

JUNHE SPECIAL REPORT



January 19, 2023

"Doing Business in a Re-opened China" Series

Editor's note:

China has never officially closed its doors, but cumbersome restrictive measures during the pandemic led to a virtual standstill in the country's exchanges with other nations. Since November 2022, China had gradually optimized its COVID strategies and lifted most of its quarantine and travel restrictions domestically. From January 8, 2023, China's exit-entry policy has also been greatly loosened. The country is now prepared to embrace the world once again.

At the time of China's re-opening, the world has seen profound changes. Inflation, energy crisis and climate change continue to trouble many countries, while concerns over economic recession and security dampen the confidence of the market. In the face of a complex and uncertain "new normal" after the "re-opening", is China still a market worthy of investment?

China remains a promising market for most foreign investors in a post-covid world. China remains one of the most friendly nations for foreign investment and foreign capital. As Premier Li Keqiang said: "China will not reverse its open door policy, just as the Yangtze and Yellow Rivers will not reverse their courses". China's huge domestic market, robust supply chain, sound infrastructure, as well as its highly qualified, hard-working and loyal labor force can bring decent returns for foreign investors. To remain competitive in the Chinese market, however, foreign companies and investors must be more

active than ever to monitor local regulatory and market changes, and be more agile in their strategies and operations.

Taking advantage of its more than 30 years of experience in assisting foreign clients, JunHe prepared this series title "Doing Business in a Re-opened China" to summarize in Q&A form the most common questions foreign investors have regarding investing and doing business in China. We have also designed novel legal service products to address client needs. With these efforts, we are hopeful that foreign investors and companies can steer clear of hidden rocks in China, build more confidence, and remain competitive and prosperous in this important market.

Episode I: Toes in Water

Chapter I - How to Conduct Due Diligence on Chinese Suppliers

Introduction

Foreign companies and foreign-invested companies need law-complying and reputable business partners in China. It is important to conduct due diligence on their Chinese suppliers. In this chapter, we answer some of the most frequently asked questions from our clients regarding due diligence on Chinese suppliers.

1. Is it common to conduct due diligence on

suppliers in China¹?

Due diligence on suppliers in China is very common. Foreign companies, foreign-invested companies, as well as domestic state-owned and privately-owned companies in China all conduct due diligence on potential business partners due to commercial considerations or internal requirements.

2. What are the focuses during supplier due diligence?

The focuses of supplier due diligence depend on the purposes of the investigation. Many investigating parties are particularly interested in the legal compliance of Chinese suppliers, especially anti-corruption compliance, so the focus is often on the current and historical compliance of the suppliers, including any record of administrative penalties or litigation involving the suppliers and their executives, shareholders, and actual controllers. Questions are frequently asked if they have engaged in commercial bribery or other misconduct, and whether they are affiliated with the employees or management of the investigating party. In some other investigations, the investigating party will focus more on the supplier's background and credentials, such as the supplier's shareholding structure, beneficial owner, financial statements, solvency, business situation and market reputation.

In recent years, some clients have been asking more questions out of export control and sustainability considerations. Suppliers' raw material origins, labor rights protection, corporate governance and environmental compliance have

become increasingly interested by our clients.

3. How is supplier due diligence normally conducted in China?

Due diligence on suppliers can be conducted either "back-to-back", where suppliers are not informed, or "forthright" where suppliers are asked to provide needed information, or a combination of both. The "back-to-back" approach typically relies on public sources, while the "forthright" approach typically requires suppliers to fill out questionnaires, submit materials and attend interviews. Due diligence can be conducted through online and offline searches and interviews, and review of materials provided by suppliers. It is also common to cross-check the findings through on-site visits and third-party interviews for important matters. In terms of the scope of the due diligence, the investigation often needs to cover the supplier's affiliates and beneficial owners in addition to the supplier itself, but it is less common to extend the investigation to the supplier's upstream and downstream partners.

A "forthright" due diligence typically takes around 2-4 weeks, if the supplier is cooperative in the process. The "back-to-back" due diligence usually takes less time.

4. What public information is available on the supplier?

In China, an investigating party can access a huge amount of valuable public information regarding its partners in China through various sources. Most frequently used sources include the following:

¹ China and Chinese suppliers as described in this chapter should be interpreted respectively as mainland China and suppliers in mainland China. Mainland China, Hong Kong, Macau and Taiwan are subject to different jurisdictions. The discussion in this chapter applies only to mainland China.

| Type of Information | Source of Information | Note |
|--|--|---|
| Basic Information | National Enterprise Credit Information Publicity System (http://www.gsxt.gov.cn) | Available information includes names of shareholders, registered capital, business scope, legal representatives, directors, officers, history of changes in registration, history of equity pledge/freeze/auctions, history of administrative penalties, lawsuits, and negative credibility records of the company |
| Mortgages on movable assets of a company | Uniform Registration System for Movable Property Financing (https://www.zhongdengwang.org.cn) | Available information includes mortgages upon production equipment, raw materials, semifinished products and final products, pledge of accounts receivable, pledge of certificates of deposit, warehouse receipts, and bills of lading, financial leasing, factoring, retention of title, and other movable assets and rights security that can be registered, except for motor vehicle mortgages, ship mortgages, aircraft mortgages, bond pledges, fund share pledges, equity pledges and pledge of property rights in intellectual properties. |
| Effective judgments which are not confidential | China Judgements Online (https://wenshu.court.gov.cn) Credit China (https://www.creditchina.gov.cn/) China Execution Information Disclosure (http://zxgk.court.gov.cn/zhixing/) The People's Court Announcement (https://rmfygg.court.gov.cn/) | The judgments published on websites such as China Judgements Online do not include all existing judgments. Some of the judgments will not be disclosed due to confidentiality issues and there is generally a time lapse between the publication and the uploading of a judgment |
| Public comments and related news reports | Search engines and third-party platforms such as Google, Bing, Baidu, WeChat, etc. | These sources can be used as reference and supporting information to understand a supplier's activities in the relevant market and its business scope |

5. What information is not publicly available?

For non-public companies, unless they choose to voluntarily disclose to the public, their financial information (including management accounts, audit reports, books and records, etc.), internal resolution documents and business transaction information are generally trade secrets and not publicly available. Public companies have more public information due to disclosure requirements. If the address of a company's real estate is available, we can run public search on the ownership and mortgage status of the real property. However, it is usually not possible to search the real property owned by a company if we only know the company name. Similarly, it is difficult to search other assets and liabilities of a private company through public sources. Certain non-public information, such as historical documents filed by a company to a registration authority, can be searched by a qualified attorney.

6. Is it possible to obtain non-public information through investigation companies?

There are cases where an investigating party hires an investigation company or even a private detective to investigate the background of a supplier. However, most clients are very cautious about this approach. The main concern is that it might be difficult to ensure that the investigation company conducts the investigation in compliance with the law. If the investigation company infringes the trade secrets or privacy of a third party in the process, the client could be held liable.

7. Is it necessary to investigate a supplier's affiliates and beneficial owners?

In supplier due diligence in China, investigation is usually not limited to the supplier itself, but to its affiliates and beneficial owners. This is because: (1) in practice, a supplier may leverage different entities during the negotiation, signing and performance of the contract with the client, and such entities are generally controlled by the same

ultimate owner but with different shareholders, assets, liabilities, operations, and personnel; and (2) the reputation, debts and operations of a supplier may depend significantly on the status of its parent/affiliated company and beneficial owner, thus the failure of a beneficial owner may also negatively affect the supplier. Therefore, most supplier due diligence in China will extend to the supplier's affiliates and beneficial owners.

8. What are the issues commonly identified in supplier due diligence?

The following issues are frequently identified in suppliers due diligence: the supplier and the executive of the investigating party are related parties (for example, an executive may take advantage of his/her position to direct the company to procure goods or services from a supplier directly controlled by him/her or his/her relatives, and consequently jeopardize the interests of the company); the supplier or its core members have been subject to criminal or administrative liability due to regulatory compliance issues or fraudulent actions; the supplier lacks operation permits or other necessary qualifications; or the supplier is involved in material disputes. The early detection of such issues allows the client to avoid misjudgments and take precautionary measures in advance (e.g., requiring the supplier to give a performance guarantee).

9. What are the main challenges in supplier due diligence?

The challenges include language and cultural barriers in communication, lack of access to the requested information, inability to determine the truthfulness and completeness of information, and challenges in assessing the risks at practical level. Counsel from an experienced professional advisor will be particularly important in such process.

10. What can outside counsels offer in supplier

due diligence in China?

Outside counsels with international vision and local wisdom can add great value in the supplier due diligence. A team of local attorneys proficient in English and versed in local law and practice can help clients to request information and identify issues more cost-effectively.

JunHe offers both standard and tailor made due diligence menus for our clients. Please email us at China_Business_Support@junhe.com to inquire more about our fee quote and credentials for different exercises.

In our next chapter, we will discuss “How to set up a business operation in China”, stay tuned.

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君合专题研究报告



2023年1月19日

“再开放、话外资”系列第一章：如何对中国供应商进行尽职调查

编者按：

中国开放的大门从未关上，但是在疫情期间，各类严格的防控政策导致中国与其他国家的交流几乎停滞。2022年11月以来，中央不断优化新冠防疫政策，国内的大部分防控政策都已解除。2023年1月8日起，中国的出入境政策也全面调整放开，我们正在再次融入世界。

再次打开国门之际，我们所处的世界已经发生深刻变化。通胀阴影、能源危机、气候变化继续困扰各国政府，而经济衰退和安全顾虑也时时扰乱市场的信心。面对复杂而不确定的“再开放”后新常态，中国是否仍然是一个值得投入的市场？

在后疫情时代，对于绝大多数外国投资者而言，中国市场仍然值得深耕。中国鼓励外商投资的政策不会发生变化，如总理所说：“长江黄河不会倒流，中国对外开放的大门不会关上”。中国巨大的国内市场，完善的供应链体系，完备的基础设施，以及高素质、勤劳忠诚的劳动力群体，依然能为外资带去巨大回报。尽管如此，想要在这复杂多变的环境中持续保持竞争优势，外国投资者和外资企业必须更加积极地去关注监管动向和市场变化，更加敏捷

地去调整战略和业务。

君合结合30多年来服务外资客户的丰富经验，特策划本“再开放、话外资”系列专题，以问答的形式将外资在华投资和经营中最常碰到的问题进行总结归纳。我们还设计了专门的法律服务产品，更有针对性地响应客户需求。我们希望通过这一小小的努力，帮助外国投资者和外资企业熟悉中国的商业和法律环境，继续扎根中国，与中国共同繁荣。

第一季：初试牛刀

第一章——如何对中国供应商进行尽职调查

引言

对于外国企业和外资企业而言，出于在华开展业务，建立稳定供应链等需求，需要有合规经营、信誉良好、具有真实履约能力的供应商作为合作伙伴。因此，对于中国供应商进行有针对性的尽职调查具有重要意义。在本章节中，我们回答了外国企业和外资企业最为关心的一些有关中国供应商尽职调查的问题，以期帮助客户更好地选聘中国供应商。

一、在中国²，对于供应商进行尽职调查是否常见？

针对供应商的尽职调查在中国非常常见。与中国存在业务往来的外国企业、在华外商投资企业以及中国国内的国有企业和私营企业均可能出于商业需要或者公司内部要求而对潜在合作伙伴进行尽职调查。

二、供应商尽职调查中的主要关注点有哪些？

供应商尽职调查的关注点视调查方的调查目的而各有不同。一些调查方特别关注中国供应商的合法合规，尤其是反贿赂合规的情况，因此关注重点是供应商的历史合规情况，包括公司与其高管、股东、实际控制人的行政处罚及涉诉记录，是否有从事过商业贿赂等违法违规行，以及是否与调查方的员工或者董监高人员存在关联关系等。在其他一些调查中，调查方更注重了解供应商的背景和履约能力，将供应商的持股关系、实控人、财务报表、偿债能力、业务情况和市场声誉等作为调查重点。

近几年来，一些客户越来越重视供应链企业的出口管制合规和可持续发展，因此，供应商的原材料来源、劳工权益保护、公司治理及环保方面的合规情况也开始成为调查关注对象。

三、在中国，针对供应商的尽职调查一般如何开展？

针对供应商的尽职调查既可以通过供应商不知情的“背靠背”方式进行，也可以通过由供应商提供信息的“直接调查”方式进行，抑或是二者结合进行调查。“背靠背”方式通常依赖公开渠道信息进行调查，而“直接调查”方式一般会要求供应商填写问卷、提交资料以及接受访谈。调查的方式可以通过线上检索、访谈，也可以通过线下审阅供应商提供的信息的方式进行，对于特别重要的事项，常见通过现场走访及第三方访谈的方式予以交叉

确认。就调查范围而言，除针对供应商实体本身，调查往往需要延伸至供应商的关联企业和实际控制人等，但较少涉及供应商的上下游合作伙伴。

在供应商充分配合的前提下，常规的“直接调查”尽职调查流程需要大约 2-4 周。“背靠背”的耗时一般更短。

四、供应商的公开信息主要来源于哪些渠道？

在中国，通过各类渠道可以查询到合作伙伴的大量公开信息，常用的渠道包括：

²本文所述的中国及中国供应商应做狭义解释，指中国大陆及注册在中国大陆的供应商。中国大陆、中国香港、中国澳门和中国台湾的法律和实践存在不同，文中的讨论仅适用于中国大陆。

| 信息种类 | 查询渠道 | 备注 |
|----------------|---|--|
| 公司基本信息 | 国家企业信用信息公示系统网站 (http://www.gsxt.gov.cn) | 可查询到目标公司的股东、注册资本、经营范围、法定代表人、董事、高管、历史沿革、股权质押/冻结/拍卖、行政处罚、诉讼、失信信息等 |
| 公司的动产抵押情况 | 动产融资统一登记公示系统 (https://www.zhongdengwang.org.cn) | 纳入动产和权利担保统一登记范围的主要有：生产设备、原材料、半成品和产品，应收账款质押，存款单、仓单、提单质押，融资租赁，保理，所有权保留，其他可以登记的动产和权利担保。但机动车抵押、船舶抵押、航空器抵押、债券质押、基金份额质押、股权质押、知识产权中的财产权质押除外 |
| 不涉密的生效判决 | 中国裁判文书网 (https://wenshu.court.gov.cn) 信用中国 (https://www.creditchina.gov.cn/) 中国执行信息公开网 (http://zxgk.court.gov.cn/zhixing/) 人民法院公告网 (https://rmfygg.court.gov.cn/) | 裁判文书网等网站公开的判决并不包含现有的全部判决，一方面部分判决由于涉密等问题不会公开，另一方面该类网站的信息也并非实时更新，一个判决从公布到上传会存在时间间隔，因此也存在时效性的问题 |
| 公司舆情信息，相关新闻报导等 | 各类搜索引擎、第三方平台如 Google，必应，百度，微信等 | 可以用于获取供应商的舆情信息，以作为参考信息及辅助线索了解其在相关市场上的活跃程度、业务涉及范围等 |

五、无法从公开渠道获得的供应商信息有哪些？

对于非公众公司而言，除非其主动披露，否则其财务信息（包括管理层报表、审计报告、账簿和记录等）、内部决议文件和商业交易信息等一般属于商业秘密，一般无法通过公开渠道获取。公众公司相对会有更多公开信息可以检索。如果知道被调查对象的不动产坐落位置，一般可以查询不动产的权属和抵押状况，但仅凭借被调查对象的法定名称，一般无法对其名下的全部不动产范围及情况进行概括查询，反之亦然。非公众公司的其他资产和负债信息也不易通过公开途径查询找到。虽有前述，部分非公开信息如公司递交登记部门的历史变更

记录，变更相关决议等，可以通过律师向登记机关申请查阅档案的方式合法查阅。

六、通过调查公司获取非公开的供应商信息是否可行？

实践中确有委托方聘请调查公司甚至私人调查员来调查供应商背景的情况，但多数企业对待此类调查方式的态度往往非常谨慎。主要的顾虑在于，在进行调查时难以确保调查公司能够严格在法律允许的范围内进行调查，例如如果调查过程中出现了侵犯他人商业秘密或隐私以获得信息的情况，可能为委托方带来责任，对此需要格外重视。

七、是否需要供应商的关联企业和实际控制人进行调查？

基于中国的商业环境与实践，尽职调查往往不仅限于供应商本身，而需要延伸至其关联企业及实际控制人。主要考虑包括：（1）实践中，与客户谈判、签约和实际履约的供应商可能是互相关联的多家企业，这些企业通常由一家实际控制人控制，但是在股东、资产、债务、业务、人员等方面存在微妙的区别；及（2）供应商的声誉、债权债务和运营情况很大程度上取决于其母公司及实际控制人的状况，并且可能一损俱损。因此大多数尽职调查会将供应商的关联企业及实际控制人作为一个整体进行调查。

八、供应商尽职调查中经常发现哪些问题？

结合我们在实务中遇到的案例，在供应商尽职调查中出现频率较高的问题主要包括：供应商与调查方的高管存在关联关系（例如高管利用职权的便利，使公司从本人或本人亲属控制的公司处购买货物或服务，并损害了公司利益等情况）、供应商或其重要股东、高管由于违法违规问题或欺诈承担刑事或者行政责任、供应商经营证照缺失或缺乏必要资质、供应商存在重大诉讼纠纷等等。提前发现这类

问题，可以让委托方避免交易上的误判，并提前采取预防措施（例如要求供应商提供履约担保措施）。

九、供应商尽职调查中的主要困难有哪些？

结合我们的实务经验，外国企业或外商投资企业在对其在华供应商的尽职调查中较容易遇到的问题包括：语言及文化差异造成的沟通障碍或沟通低效；缺乏了解所需信息的渠道；无法判断信息的真伪以及无法确定风险敞口的大小。遇到这些问题时，经验丰富的外部专业顾问的协助将会尤为重要。

十、外部律师能够提供哪些帮助？

具有国际视野及本土经验的综合性中国律师事务所有着成熟的供应商尽职调查以及相关的公司、合规法律服务能力及经验。具有双语能力的律师团队能够更好地帮助客户了解国内法律与商业实践，并协助客户更加高效地获取信息、解决问题。

君合团队在供应商尽职调查领域经验丰富，可以提供标准化或定制化的法律服务，并提供菜单式服务清单满足不同客户的需求。如有需要可随时发邮件至 China_Business_Support@junhe.com 索取报价表及业绩介绍。

下期预告：在下一期中，我们将介绍如何在中国设立业务实体，敬请关注。

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