布。白皮书强调了中国和澳大利亚金融服务行业在过去一年里的发展重点，并就如何加强澳中金融服务业往来等问题给出了若干建议，如增加外资金融机构进入市场的途径、加强中国金融监管机构与外资金融机构的对话、扩大市场容量并进一步整合市场等。

Recently, White Paper on Australian Financial Institutions in China in 2012 was promulgated on Australia Theme Day in China Beijing International Fair for Trade in Services. White Paper emphasizes the development focus in the financial service sector between China and Australia in the previous year and puts forward some suggestions on issues concerning how to strengthen Australia-China financial service business contact, including increasing channels for the entry of foreign-invested financial institutions into the market, intensifying the dialogue between China financial regulatory institutions and foreign-invested financial institutions, enlarging the capacity of the market and further integrating the market.

今年 3 月份，中国与澳大利亚签署双边本币互换协议，互换规模达 2000 亿元人民币。5 月 15 日，澳新银行宣布对其子公司澳新中国注资 20 亿元人民币，以支持其在中国的业务发展。目前，中澳金融领域合作是双方服务业合作中最为活跃的部分。

In March of this year, China and Australia signed the Bilateral Currency Reciprocal Agreement with the reciprocal scale of CNY 200 billion. On May 15, Australia & New Zealand Banking Group Limited (ANZ Bank) declared to increase the investment of CNY 2 billion to its subsidiary, Australia and New Zealand Bank (China) Company Limited so as to support its business development in China. Currently, the cooperation between China and Australia in the financial field is the most active part in Australia-China cooperation in the service sector.

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- 大陆有关部门新推出多项对台惠民新举措（来源：人民网，2012 年 6 月 19 日）  
**Mainland Authorities Newly Introduce Many Favorable Moves towards Taiwanese**  
(Source: [www.people.com.cn](http://www.people.com.cn), June 19, 2012)

6 月 17 日在厦门举行的第四届海峡论坛大会上，国务院台办主任王毅宣布：大陆



各有关主管部门新推出多项对台惠民新举措，涉及台胞在大陆就业和大陆居民赴台游、便利台胞来往大陆、进口台湾大米以及促进两岸教育、科技合作，增设两岸交流基地等方面。人力资源和社会保障部决定，进一步放宽在大陆毕业的台湾学生及其他台湾居民在大陆就业的相关政策。国家旅游局提出进一步扩大大陆居民赴台旅游的措施，今年争取推动大陆居民赴台旅游规模达到 180 万人次。

At the fourth Straits Forum held in Xiamen on June 17, Wang Yi, the director of the State Council Taiwan Affairs Office, announced that, mainland authorities newly introduced many favorable moves towards Taiwanese, which allow Taiwan compatriots to work in mainland, and mainland residents to travel to Taiwan, make it convenient for Taiwanese traveling across strait, and mainland importing Taiwan rice, and promote the cross-strait corporations in education and science, increase construction of cross-strait exchange bases. MHRSS (Ministry of Human Resources and Social Security) decided to further relax policies related to mainland employment for Taiwanese students graduated from mainland China and other Taiwan residents. CNTA (China National Tourism Administration) put forward measures to further expand the tourism scale of mainland residents traveling to Taiwan, and try to promote the tourism scale this year to reach the level of 1.8 million passengers.

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- 中央政府出台一系列加强内地与香港合作的政策措施（来源：新华网，2012 年 6 月 28 日）

**Central Government Issues a Series of Policy Measures to Strengthen the Mainland-Hong Kong Cooperation (Source: [www.xinhua.org](http://www.xinhua.org), June 28, 2012)**

日前中央政府制定一系列政策措施，加强内地与香港合作，进一步支持香港经济社会发展。这些政策措施主要涉及经贸合作、金融合作、教育交流、科技合作、旅游合作、粤港合作等六大方面。

Recently, the Central Government has formulated a series of policy measures to strengthen the cooperation between the Mainland and Hong Kong and to further support the economic and social development of Hong Kong. Such policy measures mainly cover the following 6 aspects: economic and trade cooperation, education exchange, scientific and technological cooperation, tourism cooperation, and cooperation between Hong Kong and Guangdong.

经贸合作方面，将签署《内地与香港关于建立更紧密经贸关系的安排》补充协议九；推动内地与香港企业联合“走出去”；支持珠三角地区港口、机场、轨道交通之间的衔接与合作等。

For the economic and trade cooperation, the Supplement IX to the Mainland and Hong Kong Closer Economic Partnership Arrangement will be signed; enterprises based in the Mainland and Hong Kong will join hands to "go global"; and the Pearl River Delta will be supported in respect of the connection and cooperation among ports, airports and rail transport.

金融合作方面，支持第三方利用香港办理人民币贸易投资结算，进一步丰富香港人民币离岸产品；推动沪深港交易所联合设立合资公司，推出内地与香港两地市场互相挂牌的交易所交易基金产品等。

For financial cooperation, third parties are encouraged to go through the settlement formalities for Renminbi trade investment through Hong Kong to further enrich the offshore Renminbi products of Hong Kong; and the stock exchanges in Shanghai, Shenzhen and Hongkong are promoted to establish an equity joint venture to release the fund products listed both in the Mainland and Hong Kong and to be traded at the stock exchanges.

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## **实务经验**

### **PRACTICAL EXPERIENCE**

#### **股东之间那些事儿之管好公司的营业执照和公章<sup>1</sup>**

##### **As Between Shareholders – Managing the business license and official seal of a joint venture company**

作者：邓永泉

By: Dennis Deng

营业执照和公章对于公司和股东来讲至关重要，在股东纠纷中往往成为斗争的焦点。遗憾的是，在风险控制中，它们又常常被忽略，可能股东认为是法律问题应该由律师负责，而律师又认为是商业问题应由股东自己操心。最近，我又遇到了这种事，因此，觉得很有必要提醒未来股东们的注意。

Business license and official seal are critical to a company and its shareholders, and are oftentimes at the center of contention in shareholder disputes. Regrettably, they are often neglected in risk control, possibly because shareholders believe it is a legal issue and should be the responsibility of lawyers, and the lawyers on the other hand believe it is a commercial issue and should be taken care of by the shareholders themselves. I recently came across such an incident, and felt it necessary to bring this to the attention of future shareholders.

我最近又遇到的这种事

A recent incident

一个美国公司与一个中国公司在北京设立了一家中外合资企业（“合资企业”），经营文化创意产业。双方的实际控制人有多年的交情，彼此貌似非常信任。在合资企业中，美

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<sup>1</sup> 本文初稿首发于《融资中国》2012 年 7 月刊。



方股权比例为 51%，中方股权比例为 49%。董事会是合资企业的权力机关，有四名董事，双方各委派两名。美方实际控制人为董事之一，担任董事长，是公司的法定代表人。中方实际控制人也是董事之一，担任总经理。根据合资企业的公司章程规定，合资企业的重大事项由所有董事一致同意，其他事项由三分之二董事同意。合资企业创立之初，美方实际控制人忙于自己在美国的事务，无法来中国对履行法定代表人职责，因此，合资企业的营业执照和公章、财务章都掌握在中方实际控制人（总经理）的手中，美方实际控制人（法定代表人）还刻了一个人名章，一并交给中方实际控制人（总经理），以方便其工作。

A U.S. based company and a Chinese company set up a Sino-foreign joint venture company (“JV Co.”) in Beijing to engage in culture and creative business. The de-facto controlling persons on both sides are old business friends dating back many years, and appear to have deep mutual trust. The U.S. company has a 51% and the Chinese company 49% equity interest in the JV Co.. The Board of Directors, which is the governing body of the JV Co., is comprised of four directors, giving the parties equal representation. The de-facto American controlling person is one of the directors, and also serves as chairman of the board, and legal representative of the JV Co.. The de-facto Chinese controlling person is also a director, and he serves as the general manager of the JV Co.. As provided in the Articles of Association of the JV Co., major matters of the JV Co. are subject to unanimous approval of the full board, and other matters are subject to approval by a two third majority. In the initial stage following establishment of the JV Co., the de-facto American controlling person was busy with his own business in the U.S., and could not come to China to perform the duties demanded of a legal representative. As a result, the business license, the official seal and the financial seal of the JV Co. fell into the hands of the de-facto Chinese controlling person (i.e. the general manager). The de-facto American controlling person (i.e. the legal representative) had made a personal chop and handed it over to the de-facto Chinese controlling person (i.e. the general manager) to facilitate his performance of the job.

时隔不久，问题就来了。

Problems surfaced shortly after.

合资企业建了一片文化创意产业园，拟将其中的住宅部分出售给入园的企业或艺术家。中方实际控制人（总经理）手里拿着合资企业的营业执照和公章、财务章、法定代表人名章，不经美方实际控制人（法定代表人）同意，直接就与艺术家们签订了买卖合同。合资企业的会计是中方实际控制人（总经理）的女儿，所以，这些销售款也都完全由中方实际控制人（总经理）控制了。当美方实际控制人（法定代表人）来到合资企业履行指责，要求中方实际控制人（总经理）将营业执照和公章、财务章、法定代表人名章交还给他时，中方实际控制人（总经理）却置之不理，美方实际控制人（法定代表人）什么都管不了，合资企业完全失控。

The JV Co. developed a culture and creative industry park, and intended to sell the residential units to companies or artists who move their business operations into the park. The de-facto Chinese controlling person (i.e. the general manager) had in his control the business license, the official seal and the financial seal of the JV Co., as well as the personal seal of the legal representative, and without consent of the de-facto American controlling person (i.e. the legal representative), he directly signed sales and purchase contracts with the artists. As the

accountant of the JV Co. is the daughter of the de-facto Chinese controlling person (i.e. the general manager), and all the sales proceeds are therefore entirely controlled by the de-facto Chinese controlling person (i.e. the general manager). When the de-facto American controlling person (i.e. the legal representative) came to perform duties as the legal representative of the JV Co., and asked for the return of the business license, the official seal and the financial seal of the JV Co., and his own personal chop, his request was met with deaf ears, and he was left powerless, and the JV Co. run out of control completely.

这种事情太多了！那么，可以解决吗？有的可以，有的很难！

Such incidents are so commonplace! Could it be redressed? Some could, but some may prove very difficult.

挂失

Report it Missing

如果只是营业执照或公章其一在中方实际控制人（总经理）手里，美方实际控制人（法定代表人）还可以向主管工商局申请挂失营业执照或公章，补办新的营业执照或补刻公章，然后再由美方实际控制人（法定代表人）掌握新的营业执照和公章。然而，营业执照和公章都在中方实际控制人（总经理）手里，这就很难通过挂失来解决了。一般来讲<sup>2</sup>，挂失补刻公章需要公司法定代表人签字并提供营业执照；挂失补办营业执照则需要加盖公司公章<sup>3</sup>，并由公司章程规定的公司权力机关出具决议。如上所述，合资企业的董事会是双方各自委派两名董事，根据合资企业公司章程规定，合资企业的重大事项由所有董事一致同意，其他事项由三分之二董事同意，而中方委派的两名董事是不会同意公司挂失并补办营业执照的，因此，公司也就无法先后挂失、补刻公章和补办营业执照的。

If either the business license or the official seal (not both) is in the hands of the de-facto Chinese controlling person (i.e. the general manager), the de-facto American controlling person (i.e. the legal representative) may apply to the competent administration for industry and commerce to report the missing of the corporate business license or official seal, and apply for a new business license or a new official seal, and the de-facto American controlling person (i.e. the legal representative) will then control the new business license and official seal. However, in our case, both the business license and the official seal are in the hands of the de-facto Chinese controlling person (i.e. the general manager), and it is difficult to regain both by reporting them missing. Generally speaking, to report a missing official seal and apply for a new official seal, it requires the signature of the legal representative and presentation of the business license, and to report a missing business license and apply for a new license, it requires affixation of the official seal, and presentation of a resolution issued by the governing body designated in the Articles of Association of the company. As stated above, the parties have equal representation on the board of the JV Co., and under the Articles of Association of the JV Co., major matters are subject to unanimous approval of the full board, and other matters are subject to approval by a two third majority. In our case, the two directors representing the Chinese shareholder would not have

<sup>2</sup> 实践中，有的地区发生过同时挂失补办营业执照和挂失补刻公章的成功案例。

<sup>3</sup> 有的地区还需要加盖中方股东公章和外方股东法定代表人签字。

agreed to the JV Co. reporting loss of the business license and apply for a new business license, and thus the JV Co. could not report the loss nor apply for a new official seal and a new business license.

#### 合资企业起诉中方实际控制人（总经理）

The JV Co. sues the de-facto Chinese controlling person (i.e. the general manager)

美方实际控制人（法定代表人）可以尝试由合资企业起诉<sup>4</sup>中方实际控制人（总经理），要求其向公司返还营业执照和公章等，然后再由美方实际控制人（法定代表人）掌握新的营业执照和公章，但是能否获得支持，甚至能否立案都取决于法官的自由裁量权，因为法律法规没有对营业执照和公章应该由谁来持有做出规定。有的法官认为“法定代表人是公司的代表，营业执照和公章应由法定代表人代表公司持有”，但这种观点不是多数意见。更多的观点认为，公司法并未明确规定营业执照和公章应该由谁来代表公司持有，因此这属于公司内部管理问题，应按照公司章程或其他公司内部规定来确定由谁代表公司持有。如果没有规定，则需要公司权力机关出具决议决定该事项。

The de-facto American controlling person (i.e. the legal representative) may attempt to have the JV Co. sue the de-facto Chinese controlling person (i.e. the general manager), demanding him to return the business license and official seal etc. to the JV Co., and the de-facto American controlling person (i.e. the legal representative) will then regain control of the business license and official seal. However, whether this request would be granted, or even whether admitted into docket by the court, is at the discretion of the judges, as there is no clear rules in the laws and regulations regarding who should hold the business license and the official seal. Some judges, minority in number, hold that “as the legal representative represents the company, the business license and official seal of the company should be held by the legal representative for and on behalf of the company”, while the majority view this as an internal management matter to be determined in accordance with the articles of association or other internal corporate regulations, or in the absence of such internal regulations, determined by a resolution of the governing body of the company, as there is no clear language in the PRC Company Law regarding who should hold the business license and official seal for the company.

#### 刑事手段

##### Criminal Sanctions

这是一种极端的手段。如果美方实际控制人（法定代表人）有证据证明中方实际控制人（总经理）凭借其对合资企业的实际控制权，将合资企业的财产挪为己用，那么美方实际控制人（法定代表人）就可以考虑向公安机关报案，追究其刑事责任。如果成功，美方实际控制人（法定代表人）就可以彻底排除中方实际控制人（总经理）对合资企业的控制了，营业执照和公章等也就全都拿回来了。

It is an extreme measure. If the de-facto American controlling person (i.e. the legal representative) has evidence proving that the de-facto Chinese controlling person (i.e. the general manager) embezzled the properties of the JV Co. by virtue of his actual control over the

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<sup>4</sup> 在本案中，双方的争议解决选择了诉讼而不是仲裁。

JV Co., he may consider report the case to public security bureau and hold the de-facto Chinese controlling person criminally liable. If the de-facto American controlling person succeeds, he could completely eliminate the de-facto Chinese controlling person's (i.e. the general manager's) control over the JV Co., and recover the business license and the official seal etc..

别人的教训，自己的经验

Lessons learned

看来，股东们应该未雨绸缪，从一开始就要根据自己的实际情况好好筹划一下营业执照和公章的事。

It seems that shareholders should prepare for the rainy days, and make plans regarding the business license and official seal from the outset on a case by case basis.

首先，公司营业执照和公章由自己人持有的股东（“持有股东”）一定不要让其他股东染指公司营业执照和公章，特别是在公司章程或公司内部规定没有明确规定公司营业执照和公章由自己人来持有的情况下。谨慎起见，持有股东最好还是在公司章程或公司内部规定中明确规定公司营业执照和公章由自己人来持有，因为在实际使用过程中，其他股东（“非持有股东”）的人有接触营业执照或公章的机会，很有可能借机夺走。如果公司章程或公司内部规定再没有相应规定，那么持有股东就可能讨不回来了。

First of all, the shareholder which currently holds the corporate business license and official seal of a joint venture company (the “Holding Shareholder”) must not let the other shareholders have their hands on the joint venture's business license and official seal, in particular if there is no express provision in the joint venture's articles of association or internal regulations designating the Holding Shareholder to hold the joint venture's business license and official seal. To be on the safe side, the Holding Shareholder had better introduce a clear provision in the joint venture's articles of association or internal regulations that designate the Holding Shareholder to hold the joint venture's business license and official seal, as in the ordinary course, other shareholders (the “Non-Holding Shareholders”) also have access to the business license or the official seal, and may likely use such access to take them away. In the absence of clear rules in the joint venture's articles of association or internal regulations, it would be difficult for the Holding Shareholder to ever regain the business license and official seal.

其次，对于非持有股东来讲，需要以公司内部规定的形式<sup>5</sup>明确规定营业执照和公章的使用权限、程序和事项，防止持有股东滥用营业执照和公章，在其滥用营业执照和公章的情况下也可以确定其责任<sup>6</sup>。另外，非持有股东还需要在公司章程中设立一方股东即可决定公司可以起诉股东的机制，以防持有股东把持公司，导致公司无法起诉持有股东。

Second, the Non-Holding Shareholder needs to make sure that the internal regulations of

<sup>5</sup> 在公司章程中规定很麻烦，如果稍有变动，就得到商务机关进行变更。当然，在签订合资合同和公司章程的同时，一定要准备好公司内部规定，并由未来的董事签署决议案，待公司取得营业执照的时候即可生效。这样可以防止公司设立之后达不成公司内部规定，损害非持有股东的利益。

<sup>6</sup> 相应地，在合资合同中还要规定股东委派的人员违反公司内部规定的责任，以便公司或其他股东可以追究违约股东的责任。

the joint venture expressly provide for the authority, process and matters for use of business license and official seal, to prevent abuse by the Holding Shareholder, and also to determine liability in case of such abuse. In addition, the Non-Holding Shareholder also needs to establish in the articles of association of the joint venture a mechanism where any single shareholder can make a decision to have the joint venture sue another shareholder to prevent the Holding Shareholder taking the joint venture prisoner and rendering it unable to sue the Holding Shareholder.

第三，如果股东间势力比较均衡，公司营业执照和公章可以分别由两个股东或者两个股东联盟分别持有。营业执照由势力较小的股东持有，公章由势力较大的股东持有。在需要使用营业执照的时候，势力较小的股东出示营业执照或提供复印件<sup>7</sup>。这样的话，势力较小的股东在某些情况下就可以对势力较大的股东起到一定的牵制作用，在某些情况下甚至占据了主动地位或者对势力较大的股东有一定的威慑作用。

Third, if the powers of the shareholders are more or less balanced, the business license and official seal of the joint venture company may be separately kept by each shareholder or each coalition of shareholders. The business license should be held by the weaker shareholder, while the official seal by the stronger shareholder. When it is necessary to use the business license, the weaker shareholder will provide the business license or a copy thereof. Thus, the weaker shareholder could constrain the stronger shareholder in certain cases, even taking the initiative in some instances, or have a certain deterrent effect on the stronger shareholder.

最后，需要注意的是，在制订公司内部规定的时候，一定要在公司内部公布并让相关人员签字确认，否则，在具体案件中就有可能无法被采信为证据。

Finally, it should be noted that such internal regulations of the joint venture must be circulated within the joint venture company and signed off by the relevant persons, otherwise, it might not be admitted as evidence in a specific case.

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<sup>7</sup> 如果势力较大的股东不同意如此安排，势力较小的股东还可以做出让步，同意势力较大的股东持有营业执照复印件。



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