


# Private Foreign-Taiwan Joint Ventures: Key Legal/Practical Issues You Must Know

By Owen Chio and Louis Liu  
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# 1. Baker & McKenzie and Biography of the Speakers

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## Our French connection: Christine Lagarde



An accomplished labour and anti-trust lawyer, Mme Christine Lagarde was a Partner with Baker & McKenzie in Paris from 1987 to 2005, when she left to join the French cabinet. She also served as Chairman of Baker & McKenzie from 1999 to 2004.

Christine Lagarde is the current chairman of the IMF.

# 1. Biography of the Speakers



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## Practice Areas

Mergers & Acquisitions; General Corporate & Commercial; Cross-Border Investments and Dispute Resolutions.

## Bar or Law Society Admissions

- ◆ Admitted as an Attorney in the State of New York (2001)
- ◆ Qualified as a Solicitor of England & Wales (2000)
- ◆ Qualified as a Barrister of England & Wales (Lincoln's Inn) (1997)

## Formal Education

- ◆ National Taiwan University, Taiwan (MBA 2014)
- ◆ Lady Margaret Hall, University of Oxford, U.K. (Postgraduate degree 2010)
- ◆ King's College London, University of London, U.K. (LL.M. 1998)
- ◆ The Honourable Society of Lincoln's Inn, U.K. (Degree of an Utter Barrister 1997)
- ◆ University of Manchester, U.K. (LL.B. (Honours)1996)
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# 1. *Biography of the Speakers (cont'd)*



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## **Formal Education**

- ◆ Northwestern University Law School, Chicago, U.S.A. (LL.M. 1998).
- ◆ National Chung-Hsing University, Taipei, Taiwan (LL.B. 1992).



## 2. General Concepts about Joint Ventures

## 2. *General Concepts about Joint Ventures (cont'd)*

### 2.1 What was envisaged before marriage



## ***2. General Concepts about Joint Ventures (cont'd)***

### **2.2 What often became after marriage**



## 2. *General Concepts about Joint Ventures (cont'd)*

### 2.3 Before running, you need to first walk together



## 2. *General Concepts about Joint Ventures (cont'd)*

### 2.4 Majority rules or exploits



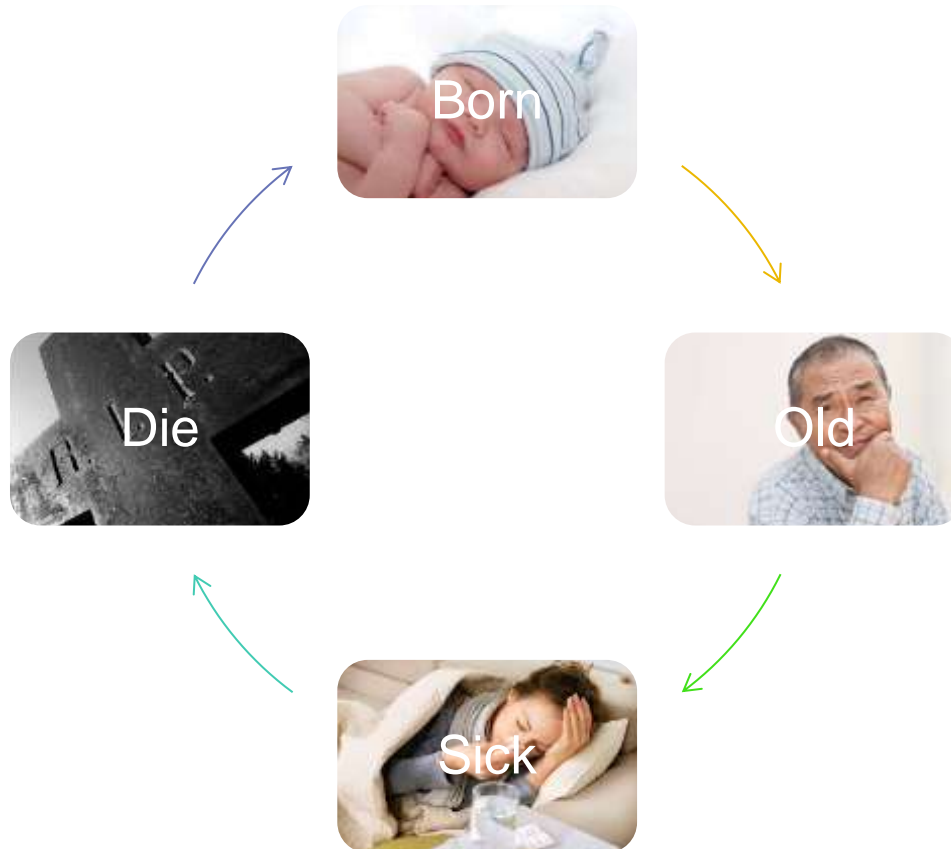
## 2. *General Concepts about Joint Ventures (cont'd)*

### 2.5 Minority tyranny (David vs. Goliath)



## 2. *General Concepts about Joint Ventures*

### 2.6 From Birth to Growth to Sickness, till Death



# 3. Investment Structure Alternatives



# 3. *Investment Structure Alternatives*

## 3.1 Joint Ventures

### 3.1.1 Definition of Joint Ventures

- A **joint venture (JV)** is an entity formed between two or more parties to undertake economic activity together and enjoy the resulting synergy.
- Normally the parties agree to create a new entity by both contributing equity, and they then share in the revenues, expenses, and control of the enterprise.

## ***3. Investment Structure Alternatives (cont'd)***

### **3.1 Joint Ventures (cont'd)**

#### **3.1.2 Advantages of Joint Ventures**

- Combining of resources
- Access to strengths, technology, markets, customers of other JV partner
- Sharing of costs and risks
- Creation of new business

#### **3.1.3 Disadvantages of Joint Ventures**

- Each JV partner must contribute (and cede ownership/control of contributions)
- May have ongoing commitments (eg. funding, licensing technology)
- May need to surrender business scopes and activities to JV Co.
- Potential for conflicts of interest
- Potential difficulties in the event of disputes and termination

## 3. Investment Structure Alternatives (cont'd)

### 3.1 Joint Ventures (cont'd)

#### 3.1.4 Various Types of Joint Ventures (cont'd)

	Existing JV	New JV
Pros	<ul style="list-style-type: none"><li>• Track records to evaluate</li><li>• Existing license/permit</li></ul>	<ul style="list-style-type: none"><li>• Clean shell</li><li>• Not inherit previous liabilities</li></ul>
Cons	<ul style="list-style-type: none"><li>• Potential liabilities to assume</li><li>• M&amp;A rules to follow</li><li>• Tax to seller if buying old shares</li></ul>	<ul style="list-style-type: none"><li>• No track records</li><li>• License/permit issue</li></ul>

## 3. *Investment Structure Alternatives (cont'd)*

### 3.1 **Joint Ventures (cont'd)**

#### 3.1.4 Various Types of Joint Ventures (cont'd)

	<b>Merger</b>
Pros	<ul style="list-style-type: none"><li>• No clear acquirer or target</li></ul>
Cons	<ul style="list-style-type: none"><li>• Need shareholders approvals from both companies</li><li>• Need employees and third party approvals</li></ul>

## 3. Investment Structure Alternatives (cont'd)

### 3.1 Joint Ventures (cont'd)

#### 3.1.4 Various Types of Joint Ventures (cont'd)

	Onshore	Offshore
Pros	<ul style="list-style-type: none"><li>• Simple corporate structure, less dividend taxing</li></ul>	<ul style="list-style-type: none"><li>• Easier to transfer the stake</li><li>• PRC investment</li><li>• IPO possibilities</li></ul>
Cons	<ul style="list-style-type: none"><li>• Regulatory hurdles for transferring stakes</li><li>• PRC investment need IC approval</li><li>• IPO only in Taiwan</li></ul>	<ul style="list-style-type: none"><li>• Complex corporate structure</li><li>• Additional dividend taxing</li></ul>

## 3. Investment Structure Alternatives (cont'd)

### 3.1 Joint Ventures (cont'd)

#### 3.1.4 Various Types of Joint Ventures (cont'd)

	Listed	Non-listed
Pros	<ul style="list-style-type: none"><li>• More visibility</li><li>• Capital market funding is an option</li></ul>	<ul style="list-style-type: none"><li>• Management flexibility</li><li>• Share/equity transfer possibility</li><li>• Shareholders agreement</li></ul>
Cons	<ul style="list-style-type: none"><li>• Disclosure under SEL</li><li>• TSE/OTC rules to follow</li><li>• Restrictions on share transfer</li></ul>	<ul style="list-style-type: none"><li>• Less visibility</li><li>• Less capital market funding</li></ul>

# 3. *Investment Structure Alternatives (cont'd)*

## 3.2 Strategic Alliance

### 3.2.1 Definition of Strategic Alliance

- A **Strategic Alliance** or a contractual joint venture is a formal relationship between two or more parties to pursue a set of agreed upon goals while remaining independent organizations.
- No legal definition. No statutory legal framework. Defined by contract.
- Contractual joint ventures (often referred to as a “consortium” under local practice) are most prevalent in large infrastructure or government projects, where the qualifications of the consortium members and bidders are regulated by the bidding documents.

### 3.2.2 Advantages

- Strong focus on business objectives
- Allows each party to concentrate on its own business and objectives
- Flexibility of relationship and terms
- May be easier to exit

## ***3. Investment Structure Alternatives (cont'd)***

### **3.2 Strategic Alliance (cont'd)**

#### **3.2.3 Disadvantages**

- Generally lower level of commitment, lesser contribution of resources
- Less permanence
- Less conducive to investment in or development of something new together (technology, facilities etc.)
- Parties need to take benefits directly rather than share benefits obtained collectively



# 4. Standard Joint Venture Agreement

## ***4. Standard Joint Venture Agreement***

1. Define the business or project
2. Agree on how to accomplish it (Business Plan)
3. Define the role to be played by each JV partner
4. Define the contributions to be made by each JV partner
5. Define the JV vehicle
6. Provide for equity and financing
7. Allocation of responsibilities
8. Agree on shareholding, control and management

## ***4. Standard Joint Venture Agreement (cont'd)***

9. Provide for deadlock and dispute resolution
10. Provide for put/call and termination of joint venture
11. Non-competition and conflicts of interest
12. Share Transfers and new JV partners
13. Confidentiality

Note: No filing of the JVA with the authorities is required.

# 5. Establishing and Operating a Private Joint Venture Company in Taiwan

## ***5. Establishing and Operating a Private Joint Venture Company in Taiwan***

### **5.1 Nationality of directors, Supervisors, Management and Staff**

- No requirements on the nationality of the directors or supervisors.
- At least one supervisor should have a residence or domicile within the territory of Taiwan.
- No requirements for nationality or residency of management or staff. But there are visa restrictions against employing foreign staff.

### **5.2 Composition of the Board and Supervisors**

- A Company limited by shares must have at least 3 directors and at least 1 supervisor.
- No shareholding requirements for directors or supervisors.

## ***5. Establishing and Operating a Private Joint Venture Company in Taiwan (cont'd)***

### **5.3 Foreign Party**

- Non-residents may generally hold 100% of the share capital of a listed or private local company, unless restricted by law for a few industries.
- Foreign investors usually must obtain FIA.

### **5.4 Capital Requirements**

- There is no minimum paid-in capital requirements for a company limited by shares after 2009.

## ***5. Establishing and Operating a Private Joint Venture Company in Taiwan (cont'd)***

### **5.5 Time**

- About two months to set up a domestic company and obtain the various required operating licences. Extra time may be required to obtain special licences, or FIA if a foreign investor is involved.

### **5.6 Statutory Accounts**

- Financial statements must be audited for Taiwan companies having paid-in capital of more than NT\$30m.

## ***5. Establishing and Operating a Private Joint Venture Company in Taiwan (cont'd)***

### **5.7 Payment for Shares**

- In the case of an FIA company, equity may be contributed by way of the following:
  - Cash or debt
  - Machinery, equipment or raw materials for the company's own use
  - Patent, copyright, trademark rights, technical know-how or other intellectual property rights, or
  - Other property approved by the competent authority.

Cannot use shares of a foreign investor as consideration, except if there's a share exchange or share swap under M&A law, if the foreign company is not a shell company.



## ***5. Establishing and Operating a Private Joint Venture Company in Taiwan (cont'd)***

### **5.8 Disposal of Shares**

- Generally no restrictions on the disposal of shares, other than the shares held by promoters which shall not be transferred until one year after incorporation.

### **5.9 Types of Governing and Managing Structures**

- The chairman is very important as he normally will have power to represent the company.
- The chairman bears various statutory obligations and liabilities.

# 6. The Right Shareholding Percentages and Board Representations

## 6. The Right Shareholding Percentages and Board Representations

### 6.1 Overview

Level of Control	Shareholding Ratio/Percentage	Board Seats
Super-Majority Control	$\geq 2/3$	$\geq 2/3$
Majority Control	$> 1/2$	$> 1/2$
Potential Grid-Lock	$1/2$	$1/2$
Substantial Minority with Veto Powers Over Significant Matters	$< 1/2$ but $> 1/3$	$> 1/3$
Insider / Substantial Minority Financial Investor	$\geq 10\%$ : (i) An insider in a listed company; (ii) can solicit proxy in a listed company	1 or 2 Seats as a director or an observer

## 6. The Right Shareholding Percentages and Board Representations (cont'd)

### 6.1 Overview (cont'd)

Level of Control	Shareholding Ratio/Percentage	Board Seats
<p><b>Meaningful Minority</b></p>	<p>≥ 3%: Petition the court to remove a director/supervisor</p> <p>≥ 3% for one year: (i) <u>Petition</u> the Board or (if the Board fails to do so within 15 days) the authorities <u>to call an EGM</u>; (ii) Request the supervisor to file law suit or (if the supervisor fails to do so within 30 days) <u>file law suit</u> on behalf of the company <u>against directors</u>; (iii) <u>Petition</u> the court to appoint an <u>inspector</u> of the company's books, business and assets; ... etc.</p>	

## 6. The Right Shareholding Percentages and Board Representations (cont'd)

### 6.1 Overview (cont'd)

Level of Control	Shareholding Ratio/Percentage	Board Seats
Meaningful Minority (cont'd)	<p>≥ 1%: Nominate a director</p> <p>≥ 1% for one year: (i) In case a company suffered damages in a <u>non-arm's length transaction</u> with its parent company, such shareholder of the subsidiary shall be entitled to, on behalf of the subsidiary, <u>claim damages against the parent company and its responsible persons</u>;</p> <p>(ii) Make <u>one proposal for the AGM</u></p>	

## 6. The Right Shareholding Percentages and Board Representations (cont'd)

### 6.2 Shareholders Meetings

Matter	General Quorum & Voting Thresholds (Private Co. / Public Co.)	Special Quorum & Voting Thresholds (Public Co.)
Private placement	N/A to a private company	<b>Quorum:</b> 50%+ of outstanding shares <b>Voting threshold:</b> 2/3 of attending shares
Dividend payment	<u>1) Cash dividend:</u> <b>Quorum:</b> 50%+ of outstanding shares <b>Voting threshold:</b> > 50% Vote <u>2) Share dividend:</u> <b>Quorum:</b> 2/3 of outstanding shares <b>Voting threshold:</b> > 50% Vote	<u>1) Cash dividend:</u> <b>Quorum:</b> 50%+ of outstanding shares <b>Voting threshold:</b> > 50% Vote <u>2) Share dividend:</u> <b>Quorum:</b> 50% + of outstanding shares <b>Voting threshold:</b> 2/3 of attending shares
Election of board members	Cumulative voting	Cumulative voting

## 6. The Right Shareholding Percentages and Board Representations (cont'd)

### 6.2 Shareholders Meetings (cont'd)

Matter	General Quorum & Voting Thresholds (Private Co. / Public Co.)	Special Quorum & Voting Thresholds (Public Co.)
Discharge of an elected Director	Quorum: 2/3 of outstanding shares Voting threshold: > 50% Vote	Quorum: 50%+ of outstanding shares Voting threshold: 2/3 of attending shares
Change of articles of incorporation or increase/decrease authorized capital	Quorum: 2/3 of outstanding shares Voting threshold: > 50% Vote	Quorum: 50%+ of outstanding shares Voting threshold: 2/3 of attending shares
Sale of all or major portion of assets, or acquire business/property to such extent as may substantially affect the business of the acquirer	Quorum: 2/3 of outstanding shares Voting threshold: > 50% Vote	Quorum: 50%+ of outstanding shares Voting threshold: 2/3 of attending shares

## 6. The Right Shareholding Percentages and Board Representations (cont'd)

### 6.2 Shareholders Meetings (cont'd)

Matter	General Quorum & Voting Thresholds (Private Co. / Public Co.)	Special Quorum & Voting Thresholds (Public Co.)
Dissolution/Merger/Spin-off	Quorum: 2/3 of outstanding shares Voting threshold: > 50% Vote	Quorum: 50%+ of outstanding shares Voting threshold: 2/3 of attending shares
Acquired by way of share swap to become a wholly-owned subsidiary (per M&A Law)	Quorum: 2/3 of outstanding shares Voting threshold: > 50% Vote	Quorum: 50%+ of outstanding shares Voting threshold: 2/3 of attending shares
General assumption or general transfer of another company's business or assets (per M&A Law)	Quorum: 2/3 of outstanding shares Voting threshold: > 50% Vote	Quorum: 50%+ of outstanding shares Voting threshold: 2/3 of attending shares



## 6. The Right Shareholding Percentages and Board Representations (cont'd)

### 6.2 Shareholders Meetings (cont'd)

Matter	General Quorum & Voting Thresholds (Private Co. / Public Co.)	Special Quorum & Voting Thresholds (Public Co.)
<p>In a M&amp;A transaction, appoint a <u>special temporary administrator</u> of the company to exercise the powers and authorities of the Chairman and the board, if there is a concern that the board may not be able to exercise its powers and authorities (per M&amp;A Law)</p>	<p><b>Quorum:</b> 2/3 of outstanding shares <b>Voting threshold:</b> &gt; 50% Vote</p>	<p><b>Quorum:</b> 50%+ of outstanding shares <b>Voting threshold:</b> 2/3 of attending shares</p>
<p>Remove the statutory restriction for equity investments in other companies in excess of 40% of the company's paid-in capital</p>	<p><b>Quorum:</b> 2/3 of outstanding shares <b>Voting threshold:</b> &gt; 50% Vote</p>	<p><b>Quorum:</b> 50%+ of outstanding shares <b>Voting threshold:</b> 2/3 of attending shares</p>

## 6. *The Right Shareholding Percentages and Board Representations (cont'd)*

### 6.2 Shareholders Meetings (cont'd)

Matter	General Quorum & Voting Thresholds (Private Co. / Public Co.)	Special Quorum & Voting Thresholds (Public Co.)
Allow a director of the board to engage in competitive activities	Quorum: 2/3 of outstanding shares Voting threshold: > 50% Vote	Quorum: 50%+ of outstanding shares Voting threshold: 2/3 of attending shares

## 6. *The Right Shareholding Percentages and Board Representations (cont'd)*

### 6.3 Board Meetings

Matter	Special Quorum & Voting Thresholds
Elect Chairman of the board	<b>Quorum:</b> 2/3 <b>Voting threshold:</b> > 50%
Issue new shares or corporate bonds	<b>Quorum:</b> 2/3 <b>Voting threshold:</b> > 50%
Buy back the JV's shares	<b>Quorum:</b> 2/3 <b>Voting threshold:</b> > 50%
Approve employee stock option plan	<b>Quorum:</b> 2/3 <b>Voting threshold:</b> > 50%
Merge a company 90% owned by the JV	<b>Quorum:</b> 2/3 <b>Voting threshold:</b> > 50%

## 6. *The Right Shareholding Percentages and Board Representations (cont'd)*

### 6.3 Board Meetings (cont'd)

Matter	Special Quorum & Voting Thresholds
Merge a company by issuing up to 20% new shares and/or paying cash not exceeding 2% of the JV's net asset value	<b>Quorum:</b> 2/3 <b>Voting threshold:</b> > 50%
Appoint key managers	<b>Quorum:</b> 1/2 <b>Voting threshold:</b> > 50%
Public issuance of the company's shares	<b>Quorum:</b> 1/2 <b>Voting threshold:</b> > 50%

# 7. Directors; Their Fiduciary Duties; Conflict of Interests

## 7. Directors; Their Fiduciary Duties; Conflict of Interests

	Individual Director	Corporate Director or Corporate Representative Director
<b>Capacity</b>	<ul style="list-style-type: none"> <li>To be elected in the capacity of the individual as the individual himself/herself</li> </ul>	<ul style="list-style-type: none"> <li>To be elected in the capacity of the individual as a corporate director or corporate shareholder representative</li> </ul>
<b>Discharge/replacement</b>	<ul style="list-style-type: none"> <li>Fixed tenure, unless discharged/replaced by a shareholders resolution</li> </ul>	<ul style="list-style-type: none"> <li>Can be replaced any time by the corporate shareholder</li> </ul>
<b>Duty, obligation and liability as a director</b>	<ul style="list-style-type: none"> <li>Owes fiduciary duty to the company</li> </ul>	<ul style="list-style-type: none"> <li>Owes fiduciary duty to the corporate shareholder, in addition to the company</li> <li>The acts of the individual appointed by the Corporate Director would be deemed those of the Corporate Director</li> </ul>

## 7. Directors; Their Fiduciary Duties; Conflict of Interests (cont'd)

	Individual Director	Corporate Director or Corporate Representative Director
<b>Practical flexibility and benefit for the corporate shareholder</b>	<ul style="list-style-type: none"> <li>• Can make judgment based on his/her own business judgment and fiduciary duty to the company</li> <li>• Conceivably can more likely carry out director duty during the whole term of directorship and make a better contribution to the company</li> </ul>	<ul style="list-style-type: none"> <li>• There can only be one Corporate Director for on corporate shareholder.</li> <li>• Can make judgment based on his/own fiduciary duty to the company, but at the same time, be subject to the instruction/restriction from the corporate shareholder</li> <li>• May spend extra time and efforts to communicate to/for the corporate shareholder/company</li> </ul>
<b>Conflict of interests</b>	<ul style="list-style-type: none"> <li>• Can potentially avoid certain apparent director conflict of interest between the corporate shareholder and the company</li> </ul>	<ul style="list-style-type: none"> <li>• Shall refrain from voting if any conflict of interest between the corporate shareholder and the company</li> </ul>

# 8. Deadlock Resolutions



# 8. *Deadlock Resolutions*

## 8.1 **Deadlock**

- **Deadlock** occurs when any matter for which an affirmative vote by the board of directors at a board meeting or by the shareholders at a shareholders' meeting is required for approval, and such matter is not approved or rejected in two immediate successive meetings.

## 8.2 **Discussion Among JV Partners**

- Start with the meeting/discussion among the working-level people from all JV partners.
- If no workable, escalate to higher level management (such as CFO/CEO).
- If still not workable, escalate to even higher level (such as board of directors) for resolution.

## **8. *Deadlock Resolutions (cont'd)***

### **8.3 Put/Call**

- If the discussion does not result in a mutually acceptable resolution, the parties may consider:
  - To have the dissenting party sell the shares to other JV partners (Put), or to have the dissenting party purchase the shares from other JV partners (Call).
  - Put/Call can be a part of the JV agreement for deadlock resolution.

### **8.4 Dissolution**

- If the parties do not want to continue the JV, they can dissolve the company.
- Can be a part of the JV agreement for deadlock resolution.

# 9. IPO the Joint Venture in Taiwan

## ***9. IPO the Joint Venture in Taiwan***

- The JV Agreement shall be terminated during the IPO application.
- Lock-up of insider's shares for six months (50%) and one year (50%).
- Share transfer restrictions on insiders.
- Continuous disclosure obligation.

# 10. Wrap-Up

## ***10. Wrap-up***

- Questions
- Comments
- Discussion of points of interest
- Sharing of experiences

THANK YOU

