

君合专题研究报告



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境外资金投资重整企业系列：

系列之一——境外资金投资重整企业的模式及退出

君合企业破产重组业务组根据处理类似案件的实务经验，就境外资金投资国内重整企业将撰写系列文章。

一、不良资产市场现状与投资

近年来，在全球经济复苏疲软背景下，中国经济发展也较为缓慢，各类投资项目收益下降明显，而此时不良资产处置业务却逐渐受到各路资金的青睐。

不良资产投资热度居高，不仅来自其本身巨大获利空间，亦与供给侧改革的政策密切相关。在“去产能、去杠杆”背景下，产能过剩企业加速进入债务重组、破产重整程序，而企业重整再生的资金需求与境外资金的投资需求恰好相契合。

在各类不良资产投资中，投资重整企业的优势体现于：

- (1) 司法保障力强，重整成功率相对较高；
- (2) 重整投资资金保障机制完善；
- (3) 重整投资成本相对低，收益相对高。

具体而言，重整过程中一般会调整股东权益和债权人清偿比率，因此投资者可通过较低投入获取高收益。

外资投资重整企业在税收方面可能亦具有一定优势。虽然内外资企业所得税已统一，但外商投资企业仍在地区、项目、产业等方面享有一定优惠，并且最高人民法院正积极推动建立破产税收优惠机制，对重整企业豁免债务和财产处置所得采取优惠税收。当然这取决于当地政府的态度。

二、境外投资者的投资模式

按照投资方式的差异，境外资金投资重整企业的模式主要可分为股权收购、设立外商投资主体再投资、跨境提供贷款三种类型。

(一) 股权收购模式

股权收购模式是指境外投资者直接收购境内重整企业股权，从而成为重整投资人的模式。在重整程序中，股权收购的具体方式是：调整原股东权益并无偿让渡予重整投资人，同时投资人以增资方式将投资款项汇入重整企业，用于企业依重整计划进行的债权清偿及其他安排。

股权收购模式的流程主要包括：

- (1) 投资者与管理人签订《保密协议》，并进行尽职调查；
- (2) 投资者与管理人签署《重整投资协议意向书》并向管理人缴纳意向金；
- (3) 投资者就股权收购向相关商务部门审批（限制类）/备案（鼓励类、允许类）；
- (4) 投资者与管理人签署《重整投资协议》；
- (5) 债权人会议表决《重整计划草案》；
- (6) 法院裁定批准《重整计划草案》；
- (7) 管理人向重整企业移交财产和营业事务；
- (8) 重整企业进行工商变更登记；
- (9) 投资者依照重整计划向重整企业增资；
- (10) 外汇登记。

债权人会议表决重整计划草案时由各类债权人分组表决，即使部分表决组未表决通过重整计划草案，符合一定条件时法院亦可强制裁定批准。实践中需注意法院对强裁的态度。

另外，外资股权收购还受到行业准入的限制，被收购重整企业若属于法规规定的并购安全审查范围内的，则还应向商务部门提出安全审查申请。

（二）外商投资主体再投资模式

境外投资者投资的常见方式是先设立外商投资企业或外商投资合伙企业（以下合称“**外商投资主体**”），再通过该主体向境内进行投资。

- (1) 设立外商投资企业。设立外商投资企业应首先取得企业名称预核准，在预核准完成后，通过综合管理系统在线填报和提交《外商投资企业设

立备案申报表》及相关文件，办理设立备案³。备案完成后领取回执，并完成后续的工商登记、外汇登记、税务登记等设立程序。

- (2) 设立外商投资合伙企业。相较于外商投资企业，设立外商投资合伙企业不仅简便快捷、管理灵活、决策高效，而且合伙企业遵循“先分后税”原则，无需缴纳企业所得税。但合伙形式要求普通合伙人承担无限连带责任，存在一定风险。另外，设立外商投资合伙企业在产业领域上亦有限制。

就外商投资主体再投资方式可分为股权收购和资产收购两类。具体如下：

1. 外商投资主体股权收购模式

外商投资主体股权收购模式是指境外投资者在境内设立外商投资主体后，再由该外商投资主体收购重整企业股权的模式。就收购流程具体可参照境外投资者直接收购境内重整企业股权的内容。

除此之外，外商投资企业再投资将受到行业准入等限制，后续投资程序亦因行业领域不同而存在差异。若被投资的重整企业经营范围属于鼓励类或允许类领域的，重整企业应向原公司登记机关报送《关于外商投资企业境内投资暂行规定》（下称“**《暂行规定》**”）及相关政府部门列明的材料，申请变更登记。若被投资的重整企业经营范围涉及限制类领域的，外商投资企业应按照《暂行规定》的规定，取得省级审批机关的同意批复，然后再向原登记机关申请变更登记。同时，外商投资企业也需就其投资行为向其原登记机关进行备案。

2. 外商投资主体资产收购模式

外商投资主体资产收购模式是指境外投资者

³ 引自《外商投资企业设立及变更备案管理暂行办法》第五条。

在境内设立外商投资主体后，再由该主体收购重整企业全部或部分资产的模式，重整企业以转让资产的对价用以清偿债权人。

破产程序中资产的处置一般需依法通过拍卖的程序进行，因此，资产收购的流程主要包括：

- (1) 投资者与管理人签订《保密协议》，然后进行尽职调查/或者与拍卖机构签署《保密协议》并缴纳保证金；
- (2) 债权人会议表决通过资产处置和变价方案；
- (3) 资产拍卖；
- (4) 外商投资主体参与拍卖程序竞标；
- (5) 凭借拍卖机构的中标通知进行权利过户。

如果重整企业资产在经过三次拍卖后都未拍卖成功的，则管理人依法可以采用变卖的方式处理资产。在此情形下，外商投资主体可直接与管理人签署资产收购协议。

（三）跨境提供贷款模式

跨境提供贷款模式是指境外主体直接通过为重整企业提供借款等债权方式进行投资的模式。主要流程包括：(1) 投资者与管理人签订《借款协议》；(2) 管理人就借款事宜报告债权人委员会或法院；(3) 管理人进行外债登记备案并取得《外债登记表》，开设外债账户；(4) 双方履行《借款协议》。

关于外债登记备案，根据央行的最新外债规定，我国已取消了境内中资企业外债事前审批，将中资企业的跨境融资改为和外商企业一样，都适用事前签约备案⁴。若重整企业借入中长期国际商业贷款，将受到《国家发展改革委关于推进企业发行外债备

案登记制管理改革的通知》（下称“2044号文”）的规范。2044号文规定发行外债的企业应当具有“较强的偿债能力”等基本条件。至于重整企业是否符合该条件，经初步检索，实务中未有先例可寻，需结合主管机关态度而定。同时，就所借的外债能否用于偿还企业的银行贷款，虽然目前上海外管局允许，但法律规定仍具有不确定性。

三、境外投资者的投资保障

境外投资者投资重整企业，不仅因为重整成功后投资者可获得可观收益，而且投资者的投资行为也能获得充分的保障。

首先，重整程序将保障投资资金的安全。投资者与管理人签订的《投资协议》中往往明确约定资金用途，并且按照重整程序，投资者支付的投资资金应汇入管理人银行专户，并在法院监督下由管理人支配和管理，从而防止资金遭乱用。在股权收购模式中，经股东权益调整后，新投资方往往能取得公司控制权，从而更好监督自投资资金的安全。在提供贷款模式中，依《破产法》的相关规定，债务人或者管理人在重整期间为继续营业而借款的，可为该借款设定担保。因此，即使重整失败，投资者亦对担保物享有优先受偿权。

其次，重整程序可保障投资行为的效率。《破产法》规定重整期间最长为九个月，即管理人须在九个月内确定投资方案等重整计划的核心内容。重整程序的法定期限保证了投资者投资重整企业具有效率上的优势和时间上的可预测性。

四、境外投资者的退出机制

境外投资者投资重整企业的主要目标是通过重整后企业升值而获利，因此退出机制成为投资者关心的重要环节。目前退出方式主要有 IPO 退出、

⁴ 引自《中国人民银行关于在全国范围内实施全口径跨境融资宏观审慎管理的通知》。

股权转让退出、清算退出的方式。

IPO 退出是指企业公开上市之后，投资者在过锁定期后可以通过二级市场公开交易或者大宗交易转让或协议转让方式卖掉之前所取得的股票，从而实现退出。

股权转让退出即境外投资者依法将自己的股权通过股权转让的方式转让给第三方从而实现退出。

清算退出是指通过企业清算而实现退出，主要是针对投资项目未获成功的一种退出方式。

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JUNHE SPECIAL REPORT



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Series: Foreign Capital Investment in Restructuring Enterprises

The first in the series –The Patterns and Exit of Foreign Capital Investment in Restructuring Enterprises

The Bankruptcy and Restructuring Group of Junhe LLP will release a series of articles concerning the investment of foreign investors in domestic restructuring enterprises, according to our practical experience in dealing with similar cases.

I. Current Situation of Non-Performing Assets and Investment therein

In recent years, China's economic development has been relatively slow in the context of a weak global economic recovery. The return on all kinds of investment projects decreased significantly, while the business of non-performing assets disposal has gradually gained increasing popularity among various funds.

The popularity of the investment in non-performing assets results not only from its high level of profitability, but to a great extent also results from the Chinese policy of Supply-Side Reform. Under the move to "Address Overcapacity and Deleveraging", enterprises with excessive production capacity accelerate the progress of entering into debt-restructuring or reorganization-by-bankruptcy procedures. Thus the capital demands of these restructuring enterprises and the investment needs of foreign capital neatly coincide.

In comparison with other forms of investment in non-performing assets, the investment in restructuring enterprises stands out with its advantages as follows: (a) the guarantee of judicial power and the relatively high possibility of successful restructuring; (b) well-rounded protection mechanism of the funds; (c) relatively low cost and high return on investment: specifically, the shareholders' equity and the creditors' compensation ratio will be adjusted in the restructuring process, so that investors can obtain high returns through low investment.

Moreover, the foreign capital investment in restructuring enterprises may also prove superior with respect to taxation. Although Chinese enterprise income tax of foreign- and domestic-funded companies has been unified, foreign-funded enterprises still win concessions in certain areas, projects, industries and other respects, and the Supreme People's Court is actively promoting the establishment of tax concession mechanism for bankruptcy as well, to permit a tax deduction for the earnings of the restructuring enterprise from debt exemption and property disposal. It depends, of course, mainly on the attitude of local governments.

II. Investment Patterns for Foreign Investors

In accordance with different methods of investment, the patterns of foreign capital investment in restructuring enterprises divide themselves into three types: equity acquisition, re-investment of a foreign-invested entity, and cross-border loans.

1. Equity Acquisition

The pattern of equity acquisition happens when foreign investors purchase shares of the domestic restructuring enterprise, thus becoming the direct restructuring investors. In the restructuring process, the specific method of equity acquisition is as follows: the rights of original shareholders are adjusted and transferred to new foreign investors; meanwhile, these investors transmit funds to the restructuring enterprise in the name of raising share capital, so that the enterprise is able to pay off its debts and carry out other arrangements in the restructuring plan.

The process of equity acquisition mainly includes: (a) the investor signs a confidentiality agreement with the trustee of the restructuring enterprise and conducts due diligence; (b) the investor signs a letter of intent to invest in restructuring with the trustee and pays therefor; (c) the investor applies to the relevant commercial departments in terms of the equity acquisition for approval (restricted category) or registration (encouraged/permitted category); (d) the investor signs the agreement of investment in restructuring enterprise with the trustee; (e) the restructuring plan is to be voted in the creditors' meeting; (f) the court approves of the restructuring plan; (g) the trustee transfers the company property and business affairs to the enterprise; (h) the enterprise carries out alteration of the business registration; (i) the investor raises the share capital of the restructuring enterprise in accordance with the restructuring plan; (j) foreign exchange registration shall be conducted.

The creditors are to be divided into different groups in the creditors' meeting to vote on the

draft of the restructuring plan. The court may also enforce its approval in certain circumstances, even though the draft does not go through the vote of several voting groups. In practice, the attitude of the court for this compulsory approval shall be taken into consideration.

In addition, equity acquisition by foreign investors is also subject to industry entry restrictions. The application to commercial departments for security review shall be filed, when the restructuring enterprise falls within the scope of those to be under security review by Mergers and Acquisition according to Chinese law.

2. Re-Investment of a Foreign-Invested Entity

The common method of investment by foreign investors is to set up a foreign-invested enterprise or a foreign-funded partnership (hereinafter collectively referred to as "**Foreign-Invested Entity**") first, and then to invest in the territory of China through this foreign-invested entity.

(a) To set up a foreign-invested enterprise: the pre-approval of the enterprise name shall be obtained first; a declaration form of establishing a foreign-invested enterprise and other relevant documents are to be completed and submitted online through the comprehensive management system;¹ after getting receipts of establishment registration, business registration, foreign exchange registration, tax registration and other procedures of establishing enterprises are to be completed.

(b) To set up a foreign-funded partnership: compared with foreign-invested enterprises, the establishment of a foreign-funded partnership is simple, flexible and efficient. Furthermore, the structure of a partnership enjoys the advantage of tax exemption on the

¹ See Art.5, Provisional Regulation on Establishment and Registration Alteration of Foreign-invested Enterprises.

principle of tax calculation after interest distribution for partnerships. This structure, however, requires ordinary partners to bear unlimited joint liability, which is a risk for investors. There are also some restrictions on setting up a foreign-funded partnership in terms of business areas.

The concrete methods of re-investment of the above mentioned Foreign-Invested Entity can be classified into two categories:

(a) Equity Acquisition by a Foreign-Invested Entity

The pattern of equity acquisition of a foreign-invested entity happens when foreign investors first set up a foreign-invested entity in China as previously mention, and then the very same entity purchases shares of restructuring enterprises. With respect to the specific process thereof, refer to the process of foreign investors' direct equity acquisition as stated in II. 1..

Apart from that, re-investment of a foreign-invested enterprise is also under industry entry restrictions, and the follow-up investment procedures are also different in different fields of business. If the business scope of the restructuring enterprise belongs to the fields of the encouraged category or the permitted category, the restructuring enterprise shall submit to registration departments the documents listed in the *Provisional Regulation on Investment of Foreign-Invested Enterprises* (hereinafter referred to as "**Provisional Regulation**") and those required by the government. In case the business scope thereof touches upon the fields of the restricted category, these foreign-invested enterprises shall obtain the approval of the provincial-level examination authority according to *Provisional Regulation*, and then apply to the original registration departments of the restructuring enterprise for registration alteration. Furthermore, these foreign-invested enterprises

are also required to report their investment to their own registration departments accordingly.

(b) Assets Acquisition by a Foreign-Invested Entity

The pattern of assets acquisition of a foreign-invested entity happens when foreign investors set up a foreign-invested entity in China, which is the same as the pattern above. The difference, however, is that the foreign-invested entity purchases all or part of the assets of the restructuring enterprise, rather than its equity, and the restructuring enterprise uses the consideration, in other words, the income from the transferred assets, to pay its debts.

The disposal of assets in the insolvency proceedings shall normally be carried out by auction according to law, so the process of assets acquisition mainly includes: (1) the investor signs a confidentiality agreement with the trustee of the restructuring enterprise and conducts due diligence, or signs with the auction institution and pays the deposit; (2) the creditor's meeting votes on and approves of the assets disposal plan; (3) the assets are to be auctioned; (4) the foreign-invested entity participates in the auction bidding; (5) the rights are to be transferred by virtue of the notification of the bid-winning from the auction institution.

If the auction of that restructuring enterprise's assets has failed three times, the trustee shall sell these assets. In which case, the foreign-invested entity could directly sign an assets acquisition agreement with the trustee.

3. Cross-Border Loans

Cross-border loans refer to the pattern of foreign investors investing in a restructuring enterprise by means of providing loans directly thereto. The overall process includes: (a) the investor signs the loan agreement with the trustee of the

restructuring enterprise; (b) the trustee reports to the creditors' committee or the court; (c) the trustee applies for the external debts registration and open an external debts account with the form of external debts registration; (d) the parties perform the loan agreement.

With regard to the registration of external debts, China has abolished the previous review of external debts of the domestic enterprises according to the latest provisions of the central bank. The system of previous agreement registration also applies to cross-border financing of domestic enterprises, which is the same as foreign enterprises.² If the restructuring enterprise borrows mid- and long-term international commercial loans, it will be regulated by the *National Development and Reform Commission's Notice on Promoting the Management and Reform of External Debts' Registration System* (hereinafter referred to as *Notice No. 2044*). It is required by the *Notice No. 2044*, that the enterprises with external debts shall have a relatively strong capability to repay its debts and other basic capacity. The question of whether restructuring enterprises meet the requirements, remains unanswered and there is no precedent in practice after the preliminary case retrieval. Thus the relevant supervising authorities' attitudes shall be taken into consideration. Meanwhile, it remains uncertain according to Chinese law, whether the borrowed external loans can be used to discharge the bank debts of the enterprise, although at present Shanghai SAFE permits this.

III. Guarantee for Foreign Investors

The reason foreign investors invest in restructuring enterprises is not only the considerable return on investment, but also sufficient guarantee for their investment.

² See The Notice of People's Bank of China on Implementation of Prudential Macro-Management of Cross-Border Financing across the Country.

First of all, the restructuring process will guarantee the safety of investment funds. The investment agreement between the investor and the trustee of the restructuring enterprise is likely to stipulate the use of the funds clearly. Those funds shall be transferred into the specific account of the trustee, and the management and disposal thereof shall be under the supervision of the court as well, to prevent abuse of those investment funds. In the pattern of equity acquisition, the investor is likely to get control of the enterprise after the adjustment of shareholders' rights and thus is able to supervise the investment funds on its own. In the pattern of cross-border loans, the debtor or the trustee may, in accordance with the bankruptcy law, set guarantee for the loans with the purpose of continuing business of the restructuring enterprise. Therefore, the investor can enjoy the priority right of compensation with regard to the collateral.

Secondly, the restructuring process will guarantee the efficiency of investment activity. The legal restructuring period is nine months at longest according to the bankruptcy law. That is to say, the trustee has to specify the central contents of the restructuring plan within nine months. That legal period of the restructuring process ensures the efficiency and predictability of the investment in restructuring enterprise.

IV. Exit of Foreign Investors

The main purpose of the foreign investors' investment in restructuring enterprise is to make profits through the upvaluation of the enterprise. Therefore, the exit mechanism constitutes an important part of investors' concern. At present, the exit mechanism includes IPO, equity transfer and liquidation.

IPO refers to the exit method that after the enterprise has been publicly listed, the foreign investor may sell its shares through the open-air

transaction on the secondary market, bulk transaction or agreement after lock-up period.

Equity transfer means that foreign investors transfer their shares to a third party in accordance

with law to exit.

Liquidation is the mechanism of exit by means of liquidation of the insolvent company. This is mainly the case, when the investment plan fails.

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