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The Board of Directors in limited companies and joint ventures in Italy and China

The Danone-Wahaha dispute

Supervisor
Ch. Prof. Renzo Riccardo Cavalieri

Graduand
Beatrice Benfatti
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前言

这篇论文的目的是对意大利及中国的有限公司与合资公司的董事会情况进行分析。

管理是公司治理问题中最微妙的部分。鉴于公司结构日益复杂，其管理机构常常由不同国籍的人员组成，因此了解公司治理的动态非常重要，可以避免不幸必要的争端。当公司治理涉及像中国这样经济发展十分迅速的发展中国家时，情况则变得更加复杂。

近几十年来，中国从一个位于边缘的发展中国家转变为世界第一经济强国。

在毛泽东政府的领导下，中国仿效苏联模式。随着大跃进和文化大革命，毛泽东让中国越来越孤立和不稳定。经过十年的隔离，七十年代初中国开始对外开放。八十年代，邓小平推动了“中国特色社会主义”：中国保留根本的社会主义制度，但在政府的全面监督下，开放更多的商业自主权，对外投资和开放国际贸易。随着改革的深入，变得更加成熟和稳定，商法也起了关键作用。2001 中国加入世界贸易组织（WTO）。中国凭借其软实力和市场实力，渐渐地但不可阻挡地扩大了其在世界各地的影响力，中国向非洲等发展中国家投资，收购了很多品牌（在意大利也是如此），在许多领域从追随者转变为领导者。通过“一带一路”和“中国制造 2025”项目，中国正准备成为独一无二的贸易和经济中心。这两个项目的目的是创建现代丝绸之路和产业创新。尽管许多国家抱怨不公平竞争、经济扩张、执法不公平、审查制度、人权等等，但在今天与中国打交道是不可避免的。

因为中国近年来在经济舞台上的重要性不容小觑，所以了解如何与中国交易非常重要。外国企业家有很多方法进入中国市场：外商投资企业，合伙企业，加工贸易合同，合资经营企业，合作经营企业等。通过这些方式，外国企业家与当地企业合作，可以降低货币风险，避免商业和文化常识错误以及获得自然资源，而当地的合作伙伴则能够获得技术及资本投资，并参与到公司管理中去。然而，外国和当地合作伙伴之间的互动可能导致文化冲突。为了合资企业的成功，必须预料和处理这些冲突。

所有的专家都强调公司管理的重要性。公司治理基于三个基础，即股东大会、董事会和监事会。股东大会是公司的审议机构。通过投资，股东获得某些所有权，包括任命和解雇董事会成员的权利。承担股东大会与监事会之间的中间地位。在某种程度上，董事会是公司背后的推动力，因为董事会是公司的管理主体。监事会的职权和组成根据公司采用的治理类型而有所不同。

本论文涉及有限公司和合资公司的董事会。

本论文分三个章节。

第一名章节集中于两个方面。意大利有限公司的董事会和国际合营企业的董事会。首先，第一段讨论关于意大利有限公司的公司治理，主要集中探讨：有限公司的五大特征，即企业法人、股东有限责任、股份的可转让性、股东选举产生的管理机关的存在、风险投资提供者对公司的所有权；民法允许的三种层制，也就是说意大利传统层制、双层制和单层制；公司治理三大主体的关系，即股东大会、董事会和监事会之间的关系。第二段介绍影响董事会的两个重要文件：公司章程和股东协议。通过这两份文件，股东为董事会的运作制定了规则。第三段对意大利传统层制的有限公司的董事会进行分析，主要集中探讨：董事的义务与责任，董事长的职位，董事会的决议等等。由于本文分析涉及一家合资公司，因此第一章也涉及国际合资企业的董事会。合资公司的基础是双方对合资公司的共同管理。这可能与当地有关公司结构的规定中的原则造成冲突。这种情况可以通过给予少数人一些特定的权力来避免，例如对特定事项的否决权。本章的最后一部分分析那些影响合资公司董事会的文件：意向书、合资协议和股东协议。

第二章集中探讨中国，尤其是公司法、中外合资经营企业法和中外合作经营企业法对董事会的规定。首先，本章简要地介绍近年来中国发生的重大变化。为了引出论文的中心议，本章也会讨论中国商法的演变。八十年代以前，商法的规定受经济法和民法管辖。文化大革命后，由于改革进程及与西方社会交流，商法有很大发展。商法的发展有三个阶段。第一阶段的特点是减少上市公司对政府的依赖，允许外国投资和创立私营公司。起初，这种混乱和实验性的法律只局限于特定的领域，地方官员的执行是不确定的和自由决定的。第二阶段的特点是“中国特色社会主义”司法基础设施的改进：许多西方模式被采纳，法律的执行不那么不确

定和自由决定的，司法系统更有决定权。1993 颁布的公司法在全国范围内推出两类公司，也就是有限责任公司和股份有限公司。第三阶段的特点是中国司法制度与西方司法制度几乎完全一致，但也没有失去那些源于政治和社会结构的特殊特点。加入世贸组织是重要的一步。公司法在这个环境中发展了。如前所述，公司法允许公共和私人企业家建立有限责任公司和股份有限公司。与其他中国法律一样，公司法也反映了中国现代化进程和许多外国法律规定的吸收。不应低估的一个重要方面是公司法中频繁提及对政府。这深深地影响到了公司治理，特别是股东和董事会的自治。根据公司法的规定，有限责任公司和股份有限公司必须实行双层董事会。一般来说，双层制不仅考虑股东的利益，而且也考虑到利益相关者的利益。可是公司法的规定赋予股东更多的权力，以及似乎意味着董事会的决议不能违背股东的决议。相反地，在大多数西方国家，除了最基本的决定外，所有的决议都是分配给董事会的。关于中外企业，它们有一个一套特殊的法律法规。法律、行政法规对中外企业有规定的，从其规定。如前所述，外国企业家进入中国市场有很多方法。合资公司是一种最知名和最常用的方法。中外合资经营企业法和中外合作经营企业法对董事会有少数的规定。这是因为董事会在很大程度上受合资公司章程、合同和其他协议的管辖。这就是为什么对这些文件进行明智的管理是非常重要的原因。我们可以观察到，因为董事由股东任命，也许董事应该代表那些任命他们的人。这可能会造成一种模棱两可的局面：董事应该忠心于合资公司还是任命他们的人？

第三名章节侧重于达能和娃哈哈关于公司管理的纠纷。达能和娃哈哈都是食品和饮料公司。在它们各自成立后的几十年里，达能逐渐扩大了全球市场，娃哈哈成为中国市场的领导者。1996 年，达能和娃哈哈共同投资设立了一家中外合资经营企业。这样它们都想达到预期的目的：达能希望进入中国市场，并需要一个强有力的当地合作伙伴，而娃哈哈能够接触到达能的核心科技并提高自己的知名度。几年来，达能和娃哈哈的合资企业成为食品和饮料行业的领导者。尽管有着相似的背景，合作带来的互利，积极的，不断增长的市场份额，合资公司受到了内部危机的冲击。

达能与娃哈哈的主要争端是知识产权，特别是商标问题。2005 年，达能发现了宗庆后控股的一些公司销售与合资公司非常类似的产品；此外，它们还在使用合资

公司的商标。问题的根源在于商标所有权的当事人之间的误解。因为它们未能和平地解决这个问题，世界范围内它们引起了一系列长期诉讼。但商标不是唯一的问题。事实上，还有一个管理问题，也就是说公司管理的问题。合资公司的日常管理委托给中方（即宗庆后先生），但达能拥有合资公司的百分之五十股份。这样情况非常含糊的，因为双方都认为负责合资公司的管理。当合资公司的中方和外方之间的冲突开始时，管理情况只会变得越来越坏。争议的升级导致宗庆后辞去董事长职务。达能亚太区经理范易谋（Emmanuel Faber）暂时取代了宗先生。范易谋也是合资公司的副董事长。然而，事实上，范易谋出色地履行了合资公司董事长的职责。合资公司管理的争斗给达能带来了严重的负面影响：员工和中国的公众舆论都认为这种行为是对宗庆后怀有敌意的接管，从而支持宗庆后，视他为反抗贪婪的外国人的民族英雄，并要求达能离开中国。结果是双方之间发生了一系列诉讼，其中大多数是由几家娃哈哈公司针对合资公司的董事提起的，指控他们同时在合资公司的董事会和其他娃哈哈的对手董事会中任职。本论文所考察的诉讼发生在杭州市上城区人民法院。该判决涉及对杭州娃哈哈食品有限公司的索赔。该公司起诉达能和娃哈哈成立的合资公司之一的杭州娃哈哈食品有限公司，指控其在宗先生的辞职后篡改董事会关于任命合资公司新董事长的决议。

达能和娃哈哈之间的争端清楚地表明了管理合资公司各方面的重要性，不仅是在最重要的方面（如商标），还有东道国的文化、公司治理等等。

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1. THE BOARD OF DIRECTORS IN ITALY

1.1 The governance of Italian limited companies

Most of the limited companies are characterized by five juridical elements: legal personality, limited liability of the partners, transferable shares, a centralized management under a board structure and ownership of the company by the venture capital providers[1].

Legal personality means that, in the eyes of the law, the company is seen as a person, separate from its owners, able to enter into contracts, to delegate its authority to agents, to suit and be sued in its own name. While legal personality protects the company from the claims that creditors may have against the company's owners, limited liability protects the assets that the shareholders hold in their own names from the creditors, which may make claims only against the assets that the firm owns itself. These two fundamental features of limited companies are closely linked to the transferability of shares: in absence of either of them, the creditworthiness of the firm may change if the identity of shareholders changes. Transferability of shares permits to the company to run its business, independently from a change of identity of its shareholders. The potential numerous and frequently changing owners given by the transferability of shares makes difficult the decision making through the majority or the unanimity of the partners, as happens in general partnerships. For this reason, the administration of the company is entrusted to an administrative organ elected by shareholders. Ownership, which implies the right to control the company and to receive the company's net earnings, is linked to capital contribution: typically, the right to participate in company's control and to receive its net earnings is proportional to the amount of capital contributed to the firm[2].

Focusing on Italy, according to the Title V of Book V of Italian Civil Code many "types" of companies can be distinguished: *società semplice* (*s.s.*), *società in nome collettivo* (*s.n.c.*), *società in accomandita semplice* (*s.a.s.*), *società per azioni* (*s.p.a.*), *società in accomandita per azioni* (*s.a.p.a.*), *società a responsabilità limitata* (*s.r.l.*), *società*

[1] Luca Enriques, Reinier Kraakman, *Diritto societario comparato: un approccio funzionale*, Bologna, Il Mulino, 2006, p. 12

[2] Cnfr. John Armour, Henry Hansmann, Renier Kraakman, *The essential elements of corporate law: what is corporate law?*, Harvard, 2009, p. 6-13. Available at: www.law.harvard.edu/programs/olin.../Kraakman_643.pdf

cooperativa and *mutua assicuratrice*. They can be divided in two families: *società di capitali* (limited companies) and *società di persone* (partnerships)[3].

In this paper only limited companies, in particular s.p.a. and s.r.l., will be taken into consideration.

The s.p.a. (company limited by shares) is governed by art. 2325 and following of the Civil Code. It presents the typical characteristics of limited companies: is a corporation in which only the company is liable for its obligations with its assets and the capital participation is represented by shares. As a company with legal personality, it is distinct from the members and enjoys a full and perfect patrimonial autonomy. The members are obligated only to the contribution promised. The creditors can only rely on the company's assets. The capital is represented by homogeneous and standardized shares, which are shareholdings of equal value and they entitle their holders equal rights; also, shares can be transferable[4]. S.p.a. can be open or closed, distinction based on the potential resort to the capital market risk. Open s.p.a. can be further divided in companies which issue shares listed on regulated market and companies which issue shares widely distributed among the public (art. 2325-bis c.c.)[5]. The minimum capital amount for incorporation is 120,000 euros (art. 2327 c.c.).

The s.r.l. (limited liability company) is governed by art. 2462 and following of the Civil Code. "It is a corporation in which the company is liable for its obligations with its assets and the capital participation of the members neither can be represented by shares nor can be subject of solicitation of public investment"[6]. It is a particularly flexible business model, that fits the needs of personalization of the members and gives them a wide contractual autonomy. It is less expensive than s.p.a. In Italian Civil Code many provisions for the s.r.l. are referred to those for s.p.a. It remains, however, a normative void which, if not filled by the Articles of Association and the By-Law, is up to the interpretation of the experts[7]. The minimum capital amount for incorporation is 10,000 euros for s.r.l. (art. 2463 c.c.) and 1 euro for Simplified s.r.l. (art. 2463 bis c.c.).

What about the governance?

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[3] Gaetano Presti, Matteo Rescigno, *Corso di diritto commerciale*, *vol. II*, Bologna, Zanichelli Editore, 2013, pp. 13-14

[4] Giuseppe Trimarchi, *Guide to the Italian limited liability companies*, Torino, Giappichelli Editore, 2013, pp. 12-13

[5] Treccani, *Società per azioni*. Available at: http://www.treccani.it/enciclopedia/societa-per-azioni_%28Dizionario-di-Economia-e-Finanza%29/

[6] Trimarchi, *Guide to the Italian limited liability companies*, p. 155, op. cit.

[7] Presti, Rescigno, *Corso di diritto commerciale*, p. 214

First of all, corporate governance can be reductively defined as "the system by which companies are directed and controlled"[8]. But governance is not just running the business of a company *per se*: it includes also the balancing of interests of shareholders, workers, creditors, consumers. Governance is the guideline for management, as governance sees if the business is running properly[9]. Governance and management need a well designed mechanism to be effective.

Generally speaking, the actors that play a key role in corporate governance are: the Shareholders' Meeting (hereinafter SM), the Board of Directors and the supervisory bodies. The SM is the deliberative body of the company. It operates collegially and takes its decisions on the matters prescribed by the Law according to the majority principle[10]. Through their investments in the form of share capital, shareholders receive certain ownership rights, including the right to appoint and dismiss the members of the Board of Directors[11]. The Board of Directors is the management body of the company. It assumes an intermediate position between the SM and the supervisory body[12]. Functions and composition of supervisory bodies vary depending on the laws and regulations of each country and on the administration system of the company.

Italian Civil Code recognizes three systems of administration for s.p.a. and s.r.l.:

- The **traditional system** establishes the presence of two bodies elected by the shareholders: the administrative body and the Supervisory Audit Board. In this system, the relationship and the division of power between SM and the Board of Directors is the result of the coordination of two provisions: art. 2364 c.c., which states that "every SM's resolution on any authorization required by the statute for acts of directors does not exclude in any case the liability of the directors for their actions"[13], and art. 2380-bis c.c., which states that "the management of the

[8] Alan Calder, *Corporate governance: A Practical Guide to the Legal Frameworks and International Codes of Practice*, London, Kogan Page Publishers, 2008, p. 12, op. cit.

[9] Cnfr. William Rees, Saleem Sheikh, *Corporate Governance & Corporate Control*, London, Cavendish Publishing Limited, 2000, p. 6

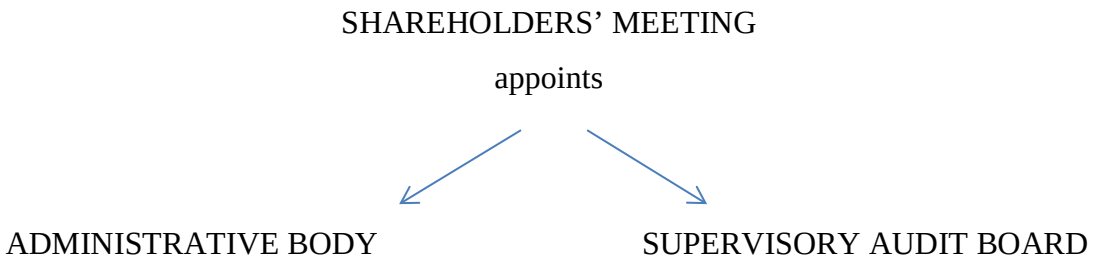
[10] Trimarchi, *Guide to the Italian limited liability companies*, p. 78

[11] Mieke Olaerts, *Euro-Chinese Company Models: An Exploratory Journey into the Position of Directors, Shareholders and Stakeholders in Chinese and European Company Law*, in Maastricht Journal of European and Comparative Law, Vol 16, Issue 2, 2009, p. 190

[12] Alessandro Baudino, Roberto Frascinelli, *Gli amministratori delle società per azioni e a responsabilità limitata: amministratore unico e consiglio di amministrazione: requisiti e compenso, nomina e cessazione, poteri, doveri e responsabilità, reati societari e reati fallimentari, amministratori di SRL unipersonali, innovazioni di cui alla L. 310/93: elenco soci, cessione di partecipazioni, prospetti dei principali adempimenti civilistici e fiscali*, Milano, A. Giuffrè Editore, 1994, p. 5

[13] Valerio Piacentini (edited by), *Codice civile italiano tradotto in inglese: parte societaria: (artt. 2325-2510: società per azioni, società a responsabilità limitata, liquidazione, trasformazione, fusione, scissione)*, Milanofiori Assago: IPSOA, Gruppo Wolters Kluwer, 2014, p. 44, op. cit

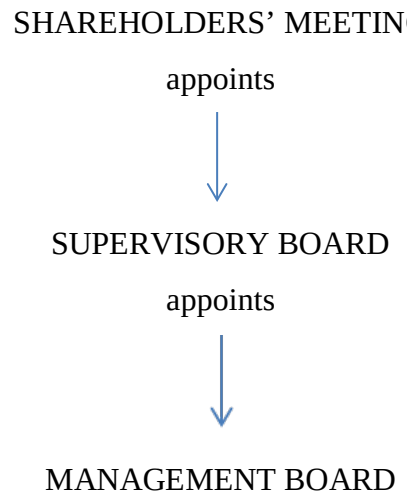
company is exclusively the task of the directors"[14]. It results that the management competence of the directors, without prejudice to the liability for their actions, shifts to the SM only in the cases provided for by the statute and the Law (i.e. in case of initiatives that may cause a substantial change of the corporate organization or its business purpose). So, the management competence of SM is limited and specific, while it is wider for the directors[15]. The Supervisory Audit Board is "the organ of internal control of the company with the main function of supervision on the administration of the company"[16]. It is composed by three or five members, which may or may not be shareholders, and two alternate auditors (art. 2397 c.c.). Its powers are listed in art. 2403-bis c.c. (they not include the auditing work, which is assigned to an external auditor). Statutory auditors must attend the meetings of the shareholders and those of the Board of Directors and executive committee (art. 2405 c.c.); however, they not have the power to prevent the Board of Directors' resolutions that violate the Law. Anyway, the delegated bodies are required to keep informed the Supervisory Audit Board (art. 2381 c.c.).



- The **two-tier system**, adopted by Germany, establishes the presence of a Supervisory Board, appointed by the shareholders (art. 2409-duodecis c.c.), and a Management Board, appointed by the Supervisory Board (art. 2409-octies c.c.). The Supervisory Board performs the functions of control of Statutory Auditors Board and some of the function that in the traditional system are of the SM. The Management Board performs the functions of the Board of Directors in the traditional system. The two-tier system makes a clear distinction between shareholders and management body by delegating some choices (e.g. appointment of directors) not directly to shareholders but to the Supervisory

[14] Piacentini, *Codice civile italiano tradotto in inglese…*, p. 61, op. cit
[15] Trimarchi, *Guide to the Italian limited liability companies*, p. 89
[16] Trimarchi, *Guide to the Italian limited liability companies*, p. 97, op. cit.

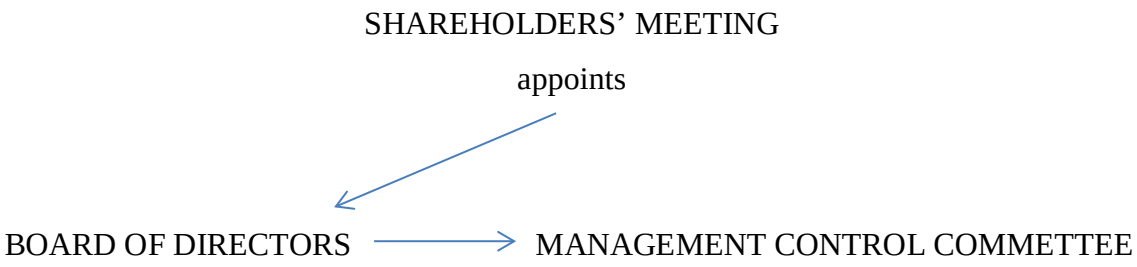
Board[17]. This way, the system takes into account not only the interests of shareholders, but also of a boarder group of people involved in the company's business (e.g. creditors and employees): the so called stakeholder model deeply affect the composition and the division of powers between the bodies of the company[18].



- The **one-tier system**, typical of the Anglo-Saxon tradition, establishes the presence of the Board of Directors and a Management Control Committee. The members of the Board of Directors are appointed by ordinary SM. The Management Control Committee (whose members are appointed by the Board of Directors among the board members who meets the requirements established by the By-Law) controls the adequacy of organizational, administrative and reporting structure and performs the additional functions assigned by the Board of Directors. This system is characterized by the absence of the Board of Auditors (whose functions are exercised by the Management Control Committee) and is the most prevalent board structure internationally[19]. The one-tier system is more focused on the interest of shareholders than the two-tier system. The shareholder model encourages the Board of Directors to give priority to the shareholders' interests. Recently, however, England has promoted an "enlightened shareholder model", which encourages the company to have regard

[17] Trimarchi, *Guide to the Italian limited liability companies*, p. 105
[18] Olaerts, *Euro-Chinese Company Models…,* p. 179
[19] Andreas M. Fleckner, Klaus J. Hopt (edited by), *Comparative corporate governance: a functional and international analysis*, Cambridge, Cambridge University Press, 2013, p. 30

not only of the shareholders' interests but also of the employees' interests and the company's impact on the environment[20].



The applicable system depends on company's strategy, structure and the rights and duties imposed upon its leading actors. Since 1970 the European Member States have tried to reach an agreement on the most suitable board structure for the European Company (also known as Societas Europea), but the attempt resulted just in the freedom of choice between the one-tier and the two-tier system[21].

As regards Italy, this paper will focus on traditional system.

1.2 The importance of Articles of Association, By-Law and Shareholders' Agreements

Before discussing in detail the Board of Directors, it is necessary to analyse three documents that play a very important role in its regulation.

The Articles of Association (hereinafter AOA) and the By-Law (hereinafter BL) are two documents needed for incorporation and must be prepared in the form of a public need, under penalty of nullity of the company (art. 2332 c.c.).

As said previously, the Civil Code regulates the s.p.a. in detail, while many provisions for the s.r.l. are referred to those for s.p.a. Obviously there are differences given by the characteristics of the two types of company.

As regards s.p.a., according to art. 2328 c.c. AOA must report the basic information of the company, such as company name, State of incorporation, number and characteristics of shares subscribed by shareholders, company's business purpose, duration of the company, etc. Concerning the governance, the AOA must contain:

[20] Olaerts, *Euro-Chinese Company Models…*, p. 179
[21] Olaerts, *Euro-Chinese Company Models…*, p. 183

the model of corporate governance adopted, the number of directors and their powers, and the indication of those who have been delegated powers of representation; the numbers of those on the Board of Statutory Auditors; the appointment of the initial directors and statutory auditors, or the members of the supervisory board, and when contemplated, the person entrusted with the statutory accounting audit[22].

Below, an example of the AOA's content that concerns the By Law- Statute and the Board of Directors:

ARTICLE 7

(By Law- Statute)

The company hereby constituted will work under the full observance of the law, under this articles of association, and under the rules of the By Law (Statute) which is attached to this document under letter "A" whose constitutes an integrated and substantial part.

ARTICLE 8

(Management and Directors)

According to the rules stated in annex "A", the Company will be managed by a Board of Directors of three members pursuant to Article 2380-bis and following of the Civil Code, with all the powers under the Law and however indicated in the annex "A".

The first Board of Directors is composed by: ... who must accept the above appointment by the term of thirty days from its knowing. The appointed directors shall remain in office for three years under the Law and specifically pursuant to art… of the Statute.

Mr. _____ (Chairman of the Board of Directors) has the representation of the Company and the powers in this regard under Law and under the annex "A"[23].

[22] Piacentini, *Codice civile italiano tradotto in inglese…,* pp. 6-7, op. cit.
[23] Trimarchi, *Guide to the Italian limited liability companies*, p. 21, op.cit.

The By Law (sometimes "Memorandum" or "Statute") contains further and detailed rules related to the operation of the company, such as operating modes, financial instruments, arbitration.

Although AOA and BL are two separate documents, according to art. 2328, par. 3 c.c. they are a contract unit, because BL is considered as an integral part of AOA. In case of inconsistencies between the provisions of the Articles of Association and those of the by-laws, the latter shall prevail.

The parties may feel the necessity to supplement AOA and BL with a more flexible and confidential one, namely the Shareholders' Agreements (SA), that is an agreement amongst the shareholders of a company[24]. According to art. 2341-bis c.c., Shareholders' Agreements have as object "the exercise of voting rights in company limited by shares or the companies that control them; set limits on the transfer of the related shares or the interest held in the companies that control them; have as their object or effect, the exercise jointly or otherwise, of a dominant influence on such companies, cannot have a duration of more than five years, and shall be deemed to have been agreed for such duration even if the parties anticipate a longer term, such agreements shall be renewable upon expiration"[25]. Moreover, SA provide regulations for the protection of minority, the control and management of the company and the resolution of disputes. Art. 2341-bis and 2341-ter c.c. put an end to a situation of uncertainty regarding the conflict between the constitutional documents of a company and the SA (in fact, for a period of time the SA were considered as "unenforceable agreements"). Furthermore, they are effective not only among the contracting partners, but also towards the company[26].

As regards s.r.l., the content of AOA is regulated by art. 2463 c.c. AOA must be established by public deed and, as concerns the company's management, they must contain "the rules governing the functioning of the company, indicating those relating to the management and powers to represent the company" and "the persons entrusted with the management of the company"[27]. There is no mention of the BL, however the constitution of a s.r.l. according to the traditional outline 'Articles of Association – By Law' is permitted, since the same rules as for the AOA must be applied to the BL. There is no regulation for SA, since that many provisions typical of the SA can be

[24] Trimarchi, *Guide to the Italian limited liability companies*, p. 29
[25] Piacentini, *Codice civile italiano tradotto in inglese…*, p. 15, op. cit
[26] Trimarchi, *Guide to the Italian limited liability companies*, pp. 29-33
[27] Piacentini, *Codice civile italiano tradotto in inglese…,* p. 165, op. cit

included in the AOA. Actually, the incorporation of those provisions in the AOA makes them less uncertain and allow the invalidity of those actions that violate them[28].

The reason for the importance of these documents, and the frequent reference to them by the Law, is that the legislator wanted to leave a certain autonomy to the parties for the benefit of the corporate governance, without harnessing it with an excessively binding legislation. Clearly, the provisions not contemplated by the Law must be considered void.

1.3 The Board of Directors

The aim of the administrative body of a company is to "carry out the operations required to achieve the corporate purpose" (art. 2380 bis c.c.)[29]. It can be composed by a single member (sole director) or more; more members form the Board of Directors.

The Board of Directors has executive powers, meaning the power to manage the company. As said in paragraph 1.1, it assumes an intermediate position between the Shareholders' Meeting (deliberative body) and the Supervisory Audit Board (control body). The relationship between these three main actors depends on the system adopted by the company (traditional, two-tier, one-tier). Management competence of the directors, without prejudice to the liability for their actions, shifts to the SM only in the cases provided for by the statute and the Law (i.e. in case of initiatives that may cause a substantial change of the corporate organization or its business purpose). So, the management competence of SM is limited and specific, while it is wider for the directors. Although the Board of Directors is elected by shareholders, it is formally distinct from them. This way the decision making process is less complex, since there is no need for the shareholders' approval except for the decisions provided by the Law; furthermore, a Board of Directors permits the representation and protection of the interests of minority shareholders[30].

The Board operates collegially, the decisions are taken in meetings by majority (art. 2388 c.c.).

In case of a complex environment, the Board may delegate its powers to an Executive Committee or to Managing Directors in order to simplify the management of the company. This way the Board assumes a function of general supervision. According to

[28] Presti, Rescigno, *Corso di diritto commerciale*, p. 217
[29] Piacentini, *Codice civile italiano tradotto in inglese…*, p. 61, op. cit
[30] Armour, *The essential elements of corporate law…*, pp. 12-13

art. 2381 c.c., the delegate bodies must report to the Board of Directors and to the Board of Statutory Auditors with the frequency set forth in the AOA, and in any case at least every six months. It must be specified that the delegation of powers does not imply the exclusion or the limitation of the Board, which may give instructions to the delegate body, revoke its acts and replace it at any time[31]. The Board cannot delegate the specified under art. 2420-ter c.c. (Delegation to the directors), art. 2423 c.c. (Drafting of the financial statements), art. 2443 c.c. (Delegation to directors), art. 2446 c.c. (Reduction of corporate capital for losses), art. 2447 c.c. (Reduction of corporate capital below legal minimum), art. 2501-ter c.c. (Merging project), art. 2506-bis (Spin-off project).

The Board of Directors is mandatory for listed companies.

1.3.1 The directors

With regard to the s.p.a., the number of the members of the Board is not prescribed by the Law, but the BL can indicate a minimum and a maximum number; if not indicated, it is up to the SM to decide. Directors may be shareholders or not (art. 2380-bis c.c.). Given the silence of the legislator, it has been considered in the past that the office of director can be held only by natural persons. Recently, however, it is considered acceptable that the office of director may be held by legal persons, unless otherwise provided by the Law. In this case, a natural person must be appointed as representative by the legal person within its organization; this representative will assume the same obligations and the same civil and criminal responsibilities as for the natural persons, without prejudice to the joint liability of the legal person[32].

The appointment of directors is up to the SM (art. 2383 c.c.), with some exceptions: the appointment of the first directors in the AOA and those provisions of artt. 2351 (The voting right) and 2449 c.c. (Companies in which the State or public entities participate). The duration of the office is provided by the BL, or by the SM if the BL is silent; it must not exceed three financial years, but the administrators may be elected again, unless otherwise provided by the BL (art. 2383 c.c.). It is a common practice to include in the BL provisions for the election of one or more directors by the minority[33].

[31] Baudino, *Gli amministratori …*, pp. 22-23
[32] Presti, Rescigno, *Corso di diritto commerciale*, p. 141
[33] Trimarchi, *Guide to the Italian limited liability companies*, p. 90

According to art. 2382 c.c., "interdicted and banned persons, disqualified persons, bankrupt persons or those persons who have been sentenced to a penalty entailing a ban, even temporary, from public office or the inability to exercise managerial functions cannot be appointed as directors, and if appointed, forfeit their office"[34]. If already appointed, the cause of ineligibility determines the disqualification of the administrator from the office. In some specific types of company (trust companies, audit companies, etc.), the Law demands the possession of particular personal or professional requirements. Particular requirements may be included in the BL. In absence of the qualifications requested by the BL, the dispositions of art. 2382 c.c. on appointment of directors shall be applied[35]. Different is the concept of incompatibility, which does not invalidate the appointment of a member, but just denies him to play two roles at the same time and obligates him to choose one of them[36].

The cessation of the office may depend on the following reasons: term's expiry (in this case they shall remain in charge until the reconstitution of another Board thanks to the *prorogatio* principle); death; forfeiture (in case of ineligibility); dismissal; resignation; in the cases specified by the AOA (for example the *simul stabunt, simul cadent* provision)[37]. Replacement is governed by art. 2386 c.c.: if a vacancy of one or more directors occurs, the others will replace them by resolution approved by the Board of Statutory Auditors, but the directors appointed by the SM must always constitute the majority of the directors; if this does not happen, the directors remaining in office must call a SM to fill the vacancies. In case of *simul stabunt, simul cadent*, which provides that in case of cessation of the office of given directors the entire Board ceases to function, a SM will be urgently called by the Board of Statutory Auditors, which can transact the ordinary business in the interim.

The appointment and dismissal of the directors must be recorded in the Companies Registry within thirty days (art. 2383 c.c.).

As regards the s.r.l. instead, it has been said previously that is a very flexible organization, in which the content of AOA and BL plays a key role to determine its management. This includes also the Board of Directors. It must be specified that unlike the provisions of art. 2380-bis c.c. for s.p.a., which states that the management of the company is up to the directors, in s.r.l. management choices may be also made by

[34] Piacentini, *Codice civile italiano tradotto in inglese…*, p. 63, op. cit
[35] Baudino, *Gli amministratori …*, pp. 9-11
[36] Presti, Rescigno, *Corso di diritto commerciale*, p. 142
[37] Presti, Rescigno, *Corso di diritto commerciale*, pp. 143-144

quota-holders: "The quota-holders decide on the subject matters reserved to their competence under the deed of incorporation [...]. Each quota-holder has the right to participate in the decisions provided for under this article and his vote counts proportionally to this quota holding. Except as otherwise provided in articles of association, the decisions of the quota-holder are adopted with the favourable vote of a majority that represents at least half of the corporate capital" (art. 2479 c.c.)[38]. When the management is entrusted to more people these constitute the Board of Directors, but the adoption of collegial method is not mandatory. Directors are appointed by quota-holders among themselves or among outsiders (if provided by the AOA or BL). The BL may also provide a disjoint or joint management (in this case, artt. 2257 and 2258 c.c. regarding Companies with unlimited liability for the Company's obligations shall be applied) [39]. As for s.p.a., a legal person may be appointed as director. For the appointment of the directors, the fourth and the fifth paragraph of art. 2383 c.c. (Appointment and dismissal of directors) shall be applied (art. 2475 c.c.). Regarding the ineligibility and forfeiture reasons, art. 2382 c.c. shall be applied. Special requirements and forfeiture reasons may be included in the AOA. In silence of the AOA, the duration of office is indefinite. The Law leaves to the autonomy of the parties (by means of the AOA) the regulation of cessation and substitution of directors[40].

The presence of one or more *de facto* directors is not rare. A *de facto* director is a person not appointed or illegally appointed that performs the act or duties of a *de jure* director (for example a person that has not the requisites to be appointed, but even so manages the company). Whether or not such person fulfils the qualifications of a director, or enjoys the rights and privileges of a director, he or she is generally held liable as a *de jure* director[41].

1.3.2 The Chairman

"The Board of Directors selects the Chairman from among its members, unless he is appointed by the Shareholders' Meeting" (art. 2380-bis c.c.). "Unless otherwise stated in the articles of association, the Chairman calls the Meeting of the Board of Directors, sets its Agenda, coordinates the work and makes sure adequate information about the

[38] Piacentini, *Codice civile italiano tradotto in inglese…,* op. cit
[39] Trimarchi, *Guide to the Italian limited liability companies*, pp. 176-177
[40] Presti, Rescigno, *Corso di diritto commerciale*, p. 239
[41] Business Dictionary, *De facto director*, op. cit. Available at: http://www.businessdictionary.com/definition/de-facto-director.html

matters on the Agenda is provided to all the members of the Board of Directors" (art. 2381 c.c.)[42]. The *iter* for the convening of the Meeting of the Board of Directors is referred to general provisions and the BL. If the BL is silent on the matter, an adequate advance notice should be given in order to allow the directors to attend the meeting[43].

Usually, the representative power is assigned, severally or jointly, to the Chairman and/or to one or more directors; there may be representatives other than directors (i.e. and external attorney)[44]. Representation consist in "the power to act and take actions against third parties in behalf of the company"[45]. While the managerial power is up to the Board of Directors collegially (and, eventually, to executive bodies), the representative power is up only to the people designated in the AOA. It is governed by art. 2384 c.c. for s.p.a. and by art. 2475 c.c. for s.r.l.

1.3.3 Duties and liabilities of directors

The duties of directors can be divided in generic (e.g. carry out the operations required to achieve the corporate purpose) and specific (e.g. keep the accounts)[46]. They "must fulfil the duties required of them by law and the articles of association with the diligence required by the nature of the appointment and their specified tasks and duties" (art. 2392 c.c.)[47].

The liability of directors is restricted only to the non-observance of duties imposed by the Law or by the BL. As any other non-observance of duties imposed by the Law or by the BL, the penalties for the non-compliant director are the dismissal for cause and the liability for damages eventually caused to the company[48] (artt. 2392 to 2393 c.c.), to the company's creditors (art. 2394 c.c.) –only s.p.a.-, to individual shareholders or third parties (art. 2395 c.c.).

An important issue is the conflict of interest, which is governed by art. 2391 c.c. for s.p.a. and by art. 2475-ter c.c. for s.r.l. In both cases, if the director in conflict of interest has voted or his vote was decisive for a certain resolution, it may be challenged within ninety days, without prejudice to the rights acquired by third parties in good faith. The director is liable for the damages caused to the company.

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[42] Piacentini, *Codice civile italiano tradotto in inglese…*, p. 62, op. cit
[43] Presti, Rescigno, *Corso di diritto commerciale*, p. 148
[44] Trimarchi, *Guide to the Italian limited liability companies*, p. 94
[45] *Ibidem…,* op. cit
[46] Presti, Rescigno, *Corso di diritto commerciale*, p. 154
[47] Piacentini, *Codice civile italiano tradotto in inglese…*, p. 70, op. cit
[48] Presti, Rescigno, *Corso di diritto commerciale*, p. 155

With the exception of those provisions about conflict of interest and liability, the Law is silent on other directors' rights and obligations[49].

1.3.4 Resolutions

As regards s.p.a., resolutions of the Board of Directors are valid only with the presence of a majority of directors (constitutive quorum), unless the AOA require a higher quorum. Resolutions are approved by absolute majority of the attending directors (deliberative quorum), unless the AOA provide for a different majority. It is not permitted to vote by proxy (art. 2388 c.c.). Resolutions must be recorded in a specific book[50].

If a resolution is not adopted in compliance with the Law or the AOA, it may be challenged only by the Board of Statutory Auditors and by the directors who were not present or dissented the resolution (art. 2388 c.c.). The procedure for challenging is referred to art. 2378 c.c., which governs the challenging of SM's resolutions. Some of the provisions of, art. 2378 c.c. are: the challenge must be filed in the court of the place where the company has its registered office; the challenger may request the suspension of the execution of the resolution; all the challenges against the same resolution must be presented together and decided by a single decision; if he deems it useful the judge may attempt a settlement with the parties suggesting the changes to be introduced to the challenged resolution. A resolution may be challenged also by shareholders, only in case they are harmful to the shareholders' rights. The procedure for challenging is referred to both artt. 2377 and 2378 c.c.

In any case, the cancellation of the Board's decisions shall not affect rights acquired in good faith by third parties (art. 2388 c.c.).

It is important to stress out that some provisions of art. 2388 c.c. are part of a larger reform dated 2003, aimed to fill the normative gap of the Civil Code of 1942, in which the resolutions of the Board of Directors were almost unquestionable and protected by the rigid positions of the Supreme Court of Cassation. The mention of artt. 2377 and 2378 c.c. in the fourth paragraph of art. 2388 c.c., added in the reform, set forth the end of the clear division between SM and Board of Directors about the validity and the procedure for challenging of their respective resolutions. Notwithstanding the

[49] Presti, Rescigno, *Corso di diritto commerciale*, p. 241
[50] Trimarchi, *Guide to the Italian limited liability companies*, p. 92

improvement given by the reform, some issues about the interpretation and the efficacy of certain aspects of art. 2388 c.c. remain unsolved[51].

Provisions of art. 2388 c.c. may also be applied to s.r.l.

1.4 The Board of Directors in joint ventures

The joint venture (JV) is an agreement by which "the operations of two or more firms are partially, but not fully, functionally integrated in order to carry out activities in one or more areas"[52].

JVs come from *common law* system. They were born in England, at the end of XVII century, as a tool for merchants to trade overseas: in case of loss, the liability was limited to the contributed capital[53]. But it was in America, in the second half of XX century, that they knew their development and their following diffusion worldwide. Originally, JVs were appointed to describe those negotiation agreements devoid of formalities and limited in time. Today, thanks to the mix with rules of both *civil* and *common law*, the JV is more distant from the US' legal framework, characterized by a delocalized and self-contained agreement[54]. While *civil law* systems have tried to make the JV agreement fit into existing rules and types of contracts, this was not needed in *common law* systems, since there is no division in "types"; the legislation applicable to the contract can be inferred from its interpretation[55].

In Italy the legal form most close to the joint venture is the *associazione temporanea d'imprese* (ATI). It is an atypical contract form that allows more firms to coordinate their activities and present themselves as a unit without altering their autonomy for the realization of complex economic operations. Since it is not exhaustively regulated by the Law, it is up to contractual autonomy to fill the regulatory vacuum[56]. Other forms for the realization of a common business purpose are the *consortium* and the *Gruppo Europeo di Interesse Economico* (GEIE).

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[51] Silvana Dalla Bontà, *Le impugnazioni delle delibere del C.D.A.: premesse storico-comparatistiche*, Trento: Università degli studi, 2006, pp. 335-339

[52] Ugo Draetta, Cesare Vaccà, *Le joint-ventures: profili giuridici e modelli contrattuali*, Milano: EGEA, 1997, p. 6 op. cit.

[53] Manlio Gasparrini, *Joint venture ed altre forme di investimenti diretti esteri: con la loro regolamentazione in 50 stati e glossario in lingua inglese*, Padova, CEDAM, 1996, p. 107

[54] Draetta, *Le joint-ventures: profili giuridici…*, pp. 104-113

[55] Draetta, *Le joint-ventures: profili giuridici…*, p. 37

[56] Presti, Rescigno, *Corso di diritto commerciale*, pp. 20-21

Although JV companies may be similar to already existing types of companies (in Italy a s.p.a. or a s.r.l.), they working system is certainly peculiar given their adherence to partners' necessities[57].

Generally speaking, JVs can be classified in many ways:

- Contractual JV and incorporated JV: a contractual JV is an agreement by which two or more parties contribute resources for a particular business project and agree on the distribution of tasks, costs and profits on the project management. The parties do not set up a separate legal entity, but work in partnership, sharing profit and losses on the terms set out in the joint venture agreement. It has no legal personality or limited liability. Usually, one of the parties acts as main contractor. In an incorporated JV a separate legal entity is established, generally a limited company (or participation in an already existing one). It is subject to the company law of the country in which it is established[58].
- Equity JV and non-equity JV: in equity JV is based on capital participation, whereas non-equity JV are only based on contractual agreements[59].
- Domestic JV and international JV.

Given the object of this paper, the international joint venture will be discussed in detail.

> An international joint venture is an association of entities, whether singular or collective, in a jurisdiction foreign to one of the parties, who have established a contractual relationship, including that derived from rights and obligations resulting from ownership of an interest in a collective entity, which association is intended to realize economic gain for the interested parties over a reasonable period of time, ore an indefinite term, and wherein all parties are able to exercise some control or influence over the legal entity chosen[60].

[57] Renzo Morresi, *Il contratto di joint venture: la joint venture contrattuale e la joint venture societaria – la scelta della forma societaria- il contratto di joint venture*, p. 2-6. Available at: www.promos-milano.it/ImagePub.aspx?id=261306

[58] Morresi, *Il contratto di joint venture…*, p. 5

[59] Gasparrini, *Joint venture ed altre forme di investimenti diretti esteri…*, p. 89

[60] Ronald Wolf, *The complete guide to international joint ventures with sample clauses and contracts*, Wolters Kluwer law & Business, 2011, p. 1, op. cit.

It is an effective tool to overcome trade barriers and access to foreign markets. Making a deal with a local partner allows the foreign investor to reduce currency risk, to avoid common business and cultural mistakes thanks to the experience of the local partner (resulting in a fair return on capital invested), to gain access to natural resources. Sometimes to participate in a certain business a foreign investor is obliged to have a local partner, other times may not have the permission to own more than a certain percentage of the equity of a local company because of the local government's fear of domination by non-nationals[61]. Besides, JVs are seen as an opportunity by developing countries, given the possibility to obtain know-how, capital investment, the possibility of company's management by local partners[62]. However, the interaction between foreign and local partners can lead to a clash of culture that must be expected and handled for the sake of the JV's success. Language barrier and behaviour are just two of the many cultural matters that a foreign investor have to face: the commercial structure and business dealings of a country are deeply influenced by its culture too[63].

International JVs are governed by the law of the country chosen by the parties or applicable according to the relevant conflict rules, while domestic JVs are governed by local law of contracts (in Italy, the Civil Code) and other relevant laws (company law, tax law etc.).

The partners exercise a joint control over the JV and a joint participation on its management, but this may create a conflict with the majority principle of local provisions on company's structure, which gives the control to one partner. This situation can be avoided by giving some specific powers to the minority, for example a veto power on given matters (*infra* 1.5.1)[64]. There is no joint control in absence of two minimum guarantees for minority, i.e. veto power on JV's essential matters and presence in the board of directors; in absence of either of them, there would be a situation in which the majority shareholder manages the company, whereas other shareholders are excluded from the management except for those matters provided by the Law. Joint control allows a certain flexibility thanks to the possibility, for example, to confer the ordinary management to a partner and general supervision to another one (*infra* 3.2)[65].

[61] Cnfr. Wolf, *The complete guide to international joint ventures…*, chapter 1.2
[62] Gasparrini, *Joint venture ed altre forme di investimenti diretti esteri…*, p. 92
[63] Wolf, *The complete guide to international joint ventures…*, pp. 8-9
[64] Gasparrini, *Joint venture ed altre forme di investimenti diretti esteri…,* p. 113
[65] Giovanni Balcet (edited by), *Joint venture multinazionali: alleanze tra imprese, competizione e potere di mercato nell'economia mondiale*, Milano, ETAS libri, 1990, p. 280

The *iter* for the establishment of a JV can be divided in four phases: strategic rationale, partner selection, negotiation of the deal, implementation[66].

1.5.1 Joint venture's documents and the Board of Directors

The key of JV's equilibrium lies in the accuracy with which shareholders and legal practitioners draft its various documents, also known as "major agreements". The most important are: the letter of intent, the joint venture agreement and the Shareholders' agreement. The regulation concerning the Board of Directors may be included in JV Agreement, Shareholders' Agreement, AOA or in an *ad hoc* supplementary document.

The letter of intent marks the first step of the JV's establishment. Generally, it is an informal and non-binding document between partners about a possible collaboration.

If the parties are willing to continue, the next document to be prepared is the Joint Venture Agreement. It is a highly technical document with a manifold purpose and it could be seen as a primary source for ownership and managerial rights[67]. Its content concerns the steps to be made before the JV's establishment, the choice of JV's legal nature, JV's objectives and ordinary business management, the promises of the parties, warranties and representations of the parties, and many other matters. Worth of mention is the clause on dispute resolution, further discussed in paragraph 3.3. Another important clause is the non-competition one. It is a quite difficult matter, because on one side this topic is governed by many national and international regulations, on the other side the parties do not like the idea of their future business bound by the agreements made for the JV. A common way to deal with this matter is to write in the JV Agreement that there shall be no competition until its implementation and to include an equal opportunity clause, which states that all related business mounted by one party shall include an offer to the JV on the same terms; the legal efficiency of equal opportunity clause is just moral, but it can be provided a clause requiring damages in case of its breach[68].

As regards the Board of Directors, it should reflect the capital interests of each partner without overlook the matter of joint control (*supra* 1.5). To achieve joint control, it is necessary to ensure the participation of minority, for example ensuring it a certain number of seats on the Board of Directors, or establishing that unanimous vote or a

[66] Cnfr. Gasparrini, *Joint venture ed altre forme di investimenti diretti esteri…*, chapter XII
[67] Wolf, *The complete guide to international joint ventures…*, pp. 95-96
[68] Wolf, *The complete guide to international joint ventures…*, pp. 186-187

qualified majority (in Italy 2/3) of the Board is mandatory for certain important issues. However, the limit between modifying quorum rights and protecting minority rights is not well defined by the Law. Usually two different clauses are drafted, one concerning the general quorum provisions if these are different from the normal commercial code provisions and the other one concerning qualified majority on particular issues[69]. A system able to maintain the equilibrium between the parties should be planned, not only in ordinary meetings of the Board, but also in case of this equilibrium does not exist anymore, i.e. in case of death or resignation of one or more directors (a tool to achieve this is the *simul stabunt, simul cadent* clause). The guarantees to the minority should be well balanced for management sake, avoiding the risk of a deadlock if their approval is necessary for any decision[70].

As the name suggests, Shareholders' Agreement concerns rights between shareholders. It has a crucial importance, since it establishes the business purpose, the amount of share capital, the shareholders' commitment to not compete with the new JV[71]; moreover, it has a significant role in enhancing and protecting minority interests. Its features could be included in the JV Agreement, but keeping them separate gives rise to greater clarity[72]. Shareholders' Agreement finds its legal framework in general civil and commercial law principles, plus law of contracts; its validity against third parties may depend on its deposition or registration. To be effective, it must be well integrated with the provisions of the other JV's documents. Since its time limit is not always regulated by the various jurisdictions and to avoid an unlimited agreement that is not well seen by many parties and lawyers, the duration will be regulated in a designated clause[73]. The parties shall decide under what law the agreement should be interpreted in a designated clause. It is not recommended to choose a set of laws that are not those of the jurisdiction in which the JV is operating. They can decide between arbitration and tribunal for dispute resolution and the language of the agreement (in case of bilingual solution, it shall be indicated which will prevail in case of conflict) in respective specific clauses. To deal with damages, in addition to the application of the appropriate statute in the country in case of a breach of contract, the parties may define the indemnities through a specific clause in the Shareholders' Agreement[74].

[69] Wolf, *The complete guide to international joint ventures…*, p. 173
[70] Balcet, *Joint venture multinazionali…*, p. 286-287
[71] Manlio Gasparrini, *Joint venture ed altre forme di investimenti diretti esteri…,* p. 142
[72] Wolf, *The complete guide to international joint ventures…*, p. 97
[73] Wolf, *The complete guide to international joint ventures…*, pp. 258-265, "Duration of the Agreement"
[74] Wolf, *The complete guide to international joint ventures…*, pp. 275-276

As regards the Board of Directors, the agreement should regulate its composition, the voting requirements, the conflict of interest, the procedures and areas of action. For example, it will be decided how many directors may be appointed by each partner, who will nominate the Chairman and the Vice-Chairman of the Board, which decisions cannot be made without the approval of the partners[75], how often the Board shall meet and the procedures, the nomination of managers and the division of powers between the Board and them[76].

Given the absence of rules on what documents are mandatory, there are often supplementary papers. One of them is the Board of Directors Agreement. The provisions of this agreement are usually included in the major agreements, but it may be useful to draft it separately in case of significant capital joint ventures[77]. Its purpose is to establish a regulatory framework for the Board. Below, a partial example of its content:

- Preamble: "It being considered by all shareholders signatories to this agreement that the proper and effective management of (identify joint venture company, hereinafter referred to as 'company') is dependent upon an equitable distribution of voting rights and is not in proportion to capital ownership, and further the said signatories are of the opinion that there must be a balance between majority and minority interests [...]".
- Share capital by class: "The share capital of company shall be divided into various classes with special rights attendant upon the classes [...]".
- Election of the Board of Directors: "[...] During the first term the following shareholders shall have the right to nominate the following positions on the Board of Directors: President-shareholder 'x', Class A. Vice President-shareholder 'y', Class B. The rest of the Board of Directors shall be selected as follows: [...]".
- Quorum rights by subject matter: "Subject to the requirements of applicable law, the affirmative vote of (insert percentage requirement) of the issued and outstanding class of shares (indicate the class of shares to be enumerated) of the company shall be required before any of the following actions set forth below

[75] Balcet, *Joint venture multinazionali…*, p. 284
[76] Cnfr. Wolf, *The complete guide to international joint ventures…*, p. 265 and following
[77] Wolf, *The complete guide to international joint ventures…*, pp. 95-100

may be taken by the company, which actions are within the exclusive competence of the Board of Directors: [...]".

- Board meetings: "The Board of Directors shall meet no less than [...], although any director can request a meeting at any time serving a reasonable written notice upon the other members of the board. All directors must receive at least seven (7) days notice in writing of any board meeting. Such notice period can be varied in writing with the consent of all the directors. Any notice must specify the matters to be discussed at the board meeting. Other matters may be discussed at the board meeting if all the directors (including alternates) agree. [...]".
- Board quorum: "The quorum of any board meeting will be ... directors present at the time of and throughout the meeting, one of whom must be an (indicate requirement, e.g., President, Vice-President). If a quorum is not present the meeting shall be postponed [...]. If a quorum is not present at the adjourned meeting, then the board of directors shall convoke a general assembly of the company [...]"[78].

It is clear that the voting rights are not the result of the percentage of ownership, but on the contrary the result of the division of share capital in classes. Each class should have the same rights. In an ordinary situation, with only 49% of votes the minority should not have any director representing its interests in the Board, but thanks to the special provisions of the JV's documents it will enjoy the various rights discussed above[79].

It is important to avoid 'squeeze-out' manoeuvres, meaning that "one group of shareholders renders the property interests of another group(s) meaningless", excluding it from any participation in property or management rights[80]. To do so, it is important to protect the minority with the provisions seen above.

Speaking of provisions, it is essential that all the provisions adopted by the JV must not be in conflict with the national laws in which the JV is located or with the national laws of the tribunals chosen for dispute resolutions[81].

[78] Wolf, *The complete guide to international joint ventures…*, pp. 111-113, op. cit.
[79] Wolf, *The complete guide to international joint ventures...*, p. 213
[80] Wolf, *The complete guide to international joint ventures…*, p. 281, op. cit.
[81] Manlio Gasparrini, *Joint venture ed altre forme di investimenti diretti esteri…*, p. 92

2. THE BOARD OF DIRECTORS IN CHINA

2.1 General overview

In a few decades China switched from a marginal developing country to the world's first economic power.

In the Fifties the Country's organisation model was inspired by the soviet one: predominant role of the communist party, fusion of powers, state planning, public ownership of the production facilities, immunity for the members of the communist party whereas the "enemies" of the party were deprived of civil and political rights[82]. After the separation from the soviet model with the Great Leap Forward (1958-1960), China fell in the dark period of the Cultural Revolution (1966-1968): those who had supported capitalism were persecuted, the Red Guards were charged with fighting the opponents of the Cultural Revolution and President Mao, the way of thinking of Mao was assumed as a guide. Worth of mention is the legal nihilism during this period: tribunals and ministries were disbanded, the law schools closed, the National People's Congress did not gather for ten years; judges and legal experts were criticized, persecuted and sent to remote areas with other intellectuals to be re-educated.

At the beginning of the Seventies, the vehemence of the Cultural Revolution faded. Slowly, there was a political and social stabilization, the Four Modernizations were promoted (agriculture, manufacturing, technology and defence), a new Constitution was promulgated. China opened to the world after almost ten years of isolation. It rebuilt the diplomatic relations with several countries, including Italy, and in 1971 became a permanent member of the United Nations Security Council[83]. The contact with the other countries lead to the necessity to keep up with the rest of the world. Many reforms to promote modernization were enacted to fill the gap.

After a brief period of closure, resulting from the events of Tiananmen, Deng Xiaoping promoted the "Socialism with Chinese characteristics": China would have been still a socialist system, but with more autonomy for business and openness to foreign investments and international trade, all under the overall supervision of the government. Reforms increased and became less experimental and uncertain, commercial law more and more assumed a key role. Joining the World Trade Organization (WTO) in 2001

[82] Renzo Cavalieri (edited by), *Diritto dell'Asia Orientale*, Venezia, Libreria Editrice Cafoscarina, 2008, p. 30

[83] Cnfr. Mario Sabattini, Paolo Santangelo, *Storia della Cina*, Bari, Editori Laterza, 2011

was inevitable, since the importance that China had assumed in the international trade and the deep effort made to reach the international standards[84].

Slowly but inexorably, China expanded its influence all over the world thanks to its soft power and market power, investing in developing countries like Africa, acquiring various brands (also in Italy), switching from follower to leader in many fields. Through the projects 'One Belt One Road' and 'Made in China 2025', for the creation of a modern Silk Road and for the innovation of industry respectively, China is preparing to become a trade and economic centre without equal.

Although many countries complain about unfair competition, increasing economic expansion, unequal enforcement of the law, censorship, human rights and so on, today dealing with China is inevitable.

2.2 The evolution of Commercial Law

Before the Eighties that set of rules belonging to Commercial Law (商法 *shang fa*) was governed by Economic Law (经济法 *jingji fa*) and Civil Law (民法 *min fa*), inspired by the soviet concepts of the state planning and the public ownership of the production facilities. After the Cultural Revolution, the reform process and the renewed relationship with the West led to the development of Commercial Law. Its evolution can be divided in three phases.

The first one, from 1979 to 1989, was characterized by the attempt to make the public companies less dependent from the central authorities, by the permission to foreign investments and to the creation of private companies. At the beginning, those innovations were limited only to specific areas and lacked of a strict supervision by the legislators, that were trying to recover after the 'ten years of disorder' of the Cultural Revolution, resulting in a disorganized set of experimental laws and an uncertain and discretionary enforcement by the local officials. Only if they proved to be efficient, they would have been applied nationwide. An important step was made in 1988 with the Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People (中华人民共和国全民所有制工业企业法 *Zhonghua Renmin Gongheguo quanmin suoyouzhi gongye qiye fa*), that recognize to the company legal personality (法人 *faren*) and wider rights of management and use of the assets entrusted to it by the state.

[84] Renzo Cavalieri, *L'adesione della Cina alla WTO, Implicazioni giuridiche*, Lecce, Argo Editrice, 2003, p. 12

Another important step was the temporary Decree for the establishment of limited liability companies; however it was very undefined, since a corporate law had not yet been issued. Regarding the companies with foreign participation, they benefited from a special legislation, different from that for domestic trade. The interaction with foreign law systems resulted in rudimentary but modern and liberal corporate laws[85]. Worth of mention are those laws concerning the Joint Ventures and the Wholly Foreign Owned Enterprises (WOFE). They marked a turning point: for the first time a Socialist state allowed the capitalist exploitation of wage labour in return for investments and know-how (*infra* 2.4). The development of economy, private companies and foreign investments implicated an evolution of the contract law. Contracts were regulated by three laws, differentiated by the parties involved or the content: the Economic Contract Law of the People's Republic of China (中华人民共和国经济合同法 *Zhonghua Renmin Gongheguo jingji hetong fa*), the Law of the People's Republic of China on Economic Contracts Involving Foreign Interests (中华人民共和国涉外合同法 *Zhonghua Renmin Gongheguo shewai hetong fa*) and the Law of the People's Republic of China on Technology Contracts (中华人民共和国技术合同法 *Zhonghua Renmin Gongheguo jishu hetong fa*). In particular, the Law on Economic Contracts Involving Foreign Interests opened Chinese market to international flows of goods and services, allowed the parties to resort to arbitration for dispute resolution (art. 37) and allowed the parties to choose the applicable law to the contract (art. 5)[86].

All these regulations were the result of a first, green attempt to manage the modernization process and keep up with the rest of the world. However, there was still no uniform corporate law that could be a reference the various laws that were blossoming in that period.

The second phase, from 1990 to 2001, was characterized by the stabilization and improvement of the juridical infrastructure of the 'Socialism with Chinese characteristics': many western models were adopted, the enforcement of laws became less uncertain and discretional, the juridical system became more competent and efficient[87]. Promulgated in 1993, the Company Law (公司法 *gongsi fa*) introduced on national scale two types of company belonging to western legal traditions, namely limited liability company (有限责任公司 *youxian zeren gongsi*) and company limited

[85] Cavalieri, *Letture di diritto cinese*, pp. 59-62
[86] Draetta, Cesare Vaccà, *Le joint-ventures: profili giuridici…*, pp. 118-119
[87] Cavalieri, *Letture di diritto cinese*, p. 60

by shares (股份有限公司 *gufen youxian gongsi*). As in most cases, Company Law was the result of a mixture: it took inspiration from both European model (especially the German one) and the *common law* model of Hong Kong. It will be amended four times (1999, 2004, 2005 and 2013)[88].

Regarding the contracts, the tripod system (三足鼎立 *sanzu dingli*) lasted until 1999, when the Contract Law (合同法 *hetong fa*) entered into force: its General Provisions set rules common to all types of contracts, while its Specific Provisions list the 15 types of contracts contemplated. Other important laws enacted in this period were the Law of the People's Republic of China Against Unfair Competition (中华人民共和国反不正当竞争法 *Zhonghua Renmin Gongheguo fan bu zhengdang jingzheng fa*) and the Law of the People's Republic of China on Partnership Enterprises(中华人民共和国合伙企业法 *Zhonghua Renmin Gongheguo hehuo qiye fa*).

The third phase, from 2001 up to the present, was characterized by an almost full alignment of Chinese juridical system with the western ones, without losing those peculiar elements deriving from the political and social structure. Joining the WTO entailed the adaptation to the requested standards, projecting China into the global market and forcing the global market to deal with China on equal terms. This adaptation concerned the legal framework on international trade, foreign investments, intellectual property and the liberalization of import and export. Among them, worth of mention are: the Law of the People's Republic of China on Foreign Trade (中华人民共和国对外贸易法 *Zhonghua Renmin Gongheguo duiwai maoyi fa*), which allowed all companies to trade with foreign countries, and not only those with special licenses as in the past; the periodical updating of the Catalogue for the Guidance of Foreign Investment (外商投资指导目录 *waishang touzi zhidao mulu*), which classifies the different investment sectors in permitted, encouraged, restricted and forbidden; the possibility for foreigners of wholesale, retail and franchising[89].

Although the great strides made in such a short time, China still has to cope with some undeniable problems, strongly marked by western countries: the matter of 'law in the books' and 'law in action'; the linguistic and technical ambiguities in laws; the quality of judgements and documents; the lightness, approximation or reluctance with which

[88] Cavalieri, *Letture di diritto cinese*, pp. 63-64
[89] Cnfr. Cavalieri, *L'adesione della Cina…*

the rules are written, interpreted or applied[90]. Even if the relationship between economic growth and a stable and predictable legal protection for investors is affirmed by many scholars, China is the evidence that is possible to become the world's first economic power without an advanced legal system[91]. Besides, China has recently become an important player even in the legal field: after a period of training and assimilation of the *know-how* from other countries, China became more conscious and informed of the various legal instruments as well as their potentiality, using them successfully on the world's scenario[92] (as happened in the Danone-Wahaha case).

2.3 Company law and corporate governance in China

As said before, the Company Law of the People's Republic of China (中华人民共和国公司法 *Zhonghua Renmin Gongheguo gongsi fa*) was enacted in 1993 and amended four times (1999, 2004, 2005 and 2013). Each amendment marked an improvement of company's legal framework, the transition of many state-owned enterprises to private ones, and a wider openness to the rest of the world. Thanks to Company Law (hereinafter CL), for the first time public and private entrepreneurs (and with some limitations even foreign entrepreneurs) were allowed to run their business by means of the two types of companies acknowledged, i.e. limited liability company (有限责任公司 *youxian zeren gongsi*) and company limited by shares (股份有限公司 *gufen youxian gongsi*). The limited liability company is defined by Company Law as an enterprise with legal person status and the liability of each shareholder is limited to its capital contribution. There is a minimum registered capital requirement depending on the kind of business in which the company is involved, the number of shareholders may be from 2 to 50. In a company limited by shares shareholders are liable for corporate debts up to the amount of their investment, the minimum registered capital is RMB 10,000,000[93]. As many other Chinese laws, Company Law also reflects Chinese process of modernization and the assimilation of many foreign legal provisions resulting from it. There are great similarities with continental Europe models in various matters (like incorporation procedures and administration), but there are hints of *common law* too. As

[90] Cavalieri, *Letture di diritto cinese*, p. 12
[91] Wei Shen, Casey Watters, *Do All Roads Lead to China?: Scholarship of Chinese Commercial Law in the Past Decade (Part 1)*, in China Review, 2016, vol. 16, no. 2, pp. 165-169
[92] Cavalieri, *Letture di diritto cinese*, pp. 174-175
[93] James Zimmerman, *China Law Deskbook: a legal guide for foreign-invested enterprises*, Chicago, ABA Section of International Law, 2004, pp. 129-130

regards the separation from the rigid economic planning, there is no more need of administrative approval as before (except in some specific situations), compliance with the requirements established by the Law is sufficient. It is also remarkable the transition from the concept of *qiye* (企业) to *gongsi* (公司) that indicates companies as subjects with a full legal personality and complete financial autonomy operating in a free market context[94]. Nevertheless, an important aspect that should not be underestimated is the reference to "the safeguard of social and economic order" and to the promotion of "the development of socialist market economy" in art. 1 CL[95]. This statement implies a strong influence of the Chinese market theory on the Law, result of Chinese historical and cultural background. This fact certainly affect all the aspects of company life, including those aspects regarding directors and shareholders[96]. The lack of autonomy from governmental interference is strengthened by artt. 5 and 19 CL, which respectively require, among the other things, "to accept the supervision by the government" and to establish in a company and provide the necessary conditions for the activities of an organization of the Communist Party of China to "carry out the activities of the party in accordance with the charter of the Communist Party of China"[97].

As regards companies involving a foreign party, they are subject to a set of special regulations, that shall prevail on Company Law's provisions[98] (*infra* 2.4). However, the provisions of Chinese Company Law deeply affects the organizational structure of these companies, restricting their flexibility (especially for joint ventures, whose structure, similar to a partnership, is "forced in the organizational straightjacket of a limited liability company")[99].

Chinese Company Law is divided in thirteen chapters: I, general provisions; II, establishment and organizational structure of limited liability companies; III, transfer of equity interests in limited liability companies; IV, establishment and organizational structure of companies limited by shares; V, issuance and transfer of shares in companies limited by shares; VI, qualifications and obligations of directors, supervisors and senior officers of companies; VII, corporate bonds; VIII, financial affairs and accounting of companies; IX, merger and division, increase and reduction of capital of

[94] Cavalieri, *Letture di diritto cinese*, pp. 63-64
[95] Invest in China, *Company Law of People's Republic of China (revised in 2013)*, op. cit. Available at: http://www.fdi.gov.cn/1800000121_39_4814_0_7.html
[96] Olaerts, *Euro-Chinese Company Models…*, p. 174
[97] Invest in China, *Company Law…*, op. cit.
[98] Fleckner, Hopt, *Comparative corporate governance…*, p. 159
[99] Olaerts, *Euro-Chinese Company Models…*, p. 194

companies; X, dissolution and liquidation of companies; XI, branches of foreign Companies; XII, legal liability; XIII, supplementary provisions.

Focusing on corporate governance, a two-tier board is mandatory for both limited liability companies and companies limited by shares. The main bodies are: the Board of Directors (董事会 *dongshi hui*), the Supervisory Board (监事会 *jianshi hui*) and the General Meeting (股东大会 *gudong dahui*)[100]. The requirement of a two-tier system and the great attention given to the employees, which must be part of the Supervisory Board and voluntarily of the Board of Directors, seems to suggest an affinity with the stakeholder model. However, the statement of art. 36 CL, "The board of shareholders is the organ of power of the company", suggest a shareholders-oriented approach, typical of one-tier system. The strong influence of the shareholders on the Board of Directors is evident, for example, in art. 37 CL, which lists the shareholders' functions and powers. Two of them are "to examine and approve reports of the Board of Directors" and "to decide the operational policy and investment plan of the company", which leave small autonomy to the Board of Directors. According to some experts, a further reading of Company Law's articles seems to imply that the Board of Directors decisions cannot go against the shareholders' ones. This way the decision power is divided between the Board of Directors and the supervisors on one side and the shareholders on the other side[101]. On the contrary, in most of Western Countries all but the most basic decisions are assigned to the Board of Directors. As regards the Supervisory Board, Company Law does not give to it any significant power and this brings to the conclusion that "the Board of Supervisors does not imply an important role in corporate governance in China"[102]. It is noteworthy, however, that for both limited liability companies and companies limited by shares the Supervisory Board must "include representatives of the shareholders and an appropriate ratio of the representatives of the company's staff and workers" (artt. 51 and 117 CL)[103]. Its competences are listed in artt. 53 and 54 CL, valid for both limited liability companies and companies limited by shares.

CL's provisions concerning the Board of Directors will be discussed in the following paragraph.

[100] Fleckner, Hopt, *Comparative corporate governance…*, pp. 160-161
[101] Olaerts, *Euro-Chinese Company Models…*, pp. 184-186
[102] Fleckner, Hopt, *Comparative corporate governance…*, p. 166, op. cit.
[103] Invest in China, *Company Law…*, op. cit.

2.3.1 The Board of Directors in companies limited by shares and limited liability companies

As regards limited liability companies, there is no mention of the Board of Directors in the content of AOA requested by art. 25 CL.

The content of art. 40 CL seems to imply that the establishment of a Board of Directors is not mandatory:

> 第四十条
>
> 有限责任公司设立董事会的，股东会会议由董事会召集，董事长主持；董事长不能履行职务或者不履行职务的，由副董事长主持；副董事长不能履行职务或者不履行职务的，[...]。有限责任公司不设董事会的，股东会会议由执行董事召集和主持 [104]。

> Art. 40
>
> If a limited liability company has established a board of directors, the general meeting shall be convened by the board of directors and presided over by the chairman of the board. If the chairman of the board is unable to or does not perform his duty, the meeting shall be presided over by the vice-chairman of the board. If the vice-chairman of the board is unable to or does not perform his duty […]. If a limited liability company has no board of directors, the general meeting shall be convened and presided over by the executive director(s)[105].

The absence of a requirement of a Board of Directors in limited liability companies is confirmed by art. 50 CL, wherein is stated that in case of a small enterprise, an executive director (执行董事 *zhixing dongshi*) can be appointed instead of a Board:

> 第五十条

[104] China Law (中国政府法制信息网 法律 中华人民共和国公司法), 中华人民共和国公司法 *Zhonghua Renmin Gongheguo Gongsi fa*, *Company Law of the People's Republic of China*, op. cit. Available at: http://www.chinalaw.gov.cn/art/2013/12/31/art_11_88220.html

[105] Invest in China, *Company Law …,* op. cit.

股东人数较少或者规模较小的有限责任公司，可以设一名执行董事，不设董事会。执行董事可以兼任公司经理。执行董事的职权由公司章程规定[106]。

Art. 50

A limited liability company with comparatively few shareholders or comparatively small in scale may have one executive director instead of a board of directors. The executive director may concurrently serve as the manager of the company. The functions and powers of the executive director shall be specified in the articles of association of the company[107].

While in Italian Civil Code there is no mention of a specific number of directors, Chinese Company Law provides a specific range for both limited liability companies and companies limited by shares:

第四十四条

有限责任公司设董事会，其成员为三人至十三人；但是，本法第五十条另有规定的除外。[…] 董事会设董事长一人，可以设副董事长。董事长、副董事长的产生办法由公司章程规定[108]。

Art. 44

A limited liability company shall have a board of directors of three to 13 members, unless otherwise stipulated in Article 51 hereof. […] A board of directors shall have one chairman of the board and may have vice-chairmen of the board. The method of appointment of the chairman and vice-chairman (or vice-chairmen) of the board shall be specified in the articles of association of the company[109].

[106] China Law, 中华人民共和国公司法, op. cit.
[107] Invest in China, *Company Law …,* op. cit.
[108] China Law, 中华人民共和国公司法, op. cit.
[109] Invest in China, *Company Law …,* op. cit..

As in Italy, the term of the office of a director must be specified in the company's AOA, but it cannot exceed three years. A director may be re-elected. On the basis of the *prorogatio* principle, a director can remain in charge even after the term of his office:

> 第四十五条
> 董事任期由公司章程规定，但每届任期不得超过三年。董事任期届满，连选可以连任。董事任期届满未及时改选，或者董事在任期内辞职导致董事会成员低于法定人数的，在改选出的董事就任前，原董事仍应当依照法律、行政法规和公司章程的规定，履行董事职务[110]。
>
> Art. 45
> The term of office of directors shall be specified in the articles of association of the company but each term may not exceed three years. If re-elected upon expiration of his term of office, a director may serve consecutive terms. If no new director is elected in time upon expiration of the term of office of a director, or if a director resigns during his term of office, resulting in the number of members of the board of directors falling below the statutory number, the original director shall perform his duties as director according to the provisions of laws, administrative regulations and the articles of association of the company before a newly elected director takes office[111].

While Italian Civil Code does not provide a specific article that lists the Board's functions and powers, art. 46 CL reaffirm the accountability of the Board of Directors to the SM and provides the Board's scope, including: "to convene the general meeting and to report on its work to the board of shareholders; to implement the resolutions of the general meeting; to decide on the business plans and investment plans of the company; […] to formulate plans for the merger, division, dissolution or change of corporate form of the company; to decide on the establishment of the company's internal management organization; to decide on the employment or dismissal of the manager of the company and his remuneration; […] to formulate the basic management system of the company;

[110] China Law, 中华人民共和国公司法, op. cit.
[111] Invest in China, *Company Law …,* op. cit.

and other functions and powers specified in the articles of association of the company."[112].

The Chairman of the board, the executive director or the manager of the company act as legal representative of the company (art.13 CL), while in Italy this task is assigned to the directors (art. 2475-bis c.c.). The appointment of a vice-Chairman is not mandatory; in any case, the method of appointment of Chairman and vice-Chairman is specified in the company's AOA (art. 44 CL).

Meetings of the Board of Directors must be convened and presided over by the Chairman. If he is not able to perform his duties, the vice-Chairman shall take his place. In case of unavailability of the vice-Chairman, the meeting shall be presided over by a director appointed by more than half of the directors (art. 47 CL)[113].

Deliberation and voting procedures are governed by art. 48 CL as follows:

> 第四十八条
> 董事会的议事方式和表决程序，除本法有规定的外，由公司章程规定。
> 董事会应当对所议事项的决定作成会议记录，出席会议的董事应当在会议记录上签名。董事会决议的表决，实行一人一票[114]。

> Art. 48
> The method of deliberation and voting procedures of the board of directors shall be specified in the articles of association of the company, except where stipulated herein. The board of directors shall keep minutes of its decisions on the matters under its consideration. The directors present at the meeting shall sign the minutes of the meeting. When voting on a resolution of the board of directors, each director present at the meeting shall have one vote[115].

As regards companies limited by shares, unlike limited liability companies the Board of Directors is mentioned in the content of AOA requested by Company Law (art. 81 CL). While in Italy the number is determined by the SM, if the AOA make no provision of

[112] Invest in China, *Company Law …,* op. cit.
[113] *Ibidem,* op. cit.
[114] China Law, 中华人民共和国公司法, op. cit.
[115] Invest in China, *Company Law …,* op. cit.

the number of directors (art. 2380-bis c.c.), art. 108 CL provides a specific number of directors. Moreover, art. 108 CL refers to the provisions of artt. 46 and 47 for limited liability companies respectively for the directors' term of office and for the Board of Directors' functions and powers:

> 第一百零八条
> 股份有限公司设董事会，其成员为五人至十九人。[…] 本法第四十五条 关于有限责任公司董事任期的规定，适用于股份有限公司董事。本法第四十六条 关于有限责任公司董事会职权的规定，适用于股份有限公司董事会 [116]。

> Art 108
> Company limited by shares shall have a board of directors of five to 19 members. […] The provisions of Article 46 hereof on the term of office of the directors of limited liability companies shall apply to the directors of companies limited by shares. The provisions of Article 47 hereof on the functions and powers of the board of directors of limited liability companies shall apply to the board of directors of companies limited by shares[117].

Art. 109 CL provides more in detail the election of the Chairman and his duties:

> 第一百零九条
> 董事会设董事长一人，可以设副董事长。董事长和副董事长由董事会以全体董事的过半数选举产生。董事长召集和主持董事会会议，检查董事会决议的实施情况。副董事长协助董事长工作，董事长不能履行职务或者不履行职务的，由副董事长履行职务；副董事长不能履行职务或者不履行职务的，由半数以上董事共同推举一名董事履行职务 [118]。

> Art. 109

[116] China Law, 中华人民共和国公司法, op. cit.
[117] Invest in China, *Company Law …,* op. cit.
[118] China Law, 中华人民共和国公司法, op. cit.

The board of directors shall have one chairman of the board and may have a vice-chairman (or vice-chairmen) of the board. The chairman and vice-chairman (or vice-chairmen) of the board shall be elected by more than half of all directors. The chairman of the board shall convene and preside over the meetings of the board of directors and inspect the implementation of the resolutions of the board of directors. The vice-chairman of the board shall assist the chairman of the board in his work. Where the chairman of the board is unable to or does not perform his duties, his duties shall be performed by the vice-chairman. If the vice-chairman is unable to or does not perform his duties, his duties shall be performed by a director jointly designated by more than half of the directors[119].

Companies limited by shares have more specific requirements on convening and voting rights than limited liability companies:

第一百一十条

董事会每年度至少召开两次会议，每次会议应当于会议召开十日前通知全体董事和监事。代表十分之一以上表决权的股东、三分之一以上董事或者监事会，可以提议召开董事会临时会议。董事长应当自接到提议后十日内，召集和主持董事会会议。董事会召开临时会议，可以另定召集董事会的通知方式和通知时限[120]。

Art. 110

The board of directors shall convene at least two meetings each year. All directors and supervisors shall be notified 10 days before each meeting is held. An extraordinary meeting of the board of directors may be proposed by shareholders representing 10% or more of the voting rights or one third or more of the directors or the board of supervisors. The chairman of the board shall convene and preside over the meeting of the board of directors within 10 days of receipt of the proposal. The notification method and time

[119] Invest in China, *Company Law …,* op. cit.
[120] China Law, 中华人民共和国公司法, op. cit.

limit for giving notice of the convening of extraordinary meetings of the board of directors may be decided separately[121].

While deliberation and voting procedures of the Board of Directors in limited liability companies are specified in the company's AOA (art. 48 CL), for companies limited by shares there is a specific article:

第一百一十一条
董事会会议应有过半数的董事出席方可举行。董事会作出决议，必须经全体董事的过半数通过。董事会决议的表决，实行一人一票[122]。

Art. 111
Meetings of the board of directors may be held only if attended by more than half of the directors. Resolutions of the board of directors shall be adopted by more than half of all directors. When voting on a resolution of the board of directors, each member shall have one vote[123].

As in Italy (art. 2392 c.c.), the directors are collectively liable for the acts of the Board. However, an individual director can indemnify himself against collective liability if his objection to a certain resolution is reported in the minutes of the meeting of the Board[124]:

第一百一十二条
董事会会议，应由董事本人出席；董事因故不能出席，可以书面委托其他董事代为出席，委托书中应载明授权范围。董事会应当对会议所议事项的决定作成会议记录，出席会议的董事应当在会议记录上签名。董事应当对董事会的决议承担责任。董事会的决议违反法律、行政法规或者公司章程、股东大会决议，致使公司遭受严重损失的，参与决

[121] Invest in China, *Company Law …,* op. cit.
[122] China Law, 中华人民共和国公司法, op. cit.
[123] Invest in China, *Company Law …,* op. cit.
[124] Olaerts, *Euro-Chinese Company Models…,* p. 190

议的董事对公司负赔偿责任。但经证明在表决时曾表明异议并记载于会议记录的，该董事可以免除责任[125]。

Art. 112

Meetings of the board of directors shall be attended by the directors in person. If a director for any reason is unable to attend the meeting, he may appoint another director in writing to attend the meeting on his behalf, and the power of attorney shall specify the scope of authorization. The board of directors shall keep minutes of its decisions on the matters under its consideration, and the directors present at the meeting shall sign the minutes of the meeting. The directors shall bear liability for the resolutions of the board of directors. If a resolution of the board of directors violates any law or administrative regulation, or the company's articles of association or a resolution of the general meeting, thereby causing the company to incur serious losses, the directors that took part in such resolution shall be liable to the company for compensation. However, if a director is proved to have expressed his objection to the resolution at the time of voting and the objection is recorded in the minutes of the meeting, such director may be released from such liability[126].

According to art. 113 CL, a company limited by shares must have a manager (经理 *jingli*), while is not mandatory for limited liability companies. Its functions and powers are the same as prescribed for limited liability companies in art. 50 CL. A member of the board can serve as a manager concurrently (art. 114 CL).

Art. 146 CL and following concerns the qualifications and obligations of directors, supervisors and senior officers of both companies limited by shares and limited liability companies. If a director is appointed in violation of the provisions listed in art. 146 CL, the appointment shall be invalid; if a director falls in one of the listed circumstances, the company shall dismiss him from his office. Regarding obligations, art. 147 CL generally states that directors shall comply with laws, administrative regulations and the AOA of the company, they bear an obligation of loyalty and diligence to the company

[125] China Law, 中华人民共和国公司法, op. cit.
[126] Invest in China, *Company Law …,* op. cit.

and shall not take advantage of their position; art. 148 CL lists the acts that shall not be performed by directors more in detail, but what the of duty of loyalty and diligence specifically entitles still remains ambiguous[127]. Those who violate such provisions in the performance of the position's duties and powers must pay compensation (art. 149 CL).

Regarding of conflict of interest, art. 21 CL states that the controlling shareholder, *de facto* controller, directors, supervisors and senior officers who use their affiliation to harm the interests of the company shall be liable for compensation. Art. 124 CL concerns the special situation of conflict of interest in listed companies' Board of Directors. If they are an interested party in the resolution matter, directors shall abstain from voting or vote in behalf of another director. The meeting may be held if attended by more than half directors without such affiliation, and resolutions must be adopted by the majority of them. In case of the number of directors without such affiliation is less than three, the matter shall be submitted to the board of shareholders[128].

The protection of minority shareholders is more accentuated in laws concerning FIEs. The reason could be the will to protect state-owned enterprises that were to become minority shareholders in JVs during the period of reform and opening of 1980s[129].

2.4 Foreign investments and joint ventures in China

Contrary to Europe, in which, once a company is established in a Member State according to its incorporation rules, it is possible for the company to move freely across Europe and to be recognized as a legal entity by the Member States, in China there is a marked distinction between 'domestic' companies and foreign invested companies. While in Europe a businessman is more free to set up the type of company that more suits his expectations[130], in China foreign investors can access the market through the following major ways:

- **Representative office**: performs a limited number of activities (like market research, management of warranty and after-sale service, technical support, research and development), but cannot do profit-making activities or receive fees for services, sign contracts, or directly generate income[131].

[127] Olaerts, *Euro-Chinese Company Models…*, p. 187
[128] Invest in China, *Company Law …,* op. cit.
[129] Fleckner, Hopt, *Comparative corporate governance…*, 2013, p. 159
[130] Olaerts, *Euro-Chinese Company Models…*, pp. 175-176
[131] Zimmerman, *China Law Deskbook…*, p. 76

- **Wholly Foreign-Owned Enterprise (WOFE)**: a limited liability company wholly owned and managed by foreign investors. Since WOFE permits to avoid some problems that may arise from the presence of a Chinese partner (like cultural differences, control and management issues, etc.), it has recently become the most preferred choice by foreign investors[132].
- **Partnership enterprise**: foreign investors are allowed to establish partnerships after the amendment of the "Partnership Enterprise Law of the People's Republic of China" (中华人民共和国合伙企业法 *Zhonghua Renmin Gongheguo hehuo qiye fa*) in 2010. Under the said law the parties may create a "business operation under a partnership contract between two or more parties that have capability to assume unlimited legal liability"[133].
- **Processing trade contract**: a foreign party provides to the Chinese party what is necessary to manufacture merchandise in accordance with contractual specifications. The finished goods are required to be exported. It is not requested to the foreign party to establish a presence in China[134].
- **Branch offices**: they are permitted to engage in production and business operations. The latter is not further specified by Company Law, but it can be applied to any business activity[135].
- **Holding company**: "is required to be established as a limited liability company and may consist of foreign investment alone or in conjunction with Chinese partners. The principal function of a holding company is to provide the enterprises founded by the company with support for sales, management, financial and subsidiary investment, research and development, manufacturing, services, marketing, and procurement activities"[136].
- **Equity investments**: in a limited liability company, in a company limited by shares or a state-owned enterprise (SOE).

[132] Zimmerman, *China Law Deskbook: …*, p. 79
[133] Zimmerman, *China Law Deskbook…*, p. 106, op. cit.
[134] Cnfr. The EU SME Centre, *Processing trade in China*. Available at: http://ccilc.pt/wp-content/uploads/2017/07/IMPORTACAO_MATERIAS_PRIMAS_EN_EUSMECENTER.pdf
[135] Zimmerman, *China Law Deskbook…*, p. 113
[136] Zimmerman, *China Law Deskbook…*, p. 114, op. cit.

- **Franchise**: an arrangement in which the franchisor grants to the franchisee the right to use its trademark, as well as certain business systems and processes, to produce and market a certain good[137].
- **Equity and Contractual JVs**.

As said before, foreign investments are subject to a set of special regulations that shall prevail on Company Law's provisions. If specific regulations are silent, Company Law shall be applied.

As regards JVs, they were the first step of Chinese modernization and openness to the world, since a Socialist state allowed for the first time the capitalist exploitation of wage labour in return for investments and know-how; moreover the laws drafted to govern them provided the basis for the future company models and regulations[138]. In China, two kind of JVs are distinguished: Equity JV (合资经营企业*hezi jingying qiye*) and Contractual JV (合作经营企业*hezuo jingying qiye*). "An Equity JV is a joint venture between Chinese and foreign partners where the profit and losses are distributed between the parties in proportion to their respective equity interests in the EJV, but the foreign partner shall hold more than 25% of the equity interest in the registered capital of the EJV The company enjoys limited liability as a 'Chinese legal person'"[139]. It is governed by the Law of the People's Republic of China on Sino-foreign Equity Joint Ventures (中华人民共和国中外合资经营企业法*Zhonghua Renmin Gongheguo zhongwai hezi jingying qiye fa*), adopted in 1979 and revised in 2001, and by the Equity Joint Venture Law Implementing Regulations. Contractual JV "is a joint venture between Chinese and foreign investors where the profits and losses are distributed between the parties in accordance with the specific provisions of the CJV contract, not necessarily in proportion to their respective equity interests in the CJV"[140]. It is governed by the Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures (中华人民共和国中外合作经营企业法*Zhonghua Renmin Gongheguo zhongwai hezuo jingying qiye fa*), adopted in 1988 and revised in 2000, and by the Regulations for the Implementation of Sino-foreign Cooperative Enterprises, and by

[137] Business Dictionary, *Franchising*. Available at: http://www.businessdictionary.com/definition/franchising.html
[138] Cavalieri, *Letture di diritto cinese*, p. 70
[139] Chris Devonshire-Ellis, Sam Woolland, Dezan Shira & Associates, *Setting up joint ventures in China*, Hong Kong, China Briefing, 2008, p. 42, op. cit.
[140] *Ibidem*

Chinese Contract Law. While the presence of a Chinese partner is not required for WOFE and representative offices, for JVs it is mandatory. A Chinese partner can be an asset for the company because has a better access to the market and local resources, can use its connections (关系 *guanxi*) to gain government approval, concessions and opportunities. However, it must be remembered that the presence of a Chinese partner requires great carefulness, especially for control operations, because it may favours its own operations over those of the JV. To avoid this situation, the parties should achieve a right balance through a careful drafting of the documents governing the JV[141].

The incorporation process is similar for both Equity and Contractual JV and it consist of: the drafting of a Memorandum of Understanding (意向书 *yixiangshu*), feasibility study, the drafting of the JV's contract and the AOA, the approval by the Ministry of Commerce of the People's Republic of China (MOFCOM) and other competent authorities, the obtainment of business licence[142].

One of the most insidious matters of investing in China, object of many disputes, is the intellectual property. First of all foreign investors should consider if their intellectual property is vital for his business in China. If it is so, they should know how to protect it. Although China has signed the most important international protocols on the registration and protection of international intellectual property, the numerous disputes between Chinese and foreign investors concerning intellectual property have shown that following international procedures is not always sufficient. To be sure, it is better to follow the Chinese procedures for the protection of intellectual property (as regards trademarks, for example, by registering them in China through the Trademark Office of China)[143].

Speaking of disputes, "although joint venture contracts in China must be governed by Chinese law, dispute resolution under such contracts may be conducted before arbitration institutions outside of China"[144]. The matter will be further discussed in paragraph 3.3.

[141] Zimmerman, *China Law Deskbook…*, pp. 89-92
[142] Cavalieri, *Letture di diritto cinese*, p. 96
[143] Devonshire-Ellis, Woolland, Dezan Shira & Associates, *Setting up joint ventures…*, pp. 69-70
[144] Zimmerman, *China Law Deskbook…*, p. 102, op. cit.

2.4.1 Chinese Equity Joint Ventures Law and Cooperative Enterprises Law's provisions on the Board of Directors

The management structure of an Equity JV and Contractual JV must follow the provisions of the respective laws and regulations. It has been said previously that Company Law prescribes three organs for the management of a company (*supra* 2.3.1), but for in limited liability companies in the form of equity or cooperative JV only the board of director is mandatory ("Implementation Opinion[145] on Issues relating to Application of Law for Administration of Examination and Approval and Registration of Foreign-Invested Companies", issued in 2006 the State Administration for Industry and Commerce, SAIC)[146].

As regards Equity JV, art. 6 of Equity Joint Venture Law deals with the appointment of directors and the life cycle of their office in the spirit of an equilibrium reached by the parties through the JV's contract and AOA:

> 第六条
>
> 合营企业设董事会，其人数组成由合营各方协商，在合同、章程中确定，并由合营各方委派和撤换。董事长和副董事长由合营各方协商确定或由董事会选举产生。中外合营者的一方担任董事长的，由他方担任副董事长。董事会根据平等互利的原则，决定合营企业的重大问题。[…] 正副总经理(或正副厂长)由合营各方分别担任。合营企业职工的录用、辞退、报酬、福利、劳动保护、劳动保险等事项，应当依法通过订立合同加以规定[147]。

> Art. 6
>
> An equity joint venture shall establish a board of directors composed of certain number of members determined through consultation by the equity joint venture partners and stipulated in the equity joint venture contract and articles of association. Each equity joint venture partner shall be responsible for the appointment and replacement of its own directors. The chairperson

[145] Definition of "Opinion" *infra*. 3.3

[146] Fleckner, Hopt, *Comparative corporate governance…*, pp. 160-161

[147] The National People's Congress of the People's Republic of China, 中华人民共和国中外合资经营企业法 *Zhonghua Renmin Gongheguo zhongwai hezi jingying qiye fa, Law of the People's Republic of China on Sino-foreign Equity Joint Ventures*, op. cit. Available at: http://www.npc.gov.cn/npc/xinwen/2016-09/06/content_1997113.htm

and deputy chairperson shall be selected by the equity joint venture partners through consultation or shall be elected by the board of directors. Where the chairperson is appointed from one party to an equity joint venture, the deputy chairperson shall be appointed from the other party. The board of directors, in accordance with the principles of equality and mutual benefit, shall decide all the important matters of an equity joint venture. The general and deputy general managers (or general and deputy factory heads) shall be appointed separately by each of the joint venture partners. Matters such as the recruitment, dismissal, remuneration, welfare benefits, labor protection and labor insurance of employees of an equity joint venture shall be stipulated in contracts concluded in accordance with the law[148].

It has been observed that the fact that the directors are directly appointed by the parties involved in the JV implies that the directors are expected to be representative of those who appointed them and this may create an ambiguous situation: the loyalty of the directors should go to the JV or to those who appointed them?[149]

A similar problem may affect also the general manager since, generally, one party nominates the general manager, while the other party may ask to nominate the deputy general manager, or to have more power in the Board of Directors[150].

According to art. 5 EJVL, the Board of Directors seems to be one of the first ways to settle a dispute between the parties of a JV:

第十五条

举办合营企业不涉及国家规定实施准入特别管理措施的，对本法第三条、第十三条、第十四条规定的审批事项，适用备案管理。国家规定的准入特别管理措施由国务院发布或者批准发布 [151]。

Article 15

[148] Ministry of Commerce of the People's Republic of China, *Law on Sino-Foreign Equity Joint Ventures*. Available at: http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100062855.shtml, op. cit.

[149] Olaerts, *Euro-Chinese Company Models…*, p. 195, op. cit.

[150] Cavalieri, *Letture di diritto cinese*, p. 104

[151] The National People's Congress of the People's Republic of China, 中华人民共和国中外合资经营企业法, op. cit.

> Any dispute arising between equity joint venture partners that the board of directors is unable to settle through consultation may be resolved through conciliation or arbitration by a Chinese arbitral body or through arbitration conducted by an arbitral body agreed on by all parties of an equity joint venture[152].

As regards contractual JVs, the Law governs the Board of Directors only with one article:

> 第十二条
> 合作企业应当设立董事会或者联合管理机构，依照合作企业合同或者章程的规定，决定合作企业的重大问题。中外合作者的一方担任董事会的董事长、联合管理机构的主任的，由他方担任副董事长、副主任。[…] 合作企业成立后改为委托中外合作者以外的他人经营管理的，必须经董事会或者联合管理机构一致同意，报审查批准机关批准，并向工商行政管理机关办理变更登记手续[153]。

> Art. 12
> A co-operative enterprise shall set up a board of directors, or a joint management body, to make decisions on major issues involving the co-operative enterprise in accordance with the provisions of the co-operative enterprise contract or articles of association. One party of the Chinese and foreign partners shall appoint a person to hold the position of chairman of the board of directors or head of the joint management body and a person appointed by the other party shall hold the position of deputy chairman of the board of directors or deputy head. After the establishment of a co-operative enterprise, if a party other than the Chinese and foreign partners is engaged to manage the business, the unanimous agreement of the members

[152] Ministry of Commerce of the People's Republic of China, *Law on Sino-Foreign Equity Joint Ventures*, op. cit.
[153] The National People's Congress of the People's Republic of China, 中华人民共和国中外合作经营企业法 *Zhonghua Renmin Gongheguo zhongwai hezuo jingying qiye fa, Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures*, op. cit. Available at: http://www.npc.gov.cn/npc/xinwen/2016-09/06/content_1997112.htm,

> of the board of directors or the joint management body must be obtained. The matter shall be reported to the examining and approving organ for approval and the change shall be registered with the administration for industry and commerce[154].

Both Equity JV Law and Cooperative JV Law establish that the following matters need the unanimous approval by the Board of Directors: amendments to the JV contract, liquidation or dissolution of the JV, increase of the registered capital of the JV or transfer of any interest of a party to the JV company, merger of the JV with any other economic organization. The other matters, such as appointment and removal of general manager, dispute resolution, significant loans or investments, are negotiable and depend upon the circumstances[155].

Unlike Equity JV Law, Cooperative JV Law is silent on disputes between shareholders and the Board. In this case Company Law and Contract Law's provisions on dispute resolution shall be applied.

As said in paragraph 1.5.1, and reaffirmed by the articles stated above, the Board of Directors is largely governed by the JV's AOA, the contract and other agreements. Those documents should set the administrative responsibilities and duties of the parties; generally, they are jointly responsible for operational matters[156]. The contract, which contains the agreements and the duties of each party, could be seen as the heart of the JV; the AOA, which sets how to accomplish the contract's content could be seen as the mind of the JV. It is useful to remind that both are binding documents between the partners who enter into the agreement[157].

[154] Ministry of Commerce of the People's Republic of China, *Law on Sino-Foreign Cooperative Joint Ventures*. Available at: http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200301/20030100065891.shtml, op. cit.
[155] Zimmerman, *China Law Deskbook…*, pp. 92-94
[156] Zimmerman, *China Law Deskbook…*, p. 101
[157] Devonshire-Ellis, Woolland, Dezan Shira & Associates, *Setting up joint ventures in China*, p. 42

3. NOT JUST THE TRADEMARK: THE DISPUTE BETWEEN DANONE AND WAHAHA ON CORPORATE GOVERNANCE

3.1 Background of the two companies

Like most of the well-known brands, the French Food Company Danone started from the scratch, in particular from a small yogurt stand that Isaac Carasso opened in Spain in 1919. The key of his success was the merge of new methods of milk fermentation with the traditional ones. To expand his market, Carasso decided to go to the U.S. and in 1942 founded the first American yogurt company in New York. From the Fifties to the Eighties Danone widened its influence across America, while in Europe it acquired or merged with biscuits manufacturer companies and fresh cheese producers[158]. Today Danone's products are available in 120 countries; among them, the first three in the top ten markets of 2017 are America, France and China[159]. Danone's mission is "bringing health through food to as many people as possible". The commitment to the environment and social responsibility is reflected in its goals: impact people's health locally, preserve and renew planet's resources, contribution to UN's Sustainable Development Goals[160]. This strong goal orientation made the company the first in the world for fresh dairy products and plant-based products, and the first in Europe for advanced medical nutrition[161].

Hangzhou Wahaha Group Co. Ltd. started from the scratch too, when Mr. Zong Qinghou started to sell soda and ice cream. In 1987 he found the Hangzhou Baoling Children Nutrition Food Factory, aiming to produce nutritional drinks for children. Four years later the company acquired the Hangzhou Canned Food Factory, a state-owned factory, in order to increase the production and meet the market's demand, becoming the biggest corporation of its district. Afterwards, it gradually started to spread across the country with the support of the state, becoming leader in the field in the Chinese market. Today, Wahaha focuses its resources on research for product innovation,

[158] Andrea Pontiggia, *International Organizational Design and Human Resources Management to China*, McGraw-Hill Education, 2016, p. 400

[159] Danone, *Global presence*. Available at: https://www.danone.com/about-danone/at-a-glance/global-presence.html

[160] Danone, *Our company goals*. Available at: https://www.danone.com/about-danone/sustainable-value-creation/our-company-goals.html

[161] Danone, *Facts & figures*. Available at: https://www.danone.com/about-danone/at-a-glance/danone-data.html

combining traditional methods with modern biology engineering. The adoption of intelligent technology alongside conventional processes in the product chain makes the company an example of what China aims to accomplish with the "Made in China 2025" project, issued in 2015 for the innovation of industry[162].

3.2 The Danone-Wahaha Joint Venture

The Wahaha joint venture was established in 1996 by three participants: Hangzhou Wahaha Group, Danone Group and Bai Fu Qin Ltd. As illustrated in figure 1, Danone and Bai Fu Qin owned the 50% each of the Jin Jia Investment Co. Ltd, which in turn owned the 51% of Wahaha Joint Venture[163].

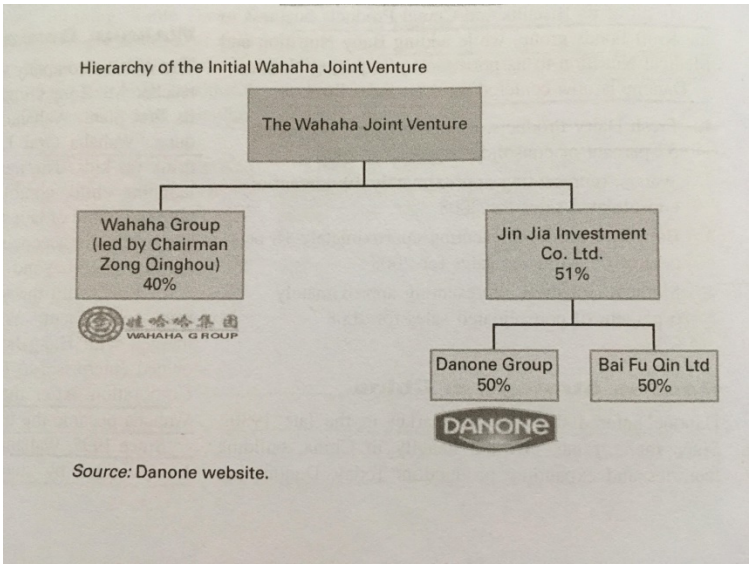

Figure 1

The agreement responded to the needs and the goals of both the companies: Danone aimed to expand its presence in Asia and needed a strong local partner, especially after the failure of its solo efforts in Chinese market in 1987; on the other side, Wahaha took advantage from Danone's know how and invested capital, not to mention that the collaboration with a well-known western brand would have increased Wahaha's prestige[164].

The parties agreed that the Wahaha trademark would have been transferred to the JV to be used only by the JV's members and that the Chinese Party (namely, Mr. Zong

[162] Wahaha, *About us*. Available at: http://en.wahaha.com.cn/aboutus/index.htm
[163] Pontiggia, *International Organizational…*, p. 402
[164] Alain Verbeke, *International Business Strategy*, Cambridge University Press, 2013, p. 375

Qinghou) was entitled to manage the JV. These two matters would have been the key point of the dispute among the partners in the future.

In 1998, Danone became the only owner of Jin Jia by buying Bai Fu Qin's interests; this lead Danone to own the 51% of shares in Wahaha Joint Venture alone.

In a few years the group became the biggest company in the beverage industry of China[165]. During this time, numerous joint ventures were established by the parties, including the Hangzhou Wahaha Food Co. Ltd. (杭州娃哈哈食品有限公司 *Hangzhou Wahaha shipin youxian gongsi*) (*infra* 3.4), but most of the literature refer to all of them as one.

Notwithstanding the similar background, the mutual benefits resulting from the cooperation, the positive and the increasing market share, the JV was soon shaken by an internal crisis.

3.2.1 The dispute

In 2005 Danone discovered that some mirror companies held by Mr. Zong were selling very similar products to the JV's ones; moreover, they were using the JV's trademark.

How was this situation possible?

As said before, only the companies constituting the JV were allowed to use the Wahaha trademark and the Chinese Party was in charge of the JV's management.

The core of the problems concerning the trademark was its transfer from Wahaha Group to the JV. According to art. 42 of the Trademark Law of the People's Republic of China (中华人民共和国商标法 *Zhonghua Renmin Gongheguo shangbiao fa*), assignor and assignee must jointly file an application to Chinese Trademark Office, which may not approve the transfer if it causes confusion or other unfavourable effects. In case of deny, the Trademark Office must give notification to the applicant and explain the reasons for the rejection. In case of approval, the assignee enjoys the exclusive right to use the trademark starting from the date of the announcement made by the Trademark Office[166].

The Trademark Office rejected the trademark transfer from Wahaha Group to the JV. The motivation was that, because Wahaha Group was a well-known state-owned enterprise, Wahaha trademark shouldn't have been transferred to a private company. "The refusal was not well-justified pursuant to the Chinese Trademark Law but

[165] Pontiggia, *International Organizational…*, p. 402

[166] WIPO, *Trademark Law of the People's Republic of China*, pp. 12-13. Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=341321

consistent with China's current policy on the disposition of state-owned enterprise's assets"[167]. To avoid the problem, the parties registered an abbreviated license. Art. 43 of Trademark Law, which governs the trademark licensing contract, states:

> 商标注册人可以通过签订商标使用许可合同，许可他人使用其注册商标。许可人应当 监督被许可人使用其注册商标的商品质量。被许可人应当保证使用该注册商标的商品质量。
>
> 经许可使用他人注册商标的，必须在使用该注册商标的商品上标明被许可人的名称和商品产地。
>
> 许可他人使用其注册商标的，许可人应当将其商标使用许可报商标局备案，由商标局公告。商标 使用许可未经备案不得对抗善意第三人 [168]。

> The owner of a registered trademark may, by concluding a trademark licensing contract, authorize another person to use his registered trademark. The licensor shall supervise the quality of the goods on which the licensee uses his registered trademark, and the licensee shall guarantee the quality of the goods on which the registered trademark is to be used.
>
> If any person is authorized to use the registered trademark of another person, the name of the licensee and the origin of the goods shall be indicated on the goods that bear the registered trademark.
>
> A licensor who licenses others to use his registered trademark shall submit the trademark licensing to the trademark office for file, and the trademark office shall announce the trademark licensing. Without filing, the trademark licensing shall not be used against a *bona fide* third party[169].

[167] Bu Qingxiu, *Danone v. Wahaha: who laughs last?*, in European Journal of Law Reform, 13 (3-4), 2011, pp. 614-628 , op. cit. Available at: http://sro.sussex.ac.uk/45622/

[168] WIPO, 中华人民共和国商标法 *Zhonghua Renmin Gongheguo Shangbiao fa, Trademark Law of the People's Republic of China*, op. cit. Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=302623

[169] WIPO, *Trademark Law of the People's Republic of China*, p. 13, op. cit.. Available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=341321

The license was approved by the Trademark Office. This alternative solution, however, lead to a misunderstanding between the parties on the trademark's ownership: legally, Wahaha Group never transferred the ownership to the JV, just the exclusive license[170].

As to the problems derived from management, with the 51% of shares Danone was leading the JV *de jure*, but Mr. Zong was leading it *de facto*. Most of the experts agree on the fact that Danone failed on evaluating the implications of letting almost all the management to the Chinese party. In fact Mr. Zong ran the business in the Chinese way, that is completely different from western concept of corporate governance: due to the high power distance in Chinese culture, deriving from Confucianism, the director of a company is seen as a paternal figure that cares for his workers and this leads them to feel more commitment to him than to the legal owner. Thanks to the agreements at the time of JV's foundation, all the original employees were confirmed and this gave to Mr. Zong a solid and loyal basic workforce; moreover, he filled many key positions of the JV with his family members. From this perspective, Danone was seen just as a passive foreign investor and not as the major shareholder[171].

According to Wahaha, Danone invested in some Wahaha's rival companies, so they had no choice but to invest in non-joint venture companies to respond to the JV's deficit in production capacity, a problem that Danone seemed to ignored despite the Chinese party's advice[172]. These non-JV companies were held partly by the Wahaha Group and partly by an offshore company in British Virgin Islands, controlled by Mr. Zong's wife and daughter. The non-JV products were very similar to the JV's ones, wore the Wahaha trademark and both were sold by the same sales company. Neither Danone nor the JV earned any income from those sales.

In 2006 Danone offered to acquire the non-JV companies, but Mr. Zong refused. That was the beginning of a long series of lawsuits around the world, in arbitration institutes and local tribunals. Danone will be defeated in the most of them.

The claims of Danone were the establishment of non-JV companies and the illegal use of the trademark, along with the violation of the non-competition clause. On the other side, Mr. Zong replied that Danone was aware of the existence of the non-JV companies from the very beginning (proven by some relevant transactions between the JV and the non-JV companies revealed by the accounting firm PricewaterhouseCoopers) and that

[170] Pontiggia, *International Organizational…*, p. 403
[171] Bu Qingxiu, *Danone v. Wahaha: who laughs last?*, pp. 614-628
[172] Wahaha, *About us*

Wahaha Group was the rightful owner of the "Wahaha" trademark, while the JV only had the right of use[173].

While Danone was struggling with the various lawsuits around the world, Mr. Zong, relying on his workers and family members' loyalty and on the fact that the public opinion in China took his side, was in a strong position, almost seen as a national hero against the greedy foreigner that was trying to control the beverage market in China.

The dispute assumed relevance each passing month, up to the involvement of the Chinese and French governments.

At the end of 2007 Danone and Wahaha tried to reach a compromise. Negotiations seemed to be at a turning point in early 2008, when Danone offered to merge the two companies' China assets and list 20% of the new JV's shares[174]. Wahaha refused and the two companies started new lawsuits.

Despite the threatening statement of Emmanuel Faber, manager of Danone's Asian operations, to let Mr. Zong "spend his life in litigation", in 2009 Danone sold its 51% of shares to the Chinese partner, putting an end to the conflict[175].

> "This settlement has been the outcome of renewed efforts of both parties to put a final end to their dispute through productive negotiations that have taken place in the spirit of mutual respect and with the support of both the Chinese and French governments"[176].

While Danone was taken as an example on how not to manage a JV with a Chinese partner, Wahaha appeared as a proud defender of national interests and proved itself on the international stage.

3.3 Dispute resolution in China

Before entering into the details of the dispute with the translation of a judgement, it is appropriate to make a brief introduction on dispute resolution in China.

The tendency of the Chinese to resolve disputes in a non-confrontational way has its origins in the past. Consultation, which is the direct negotiation between the parties or

[173] Pontiggia, *International Organizational…*, pp. 403-404

[174] Tao Jingzhou, Edward Hillier, *A tale of two companies*, in Chinabusinessreview.com, May-June 2008, p. 45-46. Available at: www.jonesday.com/files/.../a_tale_of_two_companies.pdf

[175] Wahaha, *About us*. Available at: http://en.wahaha.com.cn/aboutus/index.htm

[176] David Barboza, *Danone Exits China Venture After Years of Legal Dispute*, in The New York Times, 2009, op. cit. Available at: https://www.nytimes.com/2009/10/01/business/global/01danone.html

their representative, should be the first of various steps (the so called Alternative Dispute Resolution, ADR) before arriving to litigation and it is encouraged by Chinese law[177].

Mediation is a voluntary and friendly way to solve a dispute. It can be done by the parties or by a third person, the mediator, which helps the parties to find a way to solve the dispute; the final decision of the mediator is not binding. If the mediation is unsuccessful, the rights of the parties are covered by the courts. Mediation is better than the other ADR systems in term of costs. By the end of the Eighties, China had established more than 950,000 People's Mediation Committees to assist with dispute resolution. Mediation can take place even during arbitration or litigation. The China International Economic and Trade Arbitration Commission (CIETAC) can offer to the parties a resolution through mediation, but cannot force them. If the mediation fails, the arbitration process must continue and render an award. As regards litigation, in civil processes the judge can ask to the parties to solve the dispute through mediation; he also may pursue mediation after the close of the trial and before the issuance of a judgement. If mediation is unsuccessful, the court must proceed. A particular and quite expensive type of mediation is the joint mediation, in which the parties applies to an arbitral organization each and then the two organizations mediate the case jointly[178].

Arbitration is an ADR system for the resolution of economic disputes in which the parties give the decision to a third authority. There are two types of arbitration: '*ad hoc* arbitration', which is not an institution and is used in small transactions and specific areas of business, and 'institutional arbitration', which is an institution that provides services for arbitration procedures, common in international contracts. The parties may choose to not bind the contract to national legislation, but to give it a self-regulatory trait in addition to the assignment of dispute resolutions to international arbitration[179]. There must be a clear consent of the parties in order to solve the dispute through arbitration. The most recommended thing is to write and arbitration clause in the contract or a separate arbitration agreement, wherein the parties establish some fundamental matters such as the law governing the contract, the number of arbitrators, the place and the language of arbitration; the clause, or the agreement, must be drafted in a valid and clear way. As long as the willingness of the parties to solve disputes through arbitration is clear, an exchange of correspondence, telexes, telegrams are

[177] Zimmerman, *China Law Deskbook…*, p. 833
[178] Zimmerman, *China Law Deskbook…*, pp. 834-837
[179] Ugo Draetta, Cesare Vaccà, *Le joint-ventures: profili giuridici…*, p. 23

considered sufficient to apply for arbitration[180]. In the event that one of the aforementioned requirements has not been met, the decision passes to the competent judge. In China only institutional arbitration is allowed, but the parties can choose between domestic or foreign arbitration. The commissions responsible for the resolution of foreign-related commercial disputes are CIETAC and CMAC (China Maritime Arbitration Commission). Chinese is the official language of CIETAC, but the parties are allowed to choose the official language for the arbitration proceedings. The advantages of CIETAC are the ease of the award's enforcement and the scarce expensiveness, but the disadvantages must be considered to: one of them is the panel system, which provides for the appointment of the arbitrator(s) among a list provided by CIETAC; before 1989, CIETAC's arbitrators were exclusively Chinese nationals, today the lists include foreign professionals[181], but the risk of a low quality service is still high. Arbitration through CIETAC would be advisable in case of basic contracts, while for more complex contract foreign arbitration is preferable. Choose an arbitration institution in Hong Kong could be a good compromise because its peculiar environment resulting by the mixture of western and Chinese cultures, but without the weaknesses of Chinese arbitration institutions. As regards the applicable law, if the parties are both Chinese, the applicable law is Chinese law. In case of foreign-related contracts, the parties may choose the law governing the contract. In absence of a choice by the parties, the arbitration tribunal will decide the applicable law[182]. There is no appeal for the award that comes from arbitration, the decision is binding upon the parties. As regards the laws governing award's enforcement, three distinctions must be done: the awards issued in foreign countries are enforceable under the New York Convention; foreign-related awards are governed by art. 260 of the Civil Procedure Code; awards issued by domestic arbitration institutions are governed by art. 217 of the Civil Procedure Code[183]. Notwithstanding the abovementioned laws and regulations, it has been observed that Chinese courts are quite reluctant or slow to enforce those awards that may affect local interest and institutions.

As regards litigation in the People's Court instead, it is important to first understand Chinese court structure. The system of the courts is structured on four levels: at the top there is the Supreme People's Court at the national level, then the Higher People's

[180] Zimmerman, *China Law Deskbook…*, p. 843
[181] Zimmerman, *China Law Deskbook…*, p. 840
[182] Michael J. Moser, *Dispute Resolution in China*, New York, Juris Publishing, 2012, p. 18
[183] Zimmerman, *China Law Deskbook…*, p. 864

Court at the provincial level, the Intermediate People's Court at the municipal level and the Basic People's Court at the county level. Each level is divided in specific sections (civil, criminal and economic), but recently many courts have establish special sections on particularly relevant and delicate topics that have become the centre of many litigations, for example intellectual property[184]. A foreign party has the same rights and obligations as Chinese citizens when a legal action takes place in a People's Court. As said before, the parties may include a choice forum clause in their contract. For disputes involving a Chinese-foreign equity JV, or a Chinese-foreign cooperative JV, in the absence of an arbitration clause the People's Court has mandatory jurisdiction and application of Chinese law is mandatory[185]. It must be remembered that if an arbitration agreement exists, the parties cannot resolve the dispute through People's Court. Generally, proceedings involving foreign interests start from the Intermediate People's Court. Art. 49 of Civil Procedure Code states that in civil proceedings a corporation must be represented by its legal representative; in case a corporation has a board of directors, the Chairman is the legal representative. The proceedings for the collection and examination of proofs are similar to those of *civil law* system[186]. The role of Chinese jurist includes both an investigatory and "trier of fact" function. There is no jury system in China, as in the United States, but judges may act as a panel (in the latter case their number must be odd and decision taken by a majority vote). There is the possibility of appeal to a higher level court, but the decision of the appellate court is final[187]. Civil trials are conducted openly, except in cases where the evidence is considered confidential. It is important to remember a typical and quite peculiar aspect of Chinese juridical system, that is opinions (意见 *yijian*). Opinions (or interpretations), issued by the Supreme Court, are directives to guide the lower courts in applying a particular law. Officially they are just internal documents, but in practice they are central for interpretation and integration of laws, and act like legislative acts. It is unusual for a country that takes inspiration on *civil law* systems for many things. A long list of problem about litigation in Chinese courts has been identified by many scholars and experienced by many business man: a low degree of courts' independence from the political power (despite the Constitution's statement that they are subject only to the

[184] Cavalieri, *Letture di diritto cinese*, p. 138
[185] Zimmerman, *China Law Deskbook…,* pp. 879-880
[186] Zimmerman, *China Law Deskbook…*, p. 887
[187] Zimmerman, *China Law Deskbook…*, pp. 895-896

Law), the lack of preparation of Chinese judges, the reluctance to enforce resolutions taken in other courts (both within national borders and abroad), etc[188].
Arbitration and litigation are the most frequent ways to resolve a dispute. Each of them has strengths and weaknesses:

Arbitration	**Litigation**
It is almost always in English.	Is necessary to use the local language
Some arbitrators are very specialized and could be capable enough to decide without the participation of an external expert.	State judges may call an expert for assistance on a certain topic.
Private.	Tribunals are open to the public.
Procedural flexibility.	Standardized procedures.
The award is final and binding.	It is possible to appeal to a higher level court.
New York Convention	Difficulties on enforcement of the award abroad.
Short timing.	Long timing.
Expensive.	Not too expensive.
Arbitrators have the power to decide, but not to intervene.	Judges have the power to intervene (for example, to save some assets vital for the dispute that risk to be lost).

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The dispute between Danone and Wahaha has become one of the most famous in the world, with several lawsuits and arbitration cases both in China and foreign jurisdictions, including the Arbitration Institute of the Stockholm Chamber of Commerce, Hangzhou Arbitration Commission, Chinese courts, French courts, Italian Courts, etc.[190].

[188] Cavalieri, *Letture di diritto cinese*, pp. 190-191
[189] Cnfr. Moser, *Dispute Resolution in China*, pp. 2-3
[190] Tao Jingzhou, Hillier, *A tale of two companies*, pp. 45-46

3.4 The judgement of the People's Court of Hangzhou

The trademark is certainly the core of the dispute between Danone and Wahaha, as well as the object of most of the lawsuits. However, the crisis between the two partners affected many other aspects.

The following judgment concerns the dynamics of the JV's Board of Directors, in particular the election of a new Chairman after the resignation of Mr. Zong in June 2007. The reasons of his resignation, according to an open letter sent by Mr. Zong to the Danone chairman and chief executive Franck Riboud, included difficulties in cooperating with Danone directors in China, something that hurt Mr. Zong's "reputation and feelings". Danone refused to release any comment on Mr. Zong's letter, but stated that it was looking for Hangzhou government support for a "smooth management transition" [191]. Emmanuel Faber, manager of Danone's Asian operations and vice-Chairman of the JV, temporarily replaced Mr. Zong. It appears, however, that Faber effectively assumed the role of Chairman of the JV. The struggle for the JV's management led to strong negative consequences for Danone: the employees, and the public opinion in general, saw the deed as an hostile takeover and sided with Mr. Zong, seeing him as a national hero against the greedy foreigner and asked Danone to leave China. Faber accused Mr. Zong of using his popularity to foment the media and the employees' strikes[192]. The result was a series of lawsuits between the two parties, most of them filed by several Wahaha companies against the JV' directors, accusing them of serving simultaneously on the JV's board and on the boards of other Wahaha's competitors[193].

The following judgement concerns the claims of Hangzhou Wahaha Group Co. Ltd, which sued Hangzhou Wahaha Food Co. Ltd. (杭州娃哈哈食品有限公司 *Hangzhou Wahaha Shipin Youxian Gongsi*), one of the joint ventures established by Danone and Wahaha, on charges of falsification of the Board of Directors' resolutions on the appointment of the JV's new Chairman after the resignation of Mr. Zong. Hangzhou Wahaha Group provided to the foreign party two names as new director of the JV. Emmanuel Faber, in his capacity of vice-Chairman, called an emergency meeting of the Board in order to make a decision on all the matters deriving from Mr. Zong's

[191] The New York Times, *Chairman of Danone's joint venture in China, Wahaha, resigns*, 2007. Available at: https://www.nytimes.com/2007/06/07/business/worldbusiness/07iht-danone.4.6043570.html
[192] Wang Zhenghua, *Wahaha workers protest Danone bid*, in China Daily, 2007. Available at: http://www.chinadaily.com.cn/china/2007-06/13/content_892954.htm
[193] Tao Jingzhou, Hillier, *A tale of two companies*, p. 45

resignation. According to the plaintiff, the foreign party altered the minutes of the Board, resulting in the appointment of Faber as Chairman of the JV; moreover, the voting methods and the convening procedure were not in compliance with the Law and the JV's AOA. Wahaha Food replied that the resolutions were approved by the majority of the directors, so they shall be considered valid, and that Faber just acted on the basis of his functions and powers as vice-Chairman. The proofs provided by the plaintiff, though, confirmed that the Chinese party never signed the approval of the appointment of Faber as JV's Chairman, that he acted as a Chairman by requesting to the general manager to implement the relevant resolution and that the voting methods and convening procedures were not in compliance with the Law and the JV's AOA. The People's Court, thus, determined the cancellation of the Board of Directors' resolution and the payment of the court costs by the defendant.

3.4.1 Approach to the translation

The translation of a text is always a complex matter. It has been discussed, often with divergent opinions, many times over the centuries. Some authors were more concerned to be understood from the public, others adapted the translation to the taste of the public, others believed that a certain type of translation could have the power to encourage the reader to get closer to the original text, and so on[194]. What is certain is that translation is not just find the respective word in another language. As illustrated in figure 2, the context, the source, the receiver, the channel of communication, the noise, are all closely related to a text or a speech (the message)[195], and a good translator cannot ignore them.

[194] Cnfr. Bruno Osimo, *Manuale del traduttore: guida pratica con glossario*, Milano, Hoepli Editore, 2004, chapter 1
[195] Tiziano Vescovi, *Marketing to China*, McGraw-Hill Education, 2016, p. 324

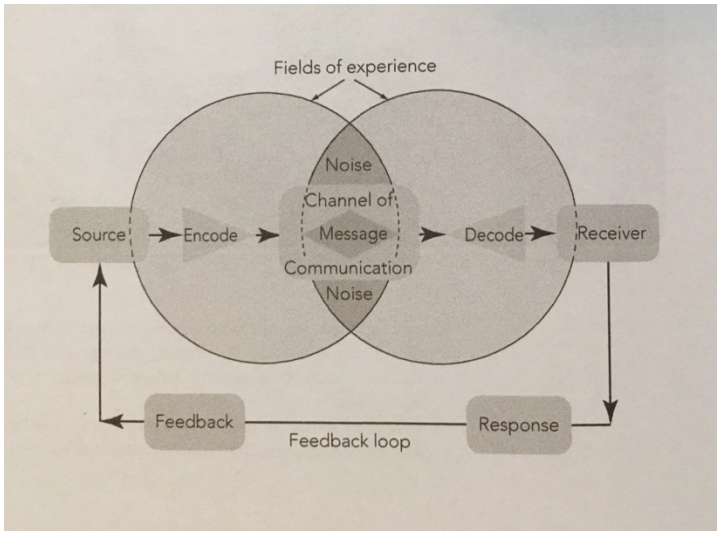

Figure 2

In this context, the interpretation that the translator gives to a text is also a crucial factor, since a language, especially Chinese, with its implicit correlations between all the constituents of a sentence, is subject to multiple interpretations. Everything but an objective process[196].

Fidelity is certain one of the most important things in a translation, but it is uncertain how to achieve it: through a literal translation or a free translation? The first is closest to the original text, but could be confusing and not fluent for the receiver, while the second is the exact opposite. Probably, the answer mainly depends on the type of receiver and the environment that surrounds him.

Translation of a judgement is, from a certain point of view, easier than the translation of a speech, for example, since court documents often follow a precise scheme and use recurring expressions that make them quite standardized. This does not mean, however, that the task is without obstacles: the more the text is specific, the more a translator should pay attention to its technical lexicon and typical expressions.

Most of the experts in the legal field prefers a literal translation, because it is closest to the original text[197]. But literal translation does not always lead to the expected results. Problems may arise in case of different legal systems, as in this case. Chinese legal system mostly derives from *civil law* system, but there could not be a corresponding word in English, which is the language of *common law*.

[196] Sara D'Attoma, Michele Mannoni, *Atti del processo penale italiano: traduzione in cinese e commento traduttologico*, Venezia, Libreria Editrice Cafoscarina, 2017, p. 14
[197] D'Attoma, Mannoni, *Atti del processo penale italiano…*, p. 12

> Simple English words will have their ordinary meaning but a quite different legal meaning. Take the word 'action' for example. Its ordinary meaning refers to some form of physical movement, while in law it refers to the legal proceedings that one party may bring against another. This is further complicated by the use of terms in languages other than English[198].

To avoid mistakes, it is useful to search the same word in different specific dictionaries, see in the examples the context in which the word is used, and choose the one that is more appropriate. Given the 'standardized nature' of juridical texts, it is also useful to have a look to similar judgements (both original text and translation) to have a sort of guideline.

In summary, translation is all but a mechanical and automatic process or an exact science, since the translation may vary on the basis of the translator, the receiver, the context, the original text and so on.

3.4.2 Text

杭州娃哈哈集团有限公司诉杭州娃哈哈食品有限公司决议纠纷案

杭州市上城区人民法院

民事判决书

(2007)上民二初字第 381 号

原告：杭州娃哈哈集团有限公司。

法定代表人：宗庆后。

委托代理人：夏德忠、叶志坚。

被告：杭州娃哈哈食品有限公司。

代表人：范易谋。

委托代理人：李静、蒋恒。

原告杭州娃哈哈集团有限公司为与被告杭州娃哈哈食品有限公司撤销董事会

[198] Ian Dobinson, Derek Roebuck, *Introduction to law in the Hong Kong SAR*, London, Hong Kong: Sweet & Maxwell, 1996, p. 11, op. cit.

决议纠纷一案，于2007年7月30日向本院起诉，本院于同日受理后，依法组成合议庭，并于2007年9月24日公开开庭进行了审理。原告委托代理人夏德忠、叶志坚，被告委托代理人李静、蒋恒到庭参加诉讼。庭审后，原、被告双方一致向法院书面申请进行庭外调解，时间从2007年12月22日至2008年4月10日，后调解未果。本案经本院院长批准延长审限6个月，经浙江省杭州市中级人民法院批准延长审限3个月。本案现已审理终结。

原告诉称，被告系原告与浙江娃哈哈实业股份有限公司（以下合称“中方”）和新加坡金加投资有限公司（以下简称“外方”）共同投资设立的中外合资经营企业。2007年6月3日，中方原委派的宗庆后等辞去被告董事职务后，中方向被告委派了两名新的董事黄小杨、林颐宏。2007年6月13日，由外方委派的担任被告副董事长的范易谋向中方新委派担任被告董事的黄小杨、林颐宏发来通知，要求召开董事会紧急会议。2007年6月20日，被告董事会在杭州凯悦酒店召开。外方委派的董事范易谋、秦鹏、嘉柯霖，中方委派的董事黄小杨、林颐宏参加了该次董事会会议。会议由副董事长范易谋主持。2007年6月25日，范易谋以被告董事长的名义向被告总经理发函，要求被告总经理实施有关决议。2007年6月26日，原告委托律师向范易谋及其代表的外方股东发出律师函，对“董事会决议”的合法性提出了异议。2007年7月16日，中方委派的董事林颐宏致函被告副董事长范易谋，要求将在2007年6月20日会议上“通过”的所谓有关“决议”立即传真给中方董事。2007年7月23日，范易谋以被告“董事长”的身份以传真方式复函林颐宏及黄小杨董事，函中称“随此附上杭州娃哈哈食品有限公司于2007年6月20日在杭州召开的上一次董事会上通过的各项决议的复印件。您想必记得上述决议已在会上提交董事会审议，并由多数董事签字通过。”

原告认为，被告的副董事长范易谋于2007年6月20日召集的董事会会议以及之后所提供的决议违反法律、法规和被告章程的规定，相关决议依法应当予以撤销。理由为：首先，被告董事会于2007年6月20日作出的关于选举范易谋为被告董事长的决议内容，违反了全国人大颁布的《中外合资经营企业法》（2001年修订）的规定和被告章程的规定。其次，被告董事会于2007年6月20日作出的决议在表决方式上也违反了被告章程第8.6条的规定。被告章程第8.6条规定：“对下列事项可由出席董事会会议的半数或以上的董事通过批准（其中中、丙双方至少各有一名董事批准）：——（K）其他影响到合营各方重大利益的事

项）。”根据上述章程的规定：董事长的选举以及决定原董事长离任后的有关事项都是影响合营各方利益的重大事项，要通过有关这些事项的决议，应当至少有中方的一名董事批准同意。但事实上，被告 2007 年 7 月 23 日提供的两份决议都没有得到中方任何董事的批准。第三，被告于 2007 年 6 月 20 日举行的董事会会议的通知程序也违反了被告公司章程的有关规定。被告副董事长范易谋于 2007 年 6 月 20 日召集的董事会会议的开会通知比实际召开日仅提前了 7 天，也未征得中方董事的书面批准，违反了合资公司章程的该项规定。第四，被告副董事长范易谋等三位外方董事私自篡改、添加部分董事会决议内容，违反了公司法和被告章程的规定；其篡改、添加的决议内容同样也不符合被告公司章程的规定。被告章程第 8.7 条规定：“对下列事项可由出席董事会会议的半数或以上的董事通过批准：……（f）合营公司在提起或解决或放弃诉讼或承认责任（对合营任何一方所进行的索偿则除外，此时，其他合营方指定的董事通过决议则视同决议得到一致通过）……”。“关于决定原董事长离任后的有关事项的决议”中要求“被告采取法律行动和程序”必须“由范易谋给予明确指示”，该项内容明显违反了被告章程第 8.7 条的上述规定。

综上所述，原告认为被告于 2007 年 6 月 20 日召开的董事会会议以及事后形成的“决议”在决议内容、召集程序、表决方式以及决议形成方式等方面，严重违反《中外合资经营企业法》和被告章程的规定，所通过的决议依法应予以撤销。故诉至法院，请求：1、依法撤销被告董事会于 2007 年 6 月 20 日做出的关于选举董事长的决议。2、依法撤销被告董事会做出的关于决定原董事长离任后的有关事项的决议。3、判令由被告承担本案全部诉讼费用。

被告答辩称：一、董事会会议的决议方式和决议内容均符合法律法规和章程的规定。1、范易谋由副董事长身份被选举委董事长并无不妥。章程第 8.2（2）条规定了董事长和副董事长的产生办法。2、本案董事会决议由出席董事会会议的半数或以上的董事批准即可。二、中方董事所称不了解决议存在、决议内容是外方董事私自篡改、添加的说法不符合事实。三、董事会会议的通知程序符合法律法规和章程的规定。综上，我们认为，本次董事会会议的决议方式、决议内容、通知程序等均符合法律法规和章程的规定，决议的合法性理应予以确认，原告所主张的诉请和理由不能成立，且有阻碍董事会管理合资公司、危害合资公司正常经营之嫌，请求法院查清事实，公正适用法律，驳回原告的诉讼请求。

原告提交下列证据以证明其主张：

1、杭州娃哈哈食品有限公司章程一份，证明（1）首届董事长经甲方（杭州娃哈哈集团公司）、乙方（杭州娃哈哈美食城股份有限公司）和丙方（新加坡金加投资有限公司）讨论后由甲方委派，首届副董事长由丙方委派，以后的董事长和副董事长在各方董事中选举产生，其中一名为中方委派的董事，另一名为丙方委派的董事。（2）合营公司注册资本的增加和转让由董事会全体董事一致批准通过。（3）凡影响到合营各方重大利益的事项，可由出席董事会会议的半数或以上的董事通过批准（其中中、丙双方至少各有一名董事批准）。（4）合营公司在提起或解决或放弃诉讼或承认责任，可由出席董事会会议的半数或以上的董事通过批准。（5）章程规定董事会会议应当提前十四天通知，并应就会议议程所涉及的问题提供尽量详细的资料和有关文件，否则不应在董事会会议上讨论和作出决定。

2、企业名称变更核准通知书及公司变更登记申请书各一份，证明原告原名“杭州娃哈哈集团公司”，1999 年变更为现名；杭州娃哈哈美食城股份有限公司于 2001 年更名为“浙江娃哈哈实业股份有限公司”。

3、更换董事通知函一份，证明 2007 年 6 月 3 日因原告原委派担任被告董事的宗庆后、杜建英辞去了董事职务，原告重新委派黄小扬、林颐宏担任被告董事。

4、2007 年 6 月 13 日发给原告方董事关于召开董事会紧急会议的通知一份，证明（1）董事会会议通知只比召开时间提前了七天。（2）通知所列议程之一是选举临时董事长。（3）范易谋以被告副董事长的名义召集此次董事会会议。

5、2007 年 6 月 25 日范易谋发给被告总经理的函一份，证明范易谋以被告董事长的名义，要求被告总经理实施 2007 年 6 月 20 日有关董事会决议。

6、2007 年 6 月 26 日原告委托律师向范易谋先生及新加坡金加投资有限公司发出的律师函一份，证明 2007 年 6 月 26 日原告委托律师向范易谋先生及新加坡金加投资有限公司发出律师函，对有关董事会决议的合法性提出质疑。

7、2007 年 7 月 16 日，中方委派的董事林颐宏发给被告副董事长范易谋的函一份，证明 2007 年 7 月 16 日中方委派的董事林颐宏致函被告副董事长范易谋，要求将在 2007 年 6 月 20 日会议上“通过”的所有“决议”立即传真给中方董事。

8、2007 年 7 月 23 日，范易谋以被告“董事长”的身份以传真方式回复给林颐宏及黄小杨董事的函一份，证明 2007 年 7 月 23 日范易谋以被告“董事长”的

身份以传真方式复函林颐宏及黄小杨董事，函中称“随此附上杭州娃哈哈食品有限公司于 2007 年 6 月 20 日在杭州召开的上一次董事会上通过的各项决议的复印件。您想必记得上述决议已在会议上提交董事会审议，并由多数董事签字通过。”

9、关于选举董事长的董事会决议一份，证明 2007 年 6 月 20 日被告董事会作出“决议”，选举范易谋为合资公司的董事长。

10、关于决定原董事长离任后的有关事项的董事会决议一份，证明被告董事会作出并被外方董事私自篡改、添加的“决议”；确认总经理继续履行职责；公司的公章、营业执照及批准证书原件移交给董事长；授权合资公司启动法律行动和程序；授权范易谋接受、签署与法律行动和程序相关的文件，委托律师参与法律行动和程序；要求合资公司所有管理人员就法律行动和程序的所有事项向范易谋汇报，以及除范易谋明确指示外不能采取任何行动或措施。

11、仲裁反请求申请书一份，证明被告 2007 年 7 月份承认范易谋为合资公司副董事长。

12、杭州娃哈哈食品有限公司 2006 年度会计审计报告一份，证明合资公司已完成 2006 年度审计，并有可分配利润。

13、杭州娃哈哈食品有限公司等合资企业 1999 年、2000 年、2006 年的董事会会议记录，证明被告等合资公司在以往召开董事会会议时，对于会议的通知是否符合章程有关规定均作为第一项议程予以确认。

以上证据经质证，被告对证据 1、3、12 的真实性、合法性无异议，对部分关联性和证明对象有异议；对证据 2、4、5、7－11 的真实性、合法性及关联性均无异议，对其中证据 7、10、11 的证明对象有异议；对证据 6 的形式上的真实性无异议，但认为是原告的单方陈述，无任何证明力；对证据 13 的真实性、合法性无异议，但认为与本案缺乏关联性，无证明力，并且是原告在举证期限届满后提交的。

被告提交下列证据以证明其抗辩意见：

1、签到清单一份，证明全体董事均参加董事会会议。

2、2007 年 6 月 18 日对会议通知的回复、范易谋的回函，证明中方董事参与会议时间、地点的确定，对此并无异议。（涉及原告方的有第 1 页和第 8 页）

3、2007 年 8 月 2 日、8 日、17 日范易谋致黄小杨、林颐宏要求其配合办理工商变更手续的函，8 月 9 日黄小杨的回函、工商材料，证明被选举为董事长后，

范易谋不再担任副董事长职务；但因中方董事未予配合，故工商档案仍未变更。

以上证据经质证，原告对证据 1、3 的真实性无异议，对证据 2 中的第 1 页和第 8 页的真实性无异议，对关联性、证明内容及证明对象有异议。

经过庭审举证、质证，本院对证据作如下认定：

对原告提交的证据 1－5、7－13 的真实性，被告未提出异议，故依法确认其证明力，对其所要证明的问题将综合全案认定。对原告提交的证据 6，被告的质证意见成立，不予确认其证明力。

对被告提交的证据 1、2 中的第 1、8 页以及证据 3 的真实性，原告未提出异议，故依法确认其证明力，对其所要证明的问题将综合全案认定。

经审理本院认定，被告杭州娃哈哈食品有限公司系原告杭州娃哈哈集团有限公司（注：合资时名称为“杭州娃哈哈集团公司”，后改为“杭州娃哈哈集团有限公司”，在公司章程中为“合营甲方”）与浙江娃哈哈实业股份有限公司（注：合资时名称为“杭州娃哈哈美食城股份有限公司”，后改为“浙江娃哈哈实业股份有限公司”，在公司章程中为“合营乙方”）和新加坡金加投资有限公司（在公司章程中为“合营丙方”）共同投资设立的中外合资经营企业。

根据《杭州娃哈哈食品有限公司章程》（以下简称公司章程）载明，合营各方协商于 1996 年 2 月 9 日签订了合资经营合同。其中公司章程第 8.2 条第（2）款规定：“首届的董事长经甲方、乙方和丙方讨论后由甲方委派，首届的副董事长由丙方委派。……如首届董事长因故无法执行其职务，继任董事长将在各方董事中选举产生”。第 8.6 条规定：“对下列事项可由出席董事会会议的半数或以上的董事通过批准（其中中、丙双方至少各有一名董事批准）：－－（K）其他影响到合营各方重大利益的事项）。”第 8.7 条规定：“对下列事项可由出席董事会会议的半数或以上的董事通过批准：……（f）合营公司在提起或解决或放弃诉讼或承认责任（对合营任何一方所进行的索偿则除外，此时，其他合营方指定的董事通过决议则视同决议得到一致通过）；……（h）其它应由董事会决定的事宜”。第 8.11 条（1）款的规定：“合营公司召开董事会会议，董事长或董事长授权代表应于董事会会议实际召开日前十四天，以传真方式发出书面通知（但需以信函确认）通知各位董事。但如经中方和丙方指定的各一名或一名以上董事书面批准，董事长或董事长授权代表可发出少于十四天的开会通知。”章程第 8.11 条（2）款规定：“上述会议通知应载明召开会议的时间、地点和会议议

程等内容，并应就会议议程所涉及的问题提供尽量详细的资料和有关文件。除非经中方和丙方指定的各一名或一名以上董事书面同意，未列入会议议程或列入会议议程但未提供相应资料和文件的事宜，不应在董事会会议上讨论和作出决定。”合资公司成立后，首届董事长由甲方委派的宗庆后担任。

2007 年 6 月 3 日杭州娃哈哈集团有限公司、浙江娃哈哈实业股份有限公司向杭州娃哈哈食品有限公司等 5 家公司发出“更换董事通知函”一份，内容为：“兹通知贵公司，我司委派的宗庆后先生、杜建英女士已辞去上述公司董事职务。我司现委派附件所列人员作为代表本公司委派至贵公司的董事。新委派的董事成员符合法律法规任职资格要求。”在后附的更换董事清单中涉及杭州娃哈哈食品有限公司的更换后的董事为黄小扬、林颐宏。

2007 年 6 月 13 日，由合营丙方委派的担任杭州娃哈哈食品有限公司副董事长的范易谋向合营甲方、乙方新委派担任杭州娃哈哈食品有限公司的董事黄小杨、林颐宏发出“关于召开董事会紧急会议的通知”。该通知载明：由于原董事长的离任，本人范易谋，作为合资公司的副董事长，按公司法和章程的有关规定，现临时代为履行董事长的职务并行使有关职权，直至临时董事长由董事会选举产生。该通知列明紧急会议的召开时间和地点为 2007 年 6 月 20 日上午 10：30，会议地点：杭州娃哈哈保健食品有限公司会议室（杭州秋涛北路 128－1 号）。紧急会议议程为：（1）欢迎新任的合资公司董事；（2）选举临时董事长并决定原董事长离任后的有关事项；（3）批准对合资公司财务、经营和管理等各方面开展审理工作；（4）审议合资公司目前业务、生产和销售形势，业务计划及 2007 年预算（包括资本性支出）；（5）审议合资公司提高资本金计划；（6）审议合资公司红利分配计划；（7）鉴于二级合资公司的某些董事辞职，批准向二级公司董事会委派董事，并决定原董事离任后的有关事项。

2007 年 6 月 20 日，杭州娃哈哈食品有限公司董事会召开。合营丙方委派的董事范易谋、秦鹏、嘉柯霖，合营甲方、乙方委派的董事黄小杨、林颐宏参加了该次董事会会议。该次会议作出了关于杭州娃哈哈食品有限公司的董事会决议二份，一份内容为“选举董事长”：（a）董事会于 2007 年 6 月 6 日收到关于宗庆后先生及杜建英女士辞去合资公司董事的通知，该辞职于 2007 年 6 月 3 日生效。董事会认可该辞职，并认可宗庆后先生已于上述日期内卸去其合资公司董事长的职务。（b）董事会兹决议，根据合资公司的章程，选举范易谋先生为合资公司

的董事长，立即生效。在各董事就上述决议表决的栏目下只有合营丙方委派的董事范易谋、秦鹏、嘉柯霖表示同意的签名，作为合营甲方、乙方委派的董事黄小杨、林颐宏未签名。另一份内容为“决定原董事长离任后的有关事项”：（a）董事会兹决议，确认合资公司当前的总经理继续履行其职责，并应向董事会汇报。（b）董事会兹决议，合资公司的公章、营业执照及批准证书原件应立即移交给董事长。（c）董事会兹决议，为维护合资公司的利益，董事会授权合资公司向任何侵犯合资公司权利和权益的自然人、法人或者其他法律实体采取任何法律行动和启动任何法律程序，包括但不限于提起诉讼、反诉、仲裁申请、仲裁反请求（下统称“法律行动和程序”）。（d）董事会兹决议，董事会授权范易谋先生作为合资公司合法和全权的授权代表，代表合资公司接收、签署任何及所有与上述法律行动和程序相关的文件、材料和文书，以及委托律师代表合资公司参与前述法律行动和程序。（e）董事会兹决议，董事会要求合资公司的所有管理人员（包括但不限于总经理及其他高级管理人员）就其所知悉的与上述法律行动和程序相关的任何及所有事项向范易谋先生及时报告。没有除范易谋先生给予的明确指使，任何人均不得擅自代表合资公司就任何法律行动和程序采取任何行动或措施。在各董事就上述决议表决的栏目下仍只有合营丙方委派的董事范易谋、秦鹏、嘉柯霖表示同意的签名，作为合营甲方、乙方委派的董事黄小杨、林颐宏并未签名。

2007 年 6 月 25 日范易谋以合资公司董事长的名义致函杭州娃哈哈食品有限公司黄小扬总经理，要求履行有关决议内容。同年 6 月 26 日，受合资公司的股东杭州娃哈哈集团有限公司的委托，浙江天册律师事务所和北京市金杜律师事务所杭州分所联合致函合营丙方范易谋，认为以上董事会决议的表决方式、决议内容等均违反了《公司法》、《中外合资经营企业法》及合资公司章程的规定，故提出异议。同年 7 月 16 日，林颐宏以杭州娃哈哈食品有限公司董事的名义发函给范易谋，表示不了解上述董事会决议的存在，要求将决议等以传真方式提供给中方董事，同时表示要求提供传真并不表示对这些决议的接收和认可。同年 7 月 23 日范易谋以董事长身份致函林颐宏、黄小扬，并将二份董事会决议传真给了林颐宏、黄小扬。后原告杭州娃哈哈集团有限公司以杭州娃哈哈食品有限公司的副董事长范易谋于 2007 年 6 月 20 日召集的董事会会议以及之后所提供的决议违反法律、法规和杭州娃哈哈食品有限公司章程的规定为由，要求依法撤销相关决议。

本院认为，根据《公司法》第二十二条第二款的规定“股东会或者股东大会、董事会的会议召集程序、表决方式违反法律、行政法规或者公司章程，或者决议内容违反公司章程的，股东可以自决议作出之日起六十日内，请求人民法院撤销”。纵观本案所涉二份董事会决议，首先，本案所涉董事会会议在通知程序上违反了公司章程的规定。根据杭州娃哈哈食品有限公司章程第 8.11 条（1）款的规定“公司召开董事会会议，董事长或董事长授权代表应于董事会会议实际召开日前十四天以传真方式发出书面通知（但需以信函确认）通知各位董事。但如经各方指定的各一名或一名以上董事书面批准，董事长或董事长授权代表可发出少于十四天的开会通知。”但本案所涉召集董事会会议的开会通知仅提前了七天于 2007 年 6 月 13 日才发出通知，不符合公司章程规定。并且原告委派的董事并未书面批准开会时间，亦未在董事会决议上签字确认，因此其参加董事会会议的行为仅仅是其行使董事权利的表现，而并不能表明其已经同意开会时间，故被告董事会会议通知程序违反了公司章程的规定。同时，6 月 13 日的会议通知中未附会议议程所涉及的详细资料和有关文件，亦不符合杭州娃哈哈食品有限公司章程第 8.11 条（2）款的规定。其次，本案所涉董事会会议在表决方式上不符合章程规定。根据杭州娃哈哈食品有限公司章程第 8.6 条（K）款的规定，“其他影响到合营各方重大利益的事项”，应由出席董事会会议的半数或以上的董事通过批准（其中中、丙双方至少各有一名董事批准）。本案所涉董事会决议涉及到选举临时董事长并决定原董事长离任后的有关事项，应属影响到合营各方重大利益的事项，但该决议未经中方至少一名董事的批准。且决议最终选举的非临时董事长，而是董事长，会议通知的议程与决议内容不符。再次，本案所涉董事会会议在决议内容上不符合章程规定。根据杭州娃哈哈食品有限公司章程第 8.7 条的规定，合营公司在提起或解决或放弃诉讼或承认责任……等事项可由出席董事会会议的半数或以上的董事通过批准。但在本案所涉“关于决定原董事长离任后的有关事项”第（e）项中，决定“没有除范易谋先生给予的明确指使，任何人均不得擅自代表合资公司就任何法律行动和程序采取任何行动或措施。”因此该项内容明显违反了合资公司章程的规定。综上，本案所涉的杭州娃哈哈食品有限公司于 2007 年 6 月 20 日作出的二份董事会决议，无论是会议召集程序、表决方式或者决议内容均存在违反公司章程的情况，原告作为股东有权在决议作出之日起六十日内，请求人民法院予以撤销。故对原告的诉讼请求，依法予以支持。

综上，依照《中华人民共和国公司法》第二十二条第二款之规定，判决如下：

一、撤销被告杭州娃哈哈食品有限公司董事会于2007年6月20日作出的关于“选举董事长”的决议。

二、撤销被告杭州娃哈哈食品有限公司董事会于2007年6月20日作出的关于“决定原董事长离任后的有关事项”的决议。

案件受理费80元，由被告杭州娃哈哈食品有限公司负担。

如不服本判决，可在判决书送达之日起十五日内，向本院递交上诉状及副本二份，上诉于浙江省杭州市中级人民法院，并向浙江省杭州市中级人民法院预交上诉案件受理费80元。在上诉期满后7日内仍未交纳的，按自动撤回上诉处理【人民法院户名（浙江省杭州市中级人民法院），账号12×××68，开户行（工商银行湖滨支行）】。

审　判　长　　王春霞

审　判　员　　宓旭庆

代理审判员　　程雪原

二〇〇九年二月二日

书　记　员　　董　婷

附页：

《中华人民共和国公司法》第二十二条第二款：股东会或者股东大会、董事会的会议召集程序、表决方式违反法律、行政法规或者公司章程，或者决议内容违反公司章程的，股东可以自决议作出之日起六十日内，请求人民法院撤销。[199]

[199] Available at: Pekin University law, 北大法宝, *Beijing fabao* (www.pkulaw.cn)

3.4.3 Translation

Hangzhou Wahaha Group Co. Ltd. v. Hangzhou Wahaha Food Co. Ltd. dispute resolution

People's Court of Hangzhou, Shangcheng District
Civil Judgement

(2007) Shàng mín èr chū zì dì 381 hào

Plaintiff: Hangzhou Wahaha Group Co. Ltd.
Legal representative: Zong Qinghou
Attorney: Xia Dezhong and Ye Zhijian
Defendant: Hangzhou Wahaha Food Co. Ltd.
Representative: Emmanuel Faber
Attorney: Li Jing and Jiang Heng

On 30 July 2007 the plaintiff Hangzhou Wahaha Group Co. Ltd. filed a lawsuit against the defendant Hangzhou Wahaha Food Co. Ltd. for the cancellation of the resolutions of the Board of Directors, lawsuit accepted the same day by this Court. After the acceptance, this Court formed a collegial panel according to the Law and on 24 September opened a public court session to hear the case. The plaintiff's attorney, Xia Dezhong and Ye Zhijian, and the defendant' attorney, Li Jing and Jiang Heng, attended the trial. After the trial, both the plaintiff and the defendant submitted a written request to the tribunal for an out-of-court mediation in the period between 22 December 2007 and 10 April 2008. The mediation was unsuccessful. The President of this Court approved an extension of six months and it was extended again for a period of three months by the approval of the Intermediate People's Court of Hangzhou, Zhejiang. This case has been heard and is now concluded.

The plaintiff declares that the defendant is a Sino-foreign joint venture established by the plaintiff, the Zhejiang Wahaha Industrial Co. Ltd. (hereinafter collectively referred to as "Chinese party") and the Singapore Jinjia Investment Co. Ltd. (hereinafter referred to as "foreign party"). On 3 June 2007, after Zong Qinghou, who was originally appointed by the Chinese party, resigned from the position of director in the defendant's

Board, the Chinese party proposed to the defendant two names as new director: Huang Xiaoyang and Lin Yihong. On 13 June 2007, Emmanuel Faber, appointed by the foreign party as vice-Chairman of the defendant, sent a notice to Huang Xiaoyang and Lin Yihong, appointed by the Chinese party as new directors, requesting the convening of an emergency meeting of the Board of Directors. The meeting of the defendant's Board of Directors was held on 20 June 2007 at the Hyatt Regency Hangzhou Hotel. Emmanuel Faber, Qin Peng and François Caquelin, directors appointed by the foreign party, and Huang Xiaoyang and Lin Yihong, directors appointed by the Chinese party, attended the above mentioned meeting, presided by the vice-Chairman Emmanuel Faber. On 25 June 2007, Emmanuel Faber, as the defendant's new Chairman, sent a letter to the defendant's general manager requesting him to implement the relevant resolutions. On 26 June 2007 the plaintiff's lawyer sent a letter to Emmanuel Faber and to the representatives of foreign party shareholders, challenging the legality of the "resolutions of the Board of Directors". On 7 July 2007, Lin Yihong, director appointed by the Chinese party, sent a letter to the defendant's vice-Chairman, Emmanuel Faber, requesting to immediately fax to the Chinese directors the so called relevant "resolutions" "approved" on 20 June 2007. On 23 July 2007, Emmanuel Faber, in the capacity of the defendant's "Chairman", sent a reply by fax to the directors Huang Xiaoyang and Lin Yihong, in which was stated: "In attached a copy of the approved resolutions of the last meeting of the Board of Directors of Hangzhou Wahaha Food Co. Ltd, held on 20 June 2007 at the Hyatt Regency Hangzhou Hotel. You surely remember that the above mentioned resolutions were submitted to the Board of Directors for deliberation and signed by the majority of directors".

The plaintiff believes that the meeting of the Board of Directors convened by the defendant's vice-Chairman Emmanuel Faber on 20 June 2007, as well as the resolutions made thereafter, violated the provisions of the Law, regulations and the defendant's articles of association, and these resolutions should be revoked according to the Law. The reasons are: first, the resolution of the defendant's Board of Directors on 20 June 2007, regarding the election of Emmanuel Faber as Chairman of the defendant's Board of Directors, violated the provisions of the "Sino-foreign Equity Joint Venture Law" (revised in 2001) promulgated by the National People's Congress and the provisions of the defendant's articles of association. Second, the voting methods of the resolutions made by the defendant's Board of Directors on 20 June 2007 violated the provisions of art. 8.6 of the defendant's articles of association, which states: "The following matters

may be approved by half or more of the directors attending the meeting of the Board (among them, there must be the approval of at least one director of the Chinese party and Party C): -- (K) other matters affecting the major interests of each party of the joint venture)". According to the above mentioned articles of association: the matters regarding the election of the Chairman of the Board of Directors, as well as the resignation of the former Chairman of the Board of Directors, are all major issues that affect the interests of the parties of the joint venture; to be approved, the resolutions concerning these matters should obtain the approval of at least one of the Chinese party directors. But in fact, the two resolutions provided by the defendant on 23 July 2007 were not approved by any of the Chinese party directors. Third, the notification procedure of the meeting of the Board of Directors held on 20 June 2007 also violated the relevant provisions of the defendant's articles of association. The notification of the meeting of the Board of Directors called by the defendant's vice-Chairman Emmanuel Faber on 20 June 2007 was only seven days ahead of the actual date of the meeting, and did not obtain the written approval of the Chinese directors, violating in this way the provisions of the joint venture company's articles of association. Fourth, the defendant's vice-Chairman Emmanuel Faber and other three foreign party directors secretly falsified and added a part of the content of the Board resolutions, violating the provisions of Company Law and the defendant's articles of association; the tampering and addition of the resolutions' content is also not conform to the provisions of the defendant's articles of association. Art. 8.7 of the defendant's articles of association states: "The following matters may be approved by half or more of the directors attending the Board meeting: … … (f) the joint venture company in initiating or resolving or waiving legal proceedings or in admission of liability, (except for claims made by either party to the joint venture, the resolutions adopted by the directors designated by the other parties of the joint venture are deemed to be unanimously adopted) …". In the "resolution on the relevant matters after the resignation of the former Chairman" is required that "the defendant in initiating legal actions and proceedings" must receive "explicit instructions by Emmanuel Faber". This clearly violates the above mentioned provisions of art. 8.7 of the defendant's articles of association.

In summary, the plaintiff believes that the meeting of defendant's Board of Directors held on 20 June 2007, as well as the "resolutions" resulting after it, gravely violate the "Sino-foreign Equity Joint Venture Law" and the provisions of the defendant's articles of association in the "resolutions" content, the convening procedure, the voting method,

the resolutions' formation and other aspects; all the approved resolutions should be revoked according to the Law. Consequently, the plaintiff asks to this Court: 1, to revoke, according to the Law, the resolution approved in the meeting of the defendant's Board of Directors on 20 June 2007 regarding the election of the Chairman. 2, to revoke, according to the Law, the resolutions of the defendant's Board of Directors concerning the relevant matters after the resignation of the former Chairman. 3, to order to the defendant to cover all the legal costs.

The defendant replies: first, all the methods and the content of the resolutions of the meeting of the Board of Directors are in accordance with the provision of the Law, regulations and the articles of association. 1, it is not improper for Emmanuel Faber, in the capacity of vice-Chairman, to be elected as Chairman. Art. 8.2 (2) of the articles of association provides the methods for the appointment of the Chairman and vice-Chairman. 2, the Board of Directors resolutions involved in this case may be approved by half or more of the directors attending the Board meeting. Second, the statement of the Chinese directors that they were not aware of the resolutions' existence and that the foreign party secretly altered and added a part of their content, is inconsistent with the facts. Third, the notification procedure of the meeting of the Board of Directors is in accordance with the provision of the Law, regulations and the articles of association. In summary, we believe that the resolutions' methods and content, the notification procedure etc. of the meeting of the Board of Directors are all in accordance with provision of the Law, regulations and the articles of association, and their legality should be confirmed; that the plaintiff's claims and reasons are untenable, further, they have hindered the Board of Directors from managing the joint venture and endangered its ordinary operations. We ask the Court to ascertain the facts, to fairly apply the Law and reject the plaintiff's claims.

The plaintiff submitted the following evidences to prove his claim:

1. A copy of the articles of association of Hangzhou Wahaha Food Co. Ltd., proving that (1) the first Chairman should be appointed by Party A after consultation between Party A (Hangzhou Wahaha Group Co.), Party B (Hangzhou Wahaha Food City Co. Ltd.) and Party C (Singapore Jinjia Investment Co. Ltd); the first vice-Chairman should be appointed by Party C, and the future Chairmen and vice-Chairmen are elected among each party's directors, one of whom is a director appointed by the Chinese party and the other is a director appointed by Party C. (2) The increase and transfer of the joint

venture's registered capital is subject to the unanimous approval of all the directors of the Board. (3) Any matter affecting the major interests of the joint venture's parties, may be approved by half or more of the directors attending the Board meeting (among them, there must be the approval of at least one director of the Chinese party and Party C). (4) The joint venture company in initiating or resolving or waiving legal proceedings or in admission of liability, must receive the approval of half or more of the directors attending the Board meeting. (5) The articles of association provide that the meeting of the Board of Directors should be notified fourteen days in advance and should provide as much detailed materials and relevant documents as possible about the meeting agenda's matters; otherwise, they should not be discussed and decided during the meeting of the Board.

2. A copy of the notification of the approval for the change of the enterprise's name and the registration's application form for the conversion of the company, proving that the plaintiff's original name was "Hangzhou Wahaha Group Co." and changed to its present name in 1999; Hangzhou Wahaha Food City Co. Ltd was renamed "Zhejiang Wahaha Industrial Co. Ltd" in 2001.
3. A copy of the notification for the replacement of directors, proving that on 3 June 2007 as a consequence of the resignation of Zong Qinghou and Du Jianying, originally appointed by the plaintiff, from their duties as directors of the defendant's Board, the plaintiff appointed Huang Xiaoyang and Lin Yihong to assume the role of the defendant's directors.
4. A copy of the notification sent on 13 June 2007 to the plaintiff's directors regarding the convening of an emergency meeting of the Board of Directors, proving that (1) the notification of the meeting of the Board of Directors was only seven days ahead the convening time. (2) One of the matters listed in the agenda was the election of an interim Chairman. (3) Emmanuel Faber convened the meeting of Board of Directors in his capacity of vice-Chairman of the defendant.
5. A copy of the letter dated 25 June 2007 sent by Emmanuel Faber to the defendant's general manager, proving that Emmanuel Faber, in the capacity of Chairman of the defendant, requested to implement the resolutions taken by the Board of Directors on 20 June 2007.

6. A copy of the letter dated 26 June 2007 sent by the plaintiff's lawyer to Mr. Emmanuel Faber and Singapore Jinjia Investment Co. Ltd, proving that on 26 June 2007 the plaintiff's lawyer sent a letter to Emmanuel Faber and Singapore Jinjia Investment Co. Ltd challenging the legality of the relevant resolutions taken by the Board of Directors.
7. A copy of the letter dated 16 July 2007 sent by the director Lin Yihong, appointed by the Chinese party, to the defendant's vice-Chairman Emmanuel Faber, proving that on 16 July 2007 the director Lin Yihong, appointed by the Chinese party, sent a letter to the defendant's vice-Chairman Emmanuel Faber requesting to immediately fax to the Chinese party directors all the "resolutions" "approved" in the meeting of the Board of Directors held on 20 June 2007.
8. A copy of the letter of reply, dated 23 July 2007, faxed by Emmanuel Faber, in the capacity of the defendant's "Chairman", to the directors Huang Xiaoyang and Lin Yihong, proving that on 23 July 2007 Emmanuel Faber, in the capacity of the defendant's "Chairman", faxed a reply to the directors Huang Xiaoyang and Lin Yihong, in which is said: "In attached a copy of the approved resolutions of the last Board meeting of Hangzhou Wahaha Food Ltd, held on 20 June 2007 at the Hyatt Regency Hangzhou Hotel. You surely remember that the above mentioned resolutions were submitted to the Board of Directors for deliberation and signed by the majority of directors".
9. A copy of the resolution of the Board of Directors about the election of the Chairman, proving the decision of the defendant's Board of Directors to elect Emmanuel Faber as Chairman of the joint venture, on 20 June 2007.
10. A copy of the resolution of the Board of Directors regarding the relevant matters after the resignation of the former Chairman, proving: the "resolutions" of the defendant's Board of Directors and their secret falsification by the foreign directors; the confirmation that the general manager continued to perform his duties; the turn over to the Chairman of the company's official seal, business license and original certificate of approval; the authorization to the joint venture to initiate legal actions and proceedings; the authorization to Emmanuel Faber to accept and sign the documents relating to legal actions and proceedings; the request to all the joint venture's managers to report to Emmanuel Faber on all the matters relating to legal actions and proceedings, and to take no action or measure without Emmanuel Faber's explicit instructions.

11. A copy of a counterclaim application in arbitration, proving that in July 2007 Emmanuel Faber was acknowledged as vice-Chairman of the joint venture.
12. A copy of the 2006 annual audit report of Hangzhou Wahaha Food Co. Ltd, proving that the joint venture completed the 2006 annual audit and had an allocable income.
13. The minutes of Hangzhou Wahaha Food Ltd, namely the joint venture enterprise's Board of Directors meetings in 1999, 2000 and 2006, proving that the first thing made by defendant and the joint venture in the previous convening of the meetings of the Board of Directors was the confirmation of whether the notification of the meeting was in compliance with the relevant provisions of the articles of association.

The above evidences have been cross-examined. The defendant has no objection to the authenticity and the legality of evidence 1, 3 and 12, but has objection to part of the relevance and the object of proof; has no objection to the authenticity, the legality and the relevance of evidence 2, 4, 5, 7-11, but has objection to the object of proof of evidence 7, 10, 11; has no objection to the formal authenticity of evidence 6, but believes that it is the plaintiff's unilateral statement, without probative value; has no objection to the authenticity and the legality of evidence 13, but believes that is unrelated to the case, without probative value, and it was submitted by the plaintiff after the expiry of the period for adducing evidences.

The defendant submitted the following evidences:

1. A copy of the list of the attending directors, certifying that all the directors, without exception, attended the meeting of the Board of Directors.
2. The 18 June 2007 reply to the meeting notification and Emmanuel Faber's letter of reply, certifying the Chinese party directors' confirmation of the time and place of the meeting, with no objection (related to the plaintiff's proof 1 and 8).
3. The letters dated 2, 8 and 17 August 2007 sent by Emmanuel Faber to Huang Xiaoyang and Lin Yihong asking them to cooperate in handling the procedures for the industrial and commercial change; Huang Xiaoyang's letter dated 9 August and the industrial and commercial materials, certifying that after being elected Chairman, Emmanuel Faber no longer held the position of vice-Chairman; due to the non-cooperation of the Chinese party directors, the industrial and commercial files remained unchanged.

The above evidences have been cross-examined. The plaintiff has no objection to the authenticity of evidence 1 and 3; has no objection to the authenticity of pages 1 and 8 of evidence 2, but objects the relevance, the content and the object of proof.

After the hearing and the cross-examination of the evidences, this Court recognizes the evidences as follows:

The defendant has no objection to the authenticity of evidence 1-5 and 7-13 provided by the plaintiff, so their probative value is confirmed according to the Law; as regards the matters that have to be proved, they will be determined in the whole case. For the evidence 6 submitted by the plaintiff, the defendant's cross-examination opinion is well-founded, so its probative value cannot be confirmed.

The plaintiff has no objection to the authenticity of evidence 1, page 1 and 8 of evidence 2, and evidence 3 provided by the defendant, so their probative value is confirmed according to the Law; as regards the matters that have to be proved, they will be determined in the whole case.

After the hearing, this Court recognizes that the defendant Hangzhou Wahaha Food Co. Ltd is a Sino-foreign joint venture jointly established by the plaintiff Hangzhou Wahaha Group Co. Ltd (note: named "Hangzhou Wahaha Group Co." at the time of the joint venture and later changed in "Hangzhou Wahaha Group Co. Ltd.", referred to as "Party A" in the joint venture's articles of association), the Zhejiang Wahaha Industrial Co. Ltd (note: named "Hangzhou Wahaha Food City Co. Ltd" at the time of the joint venture and later changed in "Zhejiang Wahaha Industrial Co. Ltd", referred to as "Party B" in the joint venture's articles of association) and the Singapore Jinjia Investment Co. Ltd (referred to as "Party C" in the joint venture's articles of association).

According to the "Articles of association of Hangzhou Wahaha Food Ltd." (hereinafter referred to as company's articles of association) the parties negotiated and signed a joint venture contract on 9 February 1996. Art. 8.2 (2) of the company's articles of association states: "the first Chairman should be appointed by Party A after consultation between Party A, Party B and Party C; the first vice-Chairman should be appointed by Party C. … … If the first Chairman is unable to perform his duties for any reason, a successor will be elected among the directors". Art. 8.6 states: "The following matters may be approved by half or more of the directors attending the Board meeting (among them, there must be the approval of at least one director of the Chinese party and Party C): -- (K) other matters affecting the major interests of each party of the joint venture)". Art. 8.7 states: The following matters may be approved by half or more of the directors

attending the Board meeting: … … (f) the joint venture company in initiating or resolving or waiving legal proceedings or in admission of liability, (except for claims made by either party to the joint venture, the resolutions adopted by the directors designated by the other parties of the joint venture are deemed to be unanimously adopted) …"; … … (h) other matters to be decided by the Board of Directors". Art. 8.11 (1) states: "When the joint venture company calls a meeting of the Board of Directors, the Chairman or a representative authorized by the Chairman shall fax a written notification to the directors fourteen days before the actual meeting of the Board (subject to confirmation by letter). However, with the written approval of each one or more directors designated by the Chinese party and Party C, the Chairman or a representative authorized by the Chairman may issue a meeting notification with less than fourteen days' notice". Art. 8.11 (2) states: "The above-mentioned meeting notification must specify the meeting's time, place, agenda and other contents, also it must provide as much detailed materials and relevant documents as possible about the meeting agenda's matters. Unless with the written approval of each one or more than one directors designated by the Chinese party and Party C, the matters not included in the agenda of the meeting or included without the corresponding materials and documents, shall not be discussed and decided at the Board of Directors meeting". After the establishment of the joint venture, the first Chairman appointed by Party A was Zong Qinghou.

On 3 June 2007 Hangzhou Wahaha Group Ltd. and Zhejiang Wahaha Industrial Co. Ltd. sent a "notification of replacement of Directors" to Hangzhou Wahaha Food Co. Ltd. and other five companies, in which was stated: "We hereby inform you that Mr. Zong Qinghou and Ms. Du Jianying, appointed by our company, have resigned their duties as directors of the abovementioned company. We attach a list of people that may represent us as directors in your company. The newly appointed directors meet the legal and regulatory requirements for that office". Huang Xiaoyang and Lin Yihong were in the attached list concerning the replacement of the directors of Hangzhou Wahaha Food Co. Ltd.

On 13 June 2007, Emmanuel Faber, appointed by the joint venture's Party C as vice-Chairman of Hangzhou Wahaha Food Co. Ltd, sent to Huang Xiaoyang and Lin Yihong, directors of Hangzhou Wahaha Food Co. Ltd newly appointed by Party A and Party B, a "notification on the convening of an emergency meeting of the Board of Directors", which stated: as a result of the resignation of the former Chairman, I, Emmanuel Faber,

vice-Chairman of the joint venture, will temporarily perform, in accordance with the relevant provisions of Company Law and the articles of association, the functions and powers of the Chairman of the Board of Directors until an interim Chairman is elected by the Board. The notice specified the time and place of the emergency meeting: 20 June 2007 at the boardroom of Hangzhou Wahaha Health Food Co. Ltd. (Qiutao North Road no. 128-1, Hangzhou), at 10:30 a.m. The emergency meeting's agenda was: (1) welcome of the newly appointed directors of the joint venture; (2) election of the interim Chairman and decision on the relevant matters after the resignation of the former Chairman; (3) approval for the examination of the financial, operational, management and any other aspect of the joint venture company; (4) discussion of the joint venture's current business, production and sales situation, business plan and 2007 budget (including capital expenditure); (5) discussion of the plan for raising the joint venture's capital; (6) discussion of the joint venture's plan on distribution of dividends; (7) in view of the resignation of some directors of the secondary joint venture, the approval of the directors appointed by the secondary joint venture and decisions on the relevant matters after the resignation of the former Chairman.

The meeting of the Hangzhou Wahaha Food Co. Ltd.'s Board of Directors was held on 20 June 2007. The directors appointed by Party C of the joint venture, Emmanuel Faber, Qin Peng and François Caquelin, and the directors appointed by Party A and Party B, Huang Xiaoyang and Lin Yihong, attended the meeting of Board of Directors. Two resolutions concerning the Board of Directors of Hangzhou Wahaha Food Co. Ltd. were made, one of them was the "election of the Chairman": (a) on 6 June 2007 the Board of Directors received a notification about the resignation of Mr. Zong Qinghou and Ms. Du Jianying from directors of the joint venture company, which became effective on 3 June 2007. The Board of Directors accepted the resignation and approved the removal of Mr. Zong Qinghou from his duties as Chairman within the aforementioned date. (b) the Board of Directors hereby decides, in accordance with the joint venture's articles of association, to elect Mr. Emmanuel Faber as Chairman of the Board of Directors, with immediate effect. In the column for each director's vote on the abovementioned resolutions there were the signatures of consent of Emmanuel Faber, Qin Peng and François Caquelin, directors appointed by Party C of the joint venture; the directors appointed by Party A and Party B, Huang Xiaoyang and Lin Yihong, did not sign. The other resolution was the "decision on the relevant matters after the resignation of the former Chairman": (a) the Board of Directors hereby confirms that the current general

manager of the joint venture company continues to perform his duties and must report to the Board of Directors. (b) The Board of Directors hereby decides that the official seal, business license and original certificate of approval of the joint venture company must be immediately turned over to the Chairman. (c) The Board of Directors hereby decides, in order to protect the interests of the joint venture company, that the Board of Directors may authorize the joint venture to take any legal action and start any legal proceeding, including but not limited to litigation, counterclaim, application for arbitration and arbitration counter request (hereinafter referred to as "legal actions and proceedings") against any natural person, legal person or other juridical entities that violates the joint venture's rights and interests. (d) The Board of Directors hereby decides to empower Mr. Emmanuel Faber to be the legitimate and plenipotentiary authorized representative of the joint venture, and to receive and sign on behalf of the joint venture company any and all papers, materials and documents related to the abovementioned legal actions and proceedings, and to entrust lawyers to represent the joint venture company in the said legal actions and proceedings. (e) The Board of Directors hereby asks to all the managerial staff of the joint venture company (including but not limited to the general manager and other senior managers) to promptly report to Mr. Faber on any and all the matters of which they are aware concerning the abovementioned legal actions and proceedings. Without explicit instructions given by Mr. Faber, no one must arbitrarily take any action or measure on behalf of the joint venture company in any legal action or procedure. In the column for each director's vote on the abovementioned resolutions there still were the signatures of consent of Emmanuel Faber, Qin Peng and François Caquelin, directors appointed by Party C of the joint venture; the directors appointed by Party A and Party B, Huang Xiaoyang and Lin Yihong, did not sign.

On 25 June 2007, Emmanuel Faber, in the name of Chairman of the joint venture company, wrote a letter to Huang Xiaoyang, general manager of Hangzhou Wahaha Food Co. Ltd., requesting the implementation of the relevant resolutions. On 26 June of the same year, the Zhejiang Tiance Law Firm and the Hangzhou Branch of Beijing Jindu Law Firm, entrusted by Hangzhou Wahaha Group Co. Ltd., shareholder of the joint venture, jointly wrote a letter to Emmanuel Faber, believing that the voting methods and the content of the Board of Directors resolutions hereinbefore violated the provisions of "Company Law", "Sino-foreign Equity Joint Venture Law" and the joint venture's articles of association, and therefore raised an objection. On 16 July 2007, Lin Yihong, in the name of director of Hangzhou Wahaha Food Co. Ltd., sent a letter to

Emmanuel Faber, expressing the unawareness of the abovementioned resolutions' existence and requesting to fax them to the Chinese directors, expressing at the same time that the request for faxes did not mean the acceptance or the approval of the resolutions. On 23 July 2007, Emmanuel Faber, as Chairman of the Board of Directors, sent a letter to Huang Xiaoyang and Lin Yihong and faxed them the two resolutions of the Board of Directors. Later, on the grounds that the resolutions made in the meeting of Board of Directors convened on 20 June 2007 by the vice-Chairman of Hangzhou Wahaha Food Co. Ltd., Emmanuel Faber, violate the provisions of the Law, regulations and articles of association, the plaintiff Hangzhou Wahaha Group. Co. Ltd. requested to revoke the relevant resolutions according to the Law.

This Court believes that according to the provisions of art. 22, par. 2 of "Company Law", "if the procedure for convening the board of shareholders or general meeting or the meeting of the board of directors, or the method of voting violates laws, administrative regulations or the articles of association of the company, or if the contents of a resolution violate the articles of association of the company, a shareholder may, within 60 days of the adoption of the resolution, request to a People's Court to revoke the resolution". Through the examination of the two resolutions involved in this case, first, the Board of Directors violated the provisions of the company's articles of association in the notification procedure. According to the provisions of art. 8.11 (1) of Hangzhou Wahaha Food Co. Ltd.'s articles of association, "When the joint venture company calls a meeting of the Board of Directors, the Chairman or a representative authorized by the Chairman shall fax a written notice to the directors fourteen days before the actual meeting of the Board (subject to confirmation by letter). However, with the written consent of each one or more directors, the Chairman or a representative authorized by the Chairman may issue a meeting notification with less than fourteen days' notice". However, the notice of the meeting of the Board of Directors involved in this case was issued only seven days in advance, on 13 June 2007, which is not in accordance with the provisions of the company's articles of association. Moreover, the directors appointed by the plaintiff did not approve the meeting time in writing, nor did sign the approval for the Board of Directors' resolutions; therefore, their participation to the meeting of the Board of Directors is nothing else than the expression of the exercise of their rights as director, and cannot indicate their agreement to the meeting time, so the defendant's procedure of notification of the meeting of the Board of Directors violates the provisions of the company's articles of association. At the same time, all the

detailed materials and relevant documents involved in the meeting's agenda were not attached to meeting's notification dated 6 June, and this is not in accordance with the provisions of art. 8.11 (2) of Hangzhou Wahaha Food Co. Ltd.'s articles of association. Secondly, the voting methods of the Board of Directors involved in this case are not in accordance with the provisions of the articles of association. According to the provisions of art. 8.6 (K) of Hangzhou Wahaha Food Co. Ltd.'s Articles of Association, "other matters affecting the major interests of each party of the joint venture", the following matters may be approved by half or more of the directors attending the Board meeting (among them, there must be the approval of at least one director of the Chinese party and Party C). The resolutions of the Board of Directors involved in this case about the election of an interim Chairman and on the decisions on the relevant matters after the resignation of the former Chairman are matters affecting the major interests of each party of the joint venture; however, the resolution was not approved by at least one Chinese director. The resolution ultimately elected a Chairman of the Board, not an interim Chairman; it is not in accordance with the agenda of the notification of the meeting. Once again, the content of the resolutions of the Board of Directors involved in this case is not in accordance with the provisions of articles of association. According to the provisions of art. 8.7, the joint venture company in initiating or resolving or waiving legal proceedings or in admission of liability… … etc. may be approved by half or more of the directors attending the Board meeting. However, in subparagraph (e) of "decisions on the relevant matters after the resignation of the former Chairman", was decided that "Without explicit instructions given by Mr. Emmanuel Faber, no one must arbitrarily take any action or measure on behalf of the joint venture company in any legal action or procedure". This content clearly violates the provisions of the joint venture company's articles of association. In summary, the two resolutions made by the Board of Directors of Hangzhou Wahaha Food Co. Ltd. on 20 June 2007, regardless of whether the convening procedure, voting the methods or the resolutions' content violate the company's articles of association, the plaintiff as a shareholder may request to the People's Court to revoke the resolution within 60 days from the adoption of the resolution. Consequently, the plaintiff's claim is supported by the Law.

In summary, in accordance with the provisions of art. 22 par. 2 of "Company Law of the People's Republic of China", the judgement is the following:

1. The cancellation of the resolution on the “election of the Chairman” made by the defendant Hangzhou Wahaha Food Co. Ltd.’s Board of Directors on 20 June 2007.
2. The cancellation of the resolution on the “decisions on the relevant matters after the resignation of the former Chairman” made by the defendant Hangzhou Wahaha Food Co. Ltd.’s Board of Directors on 20 June 2007.

The court costs are 80 Yuan RMB, which is borne by the defendant Hangzhou Wahaha Food Co. Ltd.

In case of refusal of this this judgement, it is possible within fifteen days from the date of serving of the written judgement, to present to this Court an appeal to the Hangzhou Intermediate People’s Court, and pay the court costs of 80 Yuan RMB in advance to the Hangzhou Intermediate People’s Court. If there is no payment within 7 days after the expiration of the appeal period, the appeal shall be automatically withdrawn【the name of the People’s Court (Hangzhou Intermediate People’s Court, Zhejiang Province), account number 12 XX 68, bank (Industrial and Commercial Bank of China, sub-branch of Hubin)】.

Presiding Judge: *Wang Chunxia*

Judge: *Mi Xuqing*

Acting Judge: *Cheng Xueyuan*

2 February 2009

Court Clerk: *Dong Ting*

Attachment:

Art. 2 par. 2 of the “Company Law of the People’s Republic of China”: if the procedure for convening the board of shareholders or general meeting or the meeting of the board of directors, or the method of voting violates laws, administrative regulations or the articles of association of the company, or if the contents of a resolution violate the articles of association of the company, a shareholder may, within 60 days of the adoption of the resolution, request to a People’s Court to revoke the resolution.

CONCLUSIONS

Many lessons can be learned from the dispute between Danone and Wahaha.

According to The Economist, generally there are three main reasons for Sino-foreign JVs failure: local partners wants to receive money and know-how from the outside and to achieve their own objectives at the same time; allocation of profits and investments is often unclear; China is now aware to be one of the most attractive markets in the world, it has no more need of a huge amount of investments from outside, so it is less interested in letting foreigners access its market[200].

Danone's nightmare took place in this framework.

After the failure of its solo attempt to enter the Chinese market in 1987, Danone tried again with the cooperation with a strong local partner, failing to manage the latter.

The dispute for the trademark is surely the most known. In order to bypass the refusal of the Chinese Trademark Office for the trademark's transfer from Wahaha Group to the JV, Danone signed for the license, probably not understanding entirely its implications. It is not uncommon that many foreign parties in a Sino-foreign JV complain about illegal actions of the Chinese party when it is actually not[201].

The litigation between the two giants had repercussions on many aspects, both in China and abroad.

Focusing on the object of this paper, the crisis between Danone and Wahaha shook also the management system of the JV. The consequences of Mr. Zong's resignation and the actions of the vice-Chairman Emmanuel Faber had a strong impact both inside and outside the JV. As said before, the struggle for the JV's management led to heavy consequences for Danone: the distributors refused to sell the JV's products, the employees called for numerous strikes, people started to boycott Danone's products[202], resulting in huge losses for the French firm and in a huge damage to its reputation.

The whole thing ended with the sale of Danone's 51% of shares to the Chinese party after years of unsuccessful lawsuits around the world. Most experts agree that Danone

[200] The Economist, *Wahaha-haha!: The lessons from Danone and HSBC's troubled partnerships in China*, 2007. Available at: https://www.economist.com/business/2007/04/19/wahaha-haha

[201] Dan Harris, *Danone v. Wahaha: China Business And Law Lessons To Be Learned*, in China Law Blog, 2007. Available at: https://www.chinalawblog.com/2007/09/danone_v_wahaha_china_business.html

[202] Verbeke, *International Business Strategy*, p. 377

"did not have the management resources to control the JV and did not have much experience in running successful business in China on its own"[203].

According to Steve Dickinson, lawyer at Harris Moure PLC, Danone violated the most basic rules on how to manage a JV abroad: "1) don't use technical legal techniques to assert or gain control in a JV; 2) do not expect that a 51 percent ownership interest in a JV will necessarily provide effective control; 3) do not proceed with a JV formed on a weak or uncertain legal basis; 4) the foreign party must actively supervise or participate in the day-to-day management of the JV"[204].

All the experts never get tired to stress out the importance of management in a company. The management body is one of the most delicate subjects in corporate governance. The Board of Directors is, in a way, the driving force behind a company. In limited companies, the Board is linked to the shareholders, which receive the right to appoint and dismiss the members of Board through their investment, and it is separated from them at the same time, since the shareholders and the directors' competences are clearly defined by the Law and the AOA. In JVs the equilibrium is really fragile: the Board of Directors should reflect the capital interests of each partner without overlook the matter of joint control. Nevertheless, the closer attention given to the minority to achieve the joint control must not lead to situations of deadlock. This is why it must be paid great attention to the drafting of all the major agreements that revolves around the JV.

As is clear from the judgement, the AOA play a key role in establishing an equilibrium between the partners and their respective powers. The matters affecting the major interests of the parties, legal proceedings and the election of the Chairman mentioned in the judgement are just three of a long series of decisions subject to the approval of the JV's Chinese party. In the JV's AOA, the two parties also established the appointment of the Chairman by the Chinese party (after a consultation with the other parties of the JV) and the appointment of the vice-Chairman by the foreign party. This reflects the common practice in JVs to have the Chairman appointed by one party and the vice-Chairman by the other one (*supra* 1.2 and 1.5.1) and meets requirements of art. 6 EJVL and art.12 CJVL. The legal basis on which the plaintiff mostly based his claims were the AOA's binding power upon the parties (art. 11 CL) and the provisions of art. 2 CL on convening procedures and voting methods. The statement of art. 2 CL "if the procedure for convening […] the meeting of the board of directors, or the method of

[203] Verbeke, *International Business Strategy*, p. 380, op. cit.
[204] Pontiggia, *International Organizational…*, p. 405, op. cit.

voting violates laws, administrative regulations or the articles of association of the company, or if the contents of a resolution violate the articles of association of the company […]" clearly indicates a complementarity between the provisions of the Law and those of the major agreements.

Whether this lawsuit was a legal expedient of the Chinese party to weaken the Danone's position in the overall dispute or not, it is still another defeat for the French company, with all the resulting repercussions on its reputation.

The numerous advantages given by a JV clash with the undeniable problems experienced by countless entrepreneurs. Danone and Wahaha are just one among many examples. The assumption that both the foreign and the Chinese party are oriented towards the same common goal only because they set up a JV cannot be further from the truth[205], since they are both subject to a series of opposing forces and interests.

It has been noticed that one of the most important reasons for JVs failure is cultural[206]. This emphasizes that technical knowledge is not enough to successfully run a business without an appropriate cultural knowledge of the host country. For this reason, it is important to be supported by people with both technical and cultural knowledge, which can be a valuable asset for those companies that want to do business abroad.

In order to avoid endless disputes, it is important to plan how to end a JV amicably, goal achievable only through a wise management of all the documents that revolve around the JV. "For a joint venture to be successful, you have to plan for it to die", said a consultancy to The Economist[207].

[205] Harris, *Danone v. Wahaha — Which Of Us Is The Most China Rookie?*, in China Law Blog, 2007. Available at: https://www.chinalawblog.com/2007/04/danone_v_wahaha_which_of_us_is.html

[206] Gasparrini, *Joint venture ed altre forme di investimenti diretti esteri…*, p. 98

[207] The Economist, *Wahaha-haha!: The lessons from Danone…*, 2007

CHINESE GLOSSARY

Pinyin	中文	Translation
Ànjiàn shòulǐ fèi	案件受理费	Court costs
Bànshù huò yǐshàng	半数或以上	Half or more
Bèigào	被告	Defendant
Bǐng fāng	丙方	Party C
Bóhuí	驳回	To reject
Chèxiāo	撤销	To cancel, to revoke
Dàilǐ shěnpàn yuán	代理审判员	Acting Judge
Dǒngshì zhǎng	董事长	Chairman of the Board of Directors
Dǒngshìhuì	董事会	Board of Directors
Dǒngshìhuì jǐnjí huìyì	董事会会议	Meeting of the Board of Directors
Dǒngshìhuì jǐnjí huìyì	董事会紧急会议	Emergency meeting of the Board of Directors
Fǎdìng dàibiǎo rén	法定代表人	Legal representative
Fǎguī	法规	Laws and regulations
Fǎlǜ	法律	Law
Fǎlǜ xíngdòng hé chéngxù	法律行动和程序	Legal actions and proceedings
Fǎrén	法人	Legal person
Fù dǒngshì zhǎng	副董事长	Vice-Chairman of the Board of Directors
Fúhé	符合	Conform to

Gōngsī zhāngchéng	公司章程	Company’s Articles of Association
Gǔdōng dàhuì	股东大会	General Meeting, Shareholders’ Meeting
Gǔfèn yǒuxiàn gōngsī	股份有限公司	Company limited by shares
Guīdìng	规定	To provide, provision
Héfǎ xìng	合法性	Legality
Hézī jīngyíng qǐyè	合资经营企业	Equity joint venture
Hézuò jīngyíng qǐyè	合作经营企业	Contractual joint venture
Huìyì jìlù	会议记录	Minutes
Jiǎ fāng	甲方	Party A
Jiānshìhuì	监事会	Supervisory Board
Jiūfēn	纠纷	Dispute
Juéyì	决议	Resolution
Línshí dǒngshì zhǎng	临时董事长	Interim Chairman
Lírèn	离任	To leave one’s post
Lǜshī	律师	Lawyer
Lǜshī shìwù	律师事务	Law firm
Mínfǎ	民法	Civil law
Mínshì pànjuéshū	民事判决书	Civil judgement
Pànjué	判决	Judgement, court decision
Pànlìng	判令	To order
Pīzhǔn	批准	To approve, approval
Rèndìng	认定	To recognize, to acknowledge, to determine
Rénmín fǎyuàn	人民法院	People's court

Shěnpàn yuán	审判员	Judge
Shěnpàn zhǎng	审判长	Presiding Judge
Shūjì yuán	书记员	Court Clerk
Shūmiàn pīzhǔn	书面批准	Written approval
Sùsòng fèiyòng	诉讼费用	Legal costs
Tíng wài tiáojiě	庭外调解	Out of court mediation
Tōngzhī	通知	Notification
Wéifǎn	违反	To violate
Wěituō dàilǐ rén	委托代理人	Attorney
Xuǎnjǔ	选举	To elect, election
Yǐ fāng	乙方	Party B
Yīfǎ	依法	According to the Law
Yīzhì pīzhǔn	一致批准	Unanimous approval
Yǒuxiàn zérèn gōngsī	有限责任公司	Limited liability company
Yuángào	原告	Plaintiff
Zhàokāi dǒngshìhuì huìyì	召开董事会会议	To call, to convene a meeting of the Board of Directors
Zhèngjù	证据	Evidence, proof
Zhèngmíng	证明	To prove
Zhèngmíng duìxiàng	证明对象	Object of proof
Zhèngmíng lì	证明力	Probative value
Zhēnshí xìng	真实性	Authenticity
Zhòngcái	仲裁	Arbitration
Zhòngdà lìyì	重大利益	Major interests

Zhōnghuá rénmín gònghéguó gōngsī fǎ	中华人民共和国公司法	Company Law of the People's Republic of China
Zhōnghuá rénmín gònghéguó zhōngwài hézī jīngyíng qǐyè fǎ	中华人民共和国中外合资经营企业法	Law of the People's Republic of China on Sino-foreign Equity Joint Ventures
Zhōnghuá rénmín gònghéguó zhōngwài hézuò jīngyíng qǐyè fǎ	中华人民共和国中外合作经营企业法	Law of the People's Republic of China on Sino-foreign Cooperative Joint Ventures

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