



龙来了 Here be dragons

中国投资者正马不停蹄地向全球更多元化的行业领域进军，但是律师提醒投资者在进入陌生水域之前需留意政治风险和收购后的风险，Vanessa Ip 为您报道

Chinese investors are venturing into more diversified sectors around the world, but lawyers urge them to beware the political and post-sale risks before entering uncharted waters, writes Vanessa Ip

当 中国政府和私人投资者向世界各个角落扬帆起航时，没有人向这些热衷于购买外国企业的投资者提起中国经济有出现衰退的隐忧。也许的确有必要提起。尽管人们普遍认为中国的腾飞已经结束了，但是今年1月截至9月30日的跨境交易金额仍然同比增长了18.2%，达722亿美元，并且预计到2020年对外直接投资总额将由现在的3110亿美元增长至5万亿美元。

但是在境外投资者相对陌生的水域中，风险可能会很高。在两极分化日益严重的世界里，政治因素可能会让最积极的企业家触礁。

If there are fears of an economic downturn in China, no-one has told its state and private investors keen for a slice of foreign opportunity as they open sail for the world's four corners.

And they may be right. Although it is widely speculated that China's "boom" is over, cross-border activity increased by 18.2% to US\$72.2 billion in the nine months to 30 September, with outward foreign direct investment expected to rise to over US\$5 trillion by 2020 from US\$311 billion. But in waters still relatively uncharted by outbound investors, the risks can be high. Political considerations in an increasingly polarised world can sink the

而只知并购常识却缺乏专业知识,可能会导致许多中国企业无法探测并及时发现前方的海妖。

对于那些免于海难的投资者,机遇在向他们招手。尽管中国大部分的境外并购活动依旧会集中于能源领域,但是投资者对于多元化投资的兴趣越来越浓烈,金融服务、日用消费品、基础设施建设和农产品等非传统领域推动着中国境外并购市场的发展。

无论是中国国有企业还是私人企业的眼光都越来越敏锐了,不过法律顾问建议客户要把眼光放远一些,要更好地了解收购后的运营,以确保长远的成功。

keenest entrepreneur. And a lack of expertise beyond simple acquisitions just may be the sea monster that many Chinese companies never spy on the horizon before it's too late.

For those who avoid shipwreck, opportunities beckon. While most of China's outbound M&A activity will continue to centre on the energy sector, there is growing interest in diversification and non-traditional sectors such as financial services, consumer goods, infrastructure and agricultural products are driving the Chinese outbound M&A market.

Chinese companies, both state and private, are becoming ever more discerning, however legal advisers are urging clients to look beyond the sale towards a better understanding of post-operations in order to ensure long-term success.

中资境外并购国际律所前20强 (累计金额)
Top 20 international legal advisers by China outbound M&A deal value

排名 Ranking	律师事务所 Law firms	金额 (百万美元) Value (US\$m)	交易数量 No. of deals
1	文森·艾尔斯律师事务所 Vinson & Elkins	12,431	4
2	盛信律师事务所 Simpson Thacher & Bartlett	11,239	3
3	世达律师事务所 Skadden Arps Slate Meagher & Flom	8,309	4
4	年利达律师事务所 Linklaters	8,287	10
5=	McGuireWoods	6,949	1
5=	普衡律师事务所 Paul Hastings	6,949	1
5=	长盛律师事务所 Troutman Sanders	6,949	1
8	史密夫·斐尔律师事务所 Herbert Smith Freehills	6,943	4
9	金杜律师事务所 King & Wood Mallesons	6,230	11
10	德普律师事务所 Debevoise & Plimpton	4,230	1
11	Gianni Origoni Grippo Cappelli & Partners	4,210	1
12	威嘉律师事务所 Weil Gotshal & Manges	3,100	1
13	安德慎律师事务所 Allens	3,021	6
14	高伟绅律师事务所 Clifford Chance	2,668	4
15	孖士打律师事务所 Mayer Brown JSM	1,901	4
16	霍金路伟国际律师事务所 Hogan Lovells	1,890	6
17	富而德律师事务所 Freshfields Bruckhaus Deringer	1,888	3
18	凯易律师事务所 Kirkland & Ellis	1,805	4
19	Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados	1,543	1
20	Wachtell Lipton Rosen & Katz	1,392	2

排名基于2012年10月1日至2013年9月30日公布的交易
Based on announced deals between 1 October 2012 and 30 September 2013

资料来源: 并购市场资讯 Source: Mergermarket

Shifting national interests

The key driver for outbound Chinese companies is meeting the demands of the domestic economy, says Jay Kolb, managing partner at Vinson & Elkins in Beijing. "With regard to state-owned enterprises [SOEs], the key driver is the identification of investment opportunities that have relevance to the Chinese national interest. There are a number of factors driving that interest: sourcing and improving the supply of key commodities such as oil and gas and raw materials; availability of key commodities; and training and employment of Chinese personnel. Frankly, China is continuing to be opportunistic right now. They are in a very strong market position; they have capital resources, and have an interest in investing. Many parts of the world are still not firmly on their feet and don't have capital to invest in foreign assets."

Vinson & Elkins advised on four of the largest Chinese outbound M&A deals this year, including stake acquisitions in American, Kazakhstani, Egyptian and Nigerian energy companies. While energy resources will continue to dominate the outbound investment agenda, both state and privately owned Chinese companies are increasingly looking at larger and more sophisticated deals in developed markets across the range of non-traditional sectors.

The top 10 non-energy related acquisitions this year covered a wide spectrum of industries across the globe, including food and beverage, financial, real estate, chemicals, dining and lodging, machinery and transportation companies. According to data provider Mergermarket, the greatest growth in investments was seen in the financial services and consumer sectors.

In December 2012, China Aviation Industry General Aircraft and P3 Investments announced an 80% stake acquisition of International Lease Finance Corporation in the US for US\$4.2 billion. Debevoise & Plimpton acted for the sellers while Simpson Thacher & Bartlett and Hogan Lovells acted for the buyers in the deal. Simpson Thacher were also advisers to the American pork producer, Smithfield Foods, which was acquired by Shuanghui International for US\$6.9 billion – the largest deal of the year (excluding energy, mining and utilities). Speaking on the successful completion of the deal, Peter Thomas, litigation partner in Washington DC for Simpson Thacher & Bartlett said: "as the largest Chinese inbound US deal, [it] was a watershed event which should encourage and help clear the way for future transactions".

For Fangda Partners, Chinese outbound M&A shows no signs of slowing down. On average, the firm has been acquiring new M&A clients at a rate of one to two per week, a trend that it predicts is likely to continue. Tan Peng, a partner in the firm's Beijing office, says the client focus is changing. "One trend we're seeing is clients becoming more sophisticated and

国家利益转变

中国企业向境外发展的关键动力是满足国内经济的需求，文森·艾尔斯律师事务所北京代表处管理合伙人 Jay Kolb 说道。“对于国有企业而言，抓住与中国利益相关的投资机会是最重要的驱动力。有许多因素推动国家利益：寻找并完善油气、原材料等重要商品的供应链，保证重要商品的可得性以及中国员工的培训和雇佣。坦率地说，中国现在仍然在寻觅投资机会。他们拥有很强的市场地位；他们拥有资金来源并且投资兴趣颇高。全球许多地方目前的情况仍然不稳定，没有对外国资产进行投资的资金。”

文森·艾尔斯律师事务所为今年中国最大宗境外并购交易中的四宗交易提供了法律意见，包括收购美国、哈萨克斯坦、埃及和尼日利亚能源公司的股份。尽管中国对外投资的焦点仍然是能源资源，不过中国国有企业和私人企业在发达市场的非传统领域中进行更大、更复杂交易的活动越来越多了。

今年十个最大宗非能源相关的并购交易覆盖了全球许多行业，包括食品和饮料、金融、房地产、化工、餐饮和酒店、机械和运输等行业。根据并购市场资讯 (Mergermarket) 公布的数据，金融服务业和消费行业的投资增长幅度最大。

2012年12月，中航通用飞机和 P3 Investments 宣布以 42 亿美元收购美国国际租赁金融公司 80% 的股份。德普律师事务所

中国现在仍然在寻觅投资机会。
他们拥有很强的市场地位

Frankly, China is continuing to be opportunistic right now. They are in a very strong market position



Jay Kolb

文森·艾尔斯律师事务所
管理合伙人
北京
Managing Partner
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discerning,” he says. “Rather than acquiring a whole company, we are seeing more and more asset deals. In many cases dealing in the fashion industry, companies just want to acquire the brand alone, rather than the employees or operations aspects that come with it.”

Another significant trend is the arrival of privately owned enter-

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The Sany Heavy Industry acquisition of Putzmeister

武钢并购加拿大 Adriana Resources Inc.
The Wuhan Iron and Steel acquisition of Adriana Resources Inc.

力德风电并购美国祥云风能 (CWEI) 公司开发风场增资项目
The A-TECH Wind Power acquisition of Cirrus Wind Energy

凭借我们在海外投资领域业界领先的经验，我们致力于为全球范围开疆拓土提供协助，为更多合作伙伴提供中国法律方面的专业支持，在中国公司的国际化和全球化过程中做出更多贡献。

With our industry-leading experience in the field of overseas investment, we are committed to contributing to the internationalization and globalization of Chinese companies by providing professional legal services in their outbound endeavors.

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十大中资境外并购交易 (不包括能源、矿业及公用事业项目)
Top 10 China outbound M&A deals (excluding energy, mining and utilities)

公布日期 Announcement date	目标公司 Target	目标公司所在行业 Target sector	目标公司所在地 Target location	出售方法律顾问 Sellside legal adviser	收购方 Bidder	收购方法律顾问 Buyside legal adviser	出售方 Seller	金额 (百万美元) Value (US\$m)
29/5/2013	史密斯菲尔德 Smithfield Foods	消费品 Consumer	美国 US	方达律师事务所 Fangda Partners; McGuireWoods; 宝维斯律师事务所 Paul Weiss Rifkind Wharton & Garrison; 盛信律师事务所 Simpson Thacher & Bartlett; 为财务顾问提供法律意见: 世达律师事务所 Advising financial adviser: Skadden Arps Slate Meagher & Flom	双汇国际 Shuanghui International	普衡律师事务所 Paul Hastings; 长盛律师事务所 Troutman Sanders; 为贷款人提供法律 意见: 安理国际 律师事务所 Advising debt provider: Allen & Overy		6,949
9/12/2012	国际租赁财务公司 International Lease Finance Corporation (80.1% 股权 80.1% stake)	金融服务 Financial Services	美国 US	德普律师事务所 Debevoise & Plimpton	重庆新华信托投资 New China Trust and Investment; 中航通用飞机 China Aviation Industry General Aircraft; P3 Investments	霍金路伟国际 律师事务所 Hogan Lovells; 盛信律师事务所 Simpson Thacher & Bartlett	美国国际集团 American International Group	4,230
30/9/2013	Seaco	金融服务 Financial Services	巴巴多斯 Barbados		天津渤海租赁 Tianjin Bohai Leasing	大成律师事务所 Dacheng Law Offices	海航集团 Hainan Airlines Group Company	2,954
24/9/2013	Uralkali (12.5% 股权 12.5% stake)	工业及化学 用品 Industrials & Chemicals	俄罗斯 Russia		Chengdong Investment Corporation			2,000
23/5/2013	VTB Bank (交易股权 未透露 undisclosed stake)	金融服务 Financial Services	俄罗斯 Russia		中国建设银行 China Construction Bank Onexim Group; 挪威央行投资管理 公司 Norges Bank Investment Management	高伟绅律师事务所 Clifford Chance		1,200
5/11/2012	里昂证券 CLSA (除 台湾业务外的全部现 有业务 All existing businesses excluding Taiwan business) (80.1% 股权 80.1% stake)	金融服务 Financial Services	香港 Hong Kong	佳利律师事务所 Cleary Gottlieb Steen & Hamilton; 基德律师事务所 Gide Loyrette Nouel; 世达律师事务所 Skadden Arps Slate Meagher & Flom	中信证券国际 CITIC Securities International Company	贝克·麦坚时律师 事务所 Baker & McKenzie; 凯易律师事务所 Kirkland & Ellis; 苏利文·克伦威尔律 师事务所 Sullivan & Cromwell	法国农业信 贷银行 Credit Agricole	918
2/4/2013	永丰金融控股 SinoPac Financial Holdings Company (20% 股权 20% stake)	金融服务 Financial Services	台湾 Taiwan	理律法律事务所 Lee and Li Attorneys at Law	中国工商银行 Industrial and Commercial Bank of China	众达律师事务所 Jones Day; 伟凯律师事务所 White & Case		788
31/10/2012	伦敦希思罗机场控 股公司 Heathrow Airport Holdings (10% 股权 10% stake)	交通运输 Transportation	英国 United Kingdom	富而德律师事务所 Freshfields Bruckhaus Deringer	中国投资 有限责任公司 China Investment Corporation	高伟绅律师事务所 Clifford Chance	Ferrovial	726
31/1/2013	中国春天百货集团 PCD Stores (Group)	消费品 Consumer	香港 Hong Kong	Gibson Dunn & Crutcher	王府井东安集团 Wangfujing Dongan Group	凯易律师事务所 Kirkland & Ellis		703
3/12/2012	Oerlikon Saurer; Oerlikon Schlafhorst; Oerlikon Textile Components	工业及化学 用品 Industrials & Chemicals	德国 Germany	富而德律师事务所 Freshfields Bruckhaus Deringer; Niederer Kraft & Frey	江苏金盛集团 The Jiangsu Jinsheng Group	高伟绅律师事务所 Clifford Chance; Khaitan & Co	OC Oerlikon Corporation	702

排名基于 2012 年 10 月 1 日至 2013 年 9 月 30 日公布的交易
Based on announced deals between 1 October 2012 and 30 September 2013

资料来源: 并购市场资讯 Source: Mergermarket

私人企业有可能会成为中国下一轮境外投资的主导力量

Private companies are likely to become a leading force in China's next round of outbound investment



Drew Dutton
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担任了出售方法律顾问，盛信律师事务所和霍金路伟律师事务所担任了收购方法律顾问。在双汇国际以 69 亿美元收购美国猪肉巨头史密斯菲尔德食品公司这宗年度最大并购案中，盛信律师事务所担任了史密斯菲尔德的法律顾问。对于这宗成功完成的交易，盛信律师事务所华盛顿办公室诉讼业务合伙人 Peter Thomas 说：“……作为中国在美国投资的最大一笔并购交易，这是一个转折点，它可以鼓励未来的交易并有助于为其扫清障碍。”

在方达律师事务所看来，中国的境外并购交易没有任何减速的迹象。一般来说，方达每周都会有一到两家新的并购客户，这一趋势很有可能会持续下去。方达律师事务所北京办公室合伙人谭鹏表示，客户的关注点正在发生改变。“我们注意到客户变得更加老练和敏锐了，”他说道。“我们看到越来越多的资产交易，而不是收购整个公司。比如在时尚产业的许多交易中，买方只想收购品牌本身，而不包括目标公司的员工或经营设备。”

另一个明显的趋势是中国私人企业开始参与境外投资。“短期来看，我们认为中国境外并购活动的主力队员仍然会是现金充裕的国有企业，”德普律师事务所驻香港和上海办公室合伙人 Drew Dutton 说道。“不过从长期来看，私人企业有可能会成为中国下一轮境外投资的主导力量，只要他们能够找到有效解决融资困难的办法，比如通过私募股权或者上市发行股票获得资金。”

金杜律师事务所北京办公室高级合伙人兼公司并购业务负责人徐萍也看到了中国境外投资格局的变化，私人企业正在扮演着越来越重要的角色。“2013 年上半年，私人企业已经成为了中国海外并购的主力军，在投资总额和交易量方面有史以来第一次超过了（国有企业），”徐萍说道。“我们预计中国企业会继续大力投资海外能源和电力行业，同时基础设施建设、房地产、材料和食品等其他行业部门也可能会有更多的中国私人企业前来投资。”

知识经济的挑战

年利达律师事务所上海代表处中国业务合伙人方健认为，无论是从交易规模还是交易额来看，大部分的投资还是会在美国和发达市场。“从交易量来看，美国是最活跃的目标市场，自 2012 年至

prises on the Chinese outbound investment scene. “In the short term, we believe the key players in the Chinese outbound transactions will still be cash-rich state-owned enterprises,” says Drew Dutton, partner at Debevoise & Plimpton based in Hong Kong and Shanghai. “In the longer term though, private companies are likely to become a leading force in China's next round of outbound investment, as long as they find effective solutions to resolve financial constraints, including funding support from private equity, or by listing shares.”

Xu Ping, senior partner and head of the corporate M&A group at King & Wood Mallesons in Beijing, also sees a shift in the landscape of Chinese outbound investment, with private enterprises playing greater roles. “In the first half of 2013 private-owned companies have become the main force of China overseas acquisitions, surpassing [SOEs] in both total investment capital and number of deals for the first time in history,” Xu says.

“We expect the Chinese companies will continue to invest heavily in the overseas energy and power industries, while other industries and sectors such as infrastructure, real estate, materials and the food sector are likely to see more Chinese private investors.”

Challenges of the knowledge economy

Fang Jian, national managing partner of Linklaters in Shanghai, contends that the US and developed markets will continue to have the majority of investment, both in terms of the size and value of deals. “The US was the most active target market by volume in 2012 through 2013 YTD [October] with 29 deals, although Canada is the largest in terms of deal value and Europe remains an active market for Chinese investors,” Fang notes. “Australia also gets its fair share of investment, with particular activity in natural resources, energy and utilities.”

He adds that there has been a change in focus in developed economies towards the acquisition of IP, technology and branding, with the aim of using knowledge gleaned from more foreign companies to foster growth in the domestic market. This sentiment is echoed by Henry Wang, head of investments (China) at Mayer Brown JSM in Beijing. “The US and developed markets in Europe are the most attractive markets for Chinese acquirers because they offer technology, branding, transparency

从交易量来看，美国是最活跃的目标市场

The US was the most active target market by volume



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2013年迄今(十月)共进行了29笔交易。而从交易额来看,加拿大是最大的目标市场,欧洲对于中国投资者来说仍然是很活跃的市场。”方健介绍道。“澳大利亚通过自然资源、能源和公用事业领域的交易活动也占据了部分的投资份额。”他补充说道,投资者在发达国家的关注焦点已经转移到了知识产权、技术和品牌的收购,希望利用更多外国公司的技术知识来推动国内市场的发展是投资者进行决策的动力。

这种观点得到了孖士打律师行北京代表处中国投资业务负责人王宏的认同。“美国和欧洲发达市场是最吸引中国收购者的市场,因为他们能够提供技术、品牌、透明度以及安全性,而这些正是中国投资者积极寻求的,”他说道。

方达律师事务所谭鹏认为,欧洲由于经济衰退,使得收购价格更加诱人,对于中国企业来说是最活跃的市场。他预测在中国企业寻求收购成熟的品牌和技术时,欧洲国家仍然会是“先入之选”。

德国正是这种情况,它已经成为最吸引中国投资者的欧洲目标国家之一。世达律师事务所慕尼黑办公室合伙人 Lutz Zimmer 将此归功于“德国技术的名气和质量,公司的好名声以及对德国公司似乎估值偏低的看法。”

“不同于几年前,中国投资者现在更倾向于寻找高质量的公司,不再贪图‘廉价’的机遇,特别是收购困境中的公司或业务,”他说。

尽管投资者对这些地区的兴趣盎然,但是发达市场的并购程序变得越来越规范,审查越来越严格了。

美国外国投资委员会(CFIUS)在很多时候仍然是中国投资者在美国投资的重要障碍,一些众所周知的交易都被叫停了。Dutton表示,政治障碍以及不支持外国资本控制本地企业的地方法规是瞄准北美公司的中国收购者面临的巨大挑战,而中国收购者仍然在学习如何驾驭监管程序并为之做计划。

不过律师们看到,在过去几年里中国投资者愿意花更多的精力去积极主动地应对外国投资委员会的流程。

盛信律师事务所华盛顿办公室的 Thomas 认为事前准备、积极主动、提供资源、协调合作、沟通交流以及透明度是通向成功的一些关键要素。Thomas 参与过史密斯菲尔德并购案。“在与美国政府打交道时,就交易提供协调一致的信息是至关重要的。中国投资者必须要准备好回答为什么这笔交易不会对美国国家安全造成威胁,以及这笔外国投资会如何使美国被收购资产的所有权人以及受影响的员工从中获益。”

Thomas 补充说道,投资者需要关心的一个关键问题是物理距离问题,“也就是美国目标公司所在的位置与军事基地或其他敏感设施之间的物理距离。在史密斯菲尔德并购案中,我们提前审查并分析了目标公司在美国数百间工厂的位置,避免造成严重的耽搁。”

根据美国瑞格律师事务所波士顿办公室并购业务主管 Jane Goldstein 介绍,对于哪些交易需要通过美国外国投资委员会审查的指南相对较少。“我们认为美国外国投资委员会现在正在不断扩张其触角,延伸到我们从未想到会影响国家安全的领域……因此,我们赞同主动向美国外国投资委员会提交联合自愿公告,进行预先备案,因为根据我们的经验,大部分向美国外国投资委员会进行了备案的交易实际上都会在第一个30天审查期限内获得批准,如果美国外国投资委员会觉得有兴趣,他们会在交易完成之后提出问题,”她说道。

[中国公司]不再贪图“廉价”的机遇,特别是收购困境中的公司

Chinese companies ... no longer look for cheap opportunities ... by acquiring distressed companies



Lutz Zimmer
世达律师事务所
合伙人
慕尼黑
Partner
Skadden
Munich

and security, which Chinese investors are looking for,” he says.

Tan, at Fangda, has found Europe to be the most active market for Chinese companies in light of the economic downturn, which has made prices attractive. He predicts that European countries will remain the “usual suspects” as Chinese companies seek to acquire mature brands and technology.

Such has been the case in Germany, which has become one of the most attractive European target countries for Chinese investors. Lutz Zimmer, a partner at Skadden in Munich, attributes this to “the reputation and quality of German technology and know-how, the reputation of many companies, as well as the view that German companies appear to be undervalued”.

“Different from a couple of years ago, Chinese investors tend to look for high-quality companies and no longer look for ‘cheap’ opportunities, particularly by acquiring distressed companies or businesses,” he says.

Despite ongoing interest in these regions, the acquisition process in developed markets is becoming increasingly regulated and scrutinised. In the US, the Committee on Foreign Investment in the United States (CFIUS) remains a major hurdle for Chinese investors in many instances, and some well-publicised deals have been effectively blocked.

Dutton says the biggest challenges facing Chinese buyers targeting North American companies are the political impediments, as well as local regulations that discourage foreign ownership of local businesses, where Chinese buyers are still learning to navigate and plan for the regulatory process.

However, in the past several years, firms are witnessing a greater willingness on the part of Chinese investors to devote more attention to navigating the CFIUS process in a proactive and co-operative manner.

Working on the Smithfield deal, Thomas at Simpson Thacher & Bartlett in Washington identified advanced preparation, proactivity, resourcing, co-ordination, communication and transparency as some of the key factors to success.

“When engaging with the US government, it’s critical to have a co-ordinated and consistent message about the transaction. Chinese investors should be prepared to discuss why the transaction poses no national security concern to the US, and how a foreign investment may benefit the owners of the US assets being acquired and the workers being affected.”

伟凯律师事务所纽约办公室并购业务全球主管 John Reiss 表示，中国投资者面对的主要监管挑战不一定是美国外国投资委员会的国家安全审查程序本身，而是把它想得比实际困难的畏难心理。“是的，审查程序十分具有挑战性。不过，根据我们的经验，中国投资者不应该打退堂鼓，”他说道。“的确，有一些备受瞩目的交易遇到了麻烦，比如 Ralls、华为。不过事实上，中国在美国的大部分并购都获得了美国外国投资委员会的批准并且取得了成功，包括最近受到政治反对的交易，比如今年中海油对尼克森的收购案以及史密斯菲尔德收购案。” Reiss 补充道，“如果有反对交易的声音出现，那么政府关系和公共关系战略将会是至关重要的。”

与美国一样，中国企业在德国进行投资时面临的一个监管挑战是政府对外国投资的审批程序。富而德律师事务所法兰克福办公室合伙人 Heiner Braun 说道，“德国设有外国投资审批机制，用以控制欧洲经济区以外的收购者进行交易。但是适用的标准非常高：只有对德国国家秩序或安全造成威胁，或者是涉及武器或军民两用工业的交易才能够被禁止。对这个标准的解释十分严格，因此只有很少的交易会受到实质性影响，例如大型基础设施或能源资产。因此，中国和其他海外收购者通常甚至不需要对他们的交易进行备案，没有严格的法律规定要求他们这么做。备案只是会更快地获得法律上的确定性。”

Thomas adds that one of the key issues that investors now need to be concerned about is the physical proximity issue – “that is the physical proximity of a US target’s locations to military bases or other sensitive facilities. For the Smithfield transaction, we frontloaded the review and analysis of the company’s hundreds of US locations to avoid any substantial delays”.

According to Jane Goldstein, M&A practice leader at Ropes & Gray in Boston, historically there has been relatively little guidance as to which transactions would require CFIUS review. “We think the trend now is that CFIUS is broadening its reach to industries we would not have expected to affect national security ... That said, we agree with proactively filing the voluntary joint notice on a ‘pre-filing’ basis, since in our experience the majority of transactions filed with CFIUS are cleared in the 30-day initial review period and, as a practical matter, if CFIUS is interested they can raise their issues after the closing of a transaction,” she says.

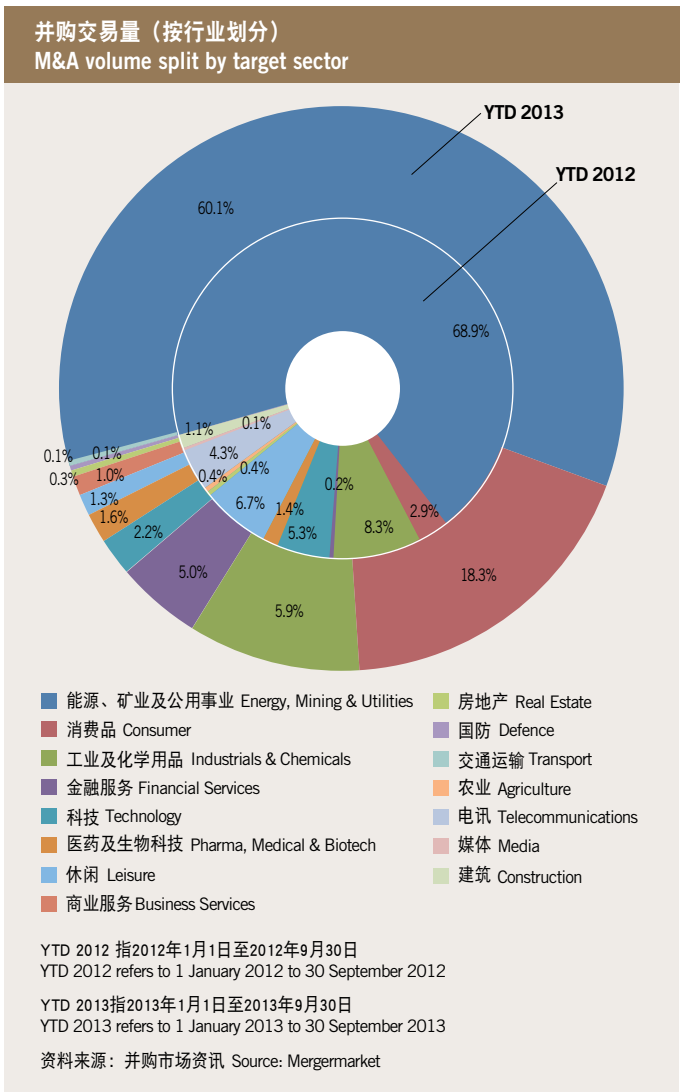
For John Reiss, global head of M&A at White & Case in New York, the major regulatory challenge for Chinese investors is not necessarily the CFIUS national security review process itself, but the perception that it is more of a barrier than it really is. “Yes, the process can be challenging. Based on our experience, however, Chinese investors should not be dissuaded,” he says.

“Yes, a number of high-profile deals have run into trouble, e.g. Ralls, Huawei. But the reality is that most Chinese acquisitions in the US clear CFIUS and succeed, including recent transactions that were the object of political opposition, including the CNOOC acquisition of Nexen and of course the Smithfield deal, both this year.” Reiss adds that if there is opposition to a transaction, government relations and public relations strategies can be crucial.

As with the US, one of the regulatory challenges faced by Chinese companies investing in Germany is the process of government approval required for foreign investments. According to Heiner Braun, a partner at Freshfields Bruckhaus Deringer in Frankfurt, “Germany has a foreign investment approval regime to control transactions by purchasers from outside the European economic area. But the standard applied is a very high one: transactions can only be blocked on the grounds that they pose a risk to the national order or safety of Germany, or are in weapons or dual-use industries. This test is interpreted in a very restrictive manner, and so there are very few deals that would be really critical, for example major infrastructure or energy assets. As a result, Chinese and other overseas buyers often do not even bother to file their deals, since there is no strict legal requirement to do so. Filing just results in faster legal certainty”.

Dalian Wanda Group recently acquired British luxury yacht manufacturer Sunseeker International for US\$501 million, representing the largest Chinese investment in the transportation sector so far this year.

However, according to Tony Woodcock, partner and head of the regulatory litigation practice at Stephenson Harwood in London, regulations in the UK are about to get tougher. “Antitrust enforcement, against domestic and foreign companies, has long been a familiar part of the American regulatory landscape, and more effective enforcement in this field can be expected in the UK in the years ahead,” he says. From April 2013, the UK has had two new financial services regulators – the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA).



中国海外投资法律与实务的最新趋势

China outbound investment – recent trends in law and practice

我们认为，中国政府对中国企业海外投资审批的大趋势应当是逐步防松管制，但可能会加强对中央企业对特定资产和投资国别的宏观管理；而境外目标国对中国国企投资者对敏感行业或资产的投资显然在加强监管；在具体实施交易的层面，中国国有和民营投资者正在迅速“国际化”且不断提升实施复杂跨境交易的能力。

境外投资审批

中国政府在境外投资审批时间和结果上的不确定性给中国投资者进行复杂的大型跨境交易造成了很大的负面影响。但是，从近期几个大型交易来看，中国政府相关的审批机构还是适应市场的发展而采取了比较务实的作法。比如，民营企业天齐锂业在收购加拿大上市公司 Talison 时，在签署 Scheme Implementation Deed 前获得了全部相关的中国政府核准。

另一个问题是，不少在境外设立了子公司的中国企业认为，只要在境外进行再投资时并购款完全在境外支付，且不需要国内母公司进行担保，就不需要考虑境内审批的问题。事实上，从现行有效的法规来看，这些境外子公司的海外再投资仍然需要获得发改委的相关核准。如果涉及境外中资银行的融资，这些银行一般会获得所有中国政府的监管审批作为提款的先决条件。

针对现行审批制度的问题，中国政府也在逐渐简化程序、放松管制。但此前的改革主要体现在审批权限下放，审批事项范围和管理方式并未出现实质性的改变。

在最近新的国务院“简政放权”政策的要求下，发改委正在酝酿进一步简化境外投资管理，探索实行以备案制为主的管理方式，并可能大幅缩减审批项目范围。发改委审核的重点也将从交易风险转变为宏观政策。据报导，国家发改委近期密集核准的 16 个海外投资项目，审核依据是项目是否符合产业政策和国家安全，并不涉及具体经营层面。

目标国投资审批

尽管各国的外国投资审核机制不同，但仍有一些共通的原则和底线。比如，涉及军事和政府通讯等国家安全的敏感资产和领域，交易可能很难获得批准。又如，目标国对于涉及能源资源、农业、食品等行业的项目审批更为严格，即使批准也会附带条件。

澳大利亚 澳大利亚于 9 月当选的新总理阿博特在竞选期间就曾公开表示不信任外国国有企业投资澳大利亚资产。新政府已提出，不会取消目前政策要求外国（指定国家除外）的国有企业投资无论金额大小一律须经外国投资审核机构（FIRB）审批的规定。

The main trend in PRC governmental approvals of overseas investments by China enterprises will be a gradual loosening of control, but there is likely to be a tightening of macro administration over enterprises under the central government, and over specific assets and the countries where investments are made. Certain jurisdictions are also clearly beefing up their oversight of investments by PRC state-owned enterprises (SOEs) in sensitive industries and assets. PRC state-owned and private investors are more sophisticated at deal execution and improving their abilities in complex cross-border transactions.

Regulatory approvals

The fact that Chinese outbound regulatory approvals are uncertain in the length of approval time and approval outcome has a big negative impact on the execution of complex cross-border transactions by PRC investors. But looking at some recent large transactions, it seems the relevant Chinese approval authorities were willing to adapt to developments of the market and take relatively practical approaches to expedite the review and approval process of outbound investments. For example, in its takeover of Canada-listed Talisman, Tianqi Lithium managed to secure all of the relevant PRC government approvals before executing the scheme implementation deed.

The other interesting phenomenon is that many overseas subsidiaries established by mainland Chinese companies take the view, when reinvesting abroad, that as long as the acquisition funds are completely paid abroad, without security provided by the parent in China, they do not need to be concerned with any PRC regulatory approval issue. But according to the regulations, any overseas reinvestment by these offshore subsidiaries still requires the approval of the National Development and Reform Commission (NDRC). Furthermore, if finance is sought from the overseas branches of Chinese financial institutions, those financiers will generally require that all the Chinese outbound regulatory approvals be included as one of the drawn down conditions.

The central government is aware of the issues associated with the existing approval regime and has taken measures to gradually decentralise it. However, previous reforms mainly took the form of delegating approval authority to lower levels, without substantive changes to the scope of approval matters or the method of administration.

To implement the State Council's new policy of "simplifying government and delegating authority", the NDRC is considering further simplifying the administration of offshore investment, exploring the implementation of an administration method mainly relying on the recordal system, and it may greatly shrink the scope of items subject to approval. The focus of NDRC review will also move away from transaction risks to macro policy. According to recent media reports, in the 16 overseas investment projects recently approved by the NDRC, compliance with industrial policy and national security, as opposed to actual business operations, formed the main basis of review.

Despite the differences in foreign investment review mechanisms of different countries, they do have principles in common. For example, approvals for transactions involving sensitive assets and



熊进 Xiong Jin

新政府将加强农业和土地方面的审批要求，包括：大幅降低外国企业投资农地的审查金额；实施新的土地登记制度，加强对外国土地所有者的监管。

美国 中美两国间存在既合作、又对立的复杂关系，中国企业应当清醒认识到他们在美国进行收购可能会遇到的阻力，但这些障碍并非不可逾越。在不久前双汇国际

收购 Smithfield 的交易中，由于 Smithfield 在美国猪肉加工和生猪市场占较高份额，收购被质疑可能影响美国食品供应安全。双汇承诺将保持 Smithfield 现有的管理层、品牌和员工不变，并通过海外子公司独立运营 Smithfield，最终赢得美国外国投资委员会 (CFIUS) 信任并批准交易。

加拿大 加拿大在今年 6 月通过了《加拿大投资法》的修订，扩大了对“外国国企”的定义范围，并限制外国国企控股加拿大油气企业。如其他主要目标国一样，加拿大也非常重视国家安全方面的审查。但是，中国企业完全可以通过精心的准备来设计成功的交易，但同时也需要认清不能触碰的国家利益底线。

投资者更成熟

经过近年来的高速发展，中国境外投资者的交易方式和技巧也在慢慢与境外成熟市场趋同，这在大型、复杂的跨境交易中体现得尤为明显。

比如，中国企业越来越多地采用联合体收购的方式，让产业投资人、EPC 承包商和财务投资人以优势互补的方式来选择、投资和运营境外项目。

近年来，中国企业也开始勇于尝试敌意收购的方式。比如，鸿商产业对澳大利亚上市公司 Discovery Metals 的收购，就是在就估值和尽职调查问题无法与董事会达成一致后，绕开董事会直接发出全面收购要约。

中国企业境外收购融资安排也日渐多元化，不再仅仅局限于采用自有资金和银行贷款。越来越多参与境外收购的中国上市公司会通过在中国境内进行定向增发以获得资金。同时，复杂的跨境换股交易方式也在尝试过程中。

sectors that impact national security – such as the military and government communications – may be difficult to secure. Project approvals by target countries involving such industries as energy resources, agriculture, foodstuffs, etc. may also be more stringent, and even if an approval is granted it may be subject to conditions.

Australia. Tony Abbott, the new prime minister, publicly stated during his election campaign that he did not trust foreign SOEs investing in Australian assets. The new government has indicated it will not abolish current policy provisions requiring approval from the Foreign Investment Review Board of investments by foreign SOEs (with the exception of designated countries), regardless of amounts involved. The new government is about to strengthen approval requirements relating to agriculture and land, including greatly reducing the amount of investment in agricultural land by foreign enterprises that requires review, and implementing a new land registration system to strengthen oversight of foreign land owners.

The US. The US and China have a complex relationship that involves both co-operation and antagonism. Chinese enterprises should recognise that acquisitions in the US could encounter resistance, but such obstacles can be overcome. Recently, Shuanghui's acquisition of Smithfield was questioned because of its potential effect on US food supply security, due to Smithfield's relatively large share of the US pork processing and live pig markets. Shuanghui undertook to keep Smithfield's management, brands and personnel unchanged and to operate Smithfield independently through an overseas subsidiary. Ultimately it gained the trust of the Committee on Foreign Investment in the US and the transaction was approved.

Canada. In June, Canada adopted amendments to the Investment Canada Act, expanding the definition of “state-owned enterprise” and placing restrictions on foreign SOEs having a controlling interest in Canadian oil sand enterprises. Like other target countries, Canada places great importance on national security reviews. PRC enterprises can design successful transactions through meticulous preparation, but they must recognise baseline national interests that are off limits.

Sophisticated deal making skills

Following rapid development in recent years, the transaction structures and execution skills of PRC outbound investors are increasingly aligned with those of mature foreign markets, and this is particularly evident in large and complex cross-border transactions.

For example, an increasing number of PRC enterprises are using consortium structures to undertake overseas acquisitions, allowing industry investors, engineering procurement and construction contractors, and financial investors to select, invest in and operate overseas projects by taking advantage of each other's strengths.

Noticeably, PRC acquisitions have been increasingly hostile, with several attempts on major public targets globally. One such deal is the (failed) acquisition by Chinese private equity group Cathay Fortune of the Australian Securities Exchange-listed DML (Discovery Metals Limited). Frustrated by the “no engaging” approach taken by the DML board and failure to reach a consensus with the board on due diligence process, Cathay launched a hostile takeover bid, but ended up with allowing the bid to lapse due to concerns over the true financial and technical prospects of DML.

Finance arrangements for offshore acquisitions by PRC enterprises are increasingly sophisticated and diversified, no longer constrained to their own funds and bank loans. More PRC-listed companies involved in offshore acquisitions are turning to private placements of additional shares in China to raise funds. Complex cross-border equity swaps are also progressively being tried as an alternative.

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中国投资者现在正在转向 服务业和工业部门

*Chinese investors are now
looking into services and
industrial sectors*



Evy Marques
法博律师事务所
合伙人
圣保罗
Partner
Felsberg e Associados
Sao Paulo

大连万达集团最近以 5.01 亿美元的价格收购了英国豪华游艇制造商圣斯克 (Sunseeker International), 这是今年中国在运输业进行的最大一笔投资。

不过, 据罗夏信律师事务所伦敦办公室合伙人兼监管诉讼业务主管 Tony Woodcock 介绍, 英国的监管规定可能会变得更加严格。“在美国监管制度中, 常常会针对国内和国外公司进行反垄断执法, 预计英国在未来几年里也会加强该领域的执法,” 他说道。2013 年 4 月, 英国设立了两个新的金融服务监管机构——审慎监管局 (PRA) 和金融市场行为监管局 (FCA)。

“金融市场行为监管局的新主管强调监管机构会继续推进对监管对象的严格监管,” Woodcock 补充道。“因此, 近来某些备受瞩目的外国投资者在英国监管部门遇到了麻烦, 包括 2012 年监管部门开始调查卡塔尔控股在 2008 年对巴克莱的投资。”

不过, 西盟斯律师事务所伦敦办公室欧盟竞争法和监管业务合伙人 Peter Broadhurst 介绍, 审慎监管局和金融市场行为监管局对并购控制没有管辖权。并购控制仍然属于英国公平交易局 (OFT) 以及欧盟的管辖范围。英国公平交易局将于 2014 年 4 月 1 日被竞争及市场管理局 (CMA) 所取代。

“对于中国投资者来说, 有关并购控制的一个重要问题通常是对收购者的相关 ‘集团’ 进行定义, 也就是中国实体是否是一个独立的实体或者实际上是一个更大实体的一部分, 也可能是政府的一部分。不过这些都不会影响审慎监管局和金融市场行为监管局的设立,” Broadhurst 说。

“金融市场行为监管局在履行其他职能的同时还负有促进市场竞争的职责和运作目标。虽然很有趣, 但它本身并不拥有很大的权力。不过, 有提案建议赋予金融市场行为监管局在处理反竞争协议和滥用市场支配地位案件时与公平交易局相同的权力, 不过它不能拥有比公平交易局更大的权力。审慎监管局不拥有任何处理涉及竞争问题的权力。”

分散在资源丰富国家

在欧洲之外, 律师们预测会有更多持续的投资进入巴西和澳大

“The new head of the FCA has stressed that the authority will maintain a drive towards intrusive supervision of regulated firms,” Woodcock adds. “As a result, high-profile foreign investors have run into difficulties with regulators in the UK in the recent past, including the 2012 investigation into the investment made by Qatar Holdings in Barclays in 2008.”

But according to Peter Broadhurst, EU competition and regulatory partner at Simmons and Simmons in London, the PRA and FCA will have no jurisdiction over merger control. This is to remain with the Office of Fair Trading (OFT), which will be replaced by the Competition and Markets Authority on 1 April 2014; and the EU. “With regard to Chinese investors, a key merger control question is typically to define the relevant ‘group’ on the acquiring side, i.e. whether the Chinese entity is a stand-alone entity or actually part of a wider entity, possibly forming part of the state. But nothing here changes as a result of the creation of the PRA and the FCA,” he says.

“The FCA was given a duty and an operational objective to promote competition in carrying out its other functions. By itself, although interesting, this is somewhat toothless. However, there is a proposal to give the FCA the same powers as the OFT in relation to anticompetitive agreements and abuse of dominance. But it will not get anything more than the OFT. The PRA has no competition remit whatsoever.”

Diversifying in resource-rich economies

Outside Europe, lawyers expect to see increased and continued activity in resource-rich economies such as Brazil and Australia, but even within these markets Chinese companies are beginning to diversify their investments.

Evy Marques, a partner in the corporate M&A department at Felsberg e Associados, Sao Paulo, which represents State Grid Corporation of China, says Brazil is only behind Australia, the US and Canada as the main destination for Chinese investors. “Although there has been a slight decrease in the investment of natural resources, Chinese investors are now looking into services and industrial sectors,” she says. “The top state-owned Chinese banks, including Bank of China and ICBC, already have branches in Brazil, and other banks are planning to come to the country. In the industrial sector, most investments are in heavy machinery and the automobile industry, following the success of JAC Motors and Sany.”

King & Wood Mallesons advised on the largest Chinese-Australian energy acquisition this year – an interest in the Queensland Curtis LNG project was bought by China National Offshore Oil Corporation for over US\$2 billion.

While Australia remains an attractive destination for Chinese companies for its natural resources, the regulatory challenges, according to Louis Chiam, a partner at King & Wood Mallesons in Melbourne, fall into two categories: “First, a number of investors find Australian foreign investment rules difficult to navigate. This is in part because, rather than a clear-cut ‘negative list’, which says which sectors you can or cannot invest in, the Foreign Investment Review Board [FIRB] process applies to all acquisitions above the relevant dollar threshold. Also, as many PRC investors are state-owned, they are subject to special rules for foreign states, including a zero-dollar threshold, which means all acquisitions require FIRB approval,” he says. “The second area is due diligence on Australia’s business and sector regulation, for example in mining or agriculture. Australian regulation is, in

中国投资者在收购战略企业时会受到一定的限制

Chinese investors are subject to certain restrictions on the acquisition of strategic enterprises



Dmitriy Glazounov
Liniya Prava 律师事务所
管理合伙人
莫斯科
Managing Partner
Liniya Prava
Moscow

利亚等资源丰富的经济体,即使是在这些市场中,中国企业的投资已经开始走向多元化了。

位于圣保罗的法博律师事务所公司并购业务部合伙人 Evy Marques 表示,巴西仅次于澳大利亚、美国和加拿大,是中国投资者的主要目标地区。Evvy Marques 是中国国家电网公司的法律顾问。“虽然自然资源行业的投资出现了小幅减少,但是中国投资者现在正在转向服务业和工业部门,”她说道。“中国银行和中国工商银行等重要国有银行已经在巴西开设了分支机构,其他银行也正在计划进军巴西。在工业部门,继 JAC 江淮汽车和三一重工取得成功之后,大部分的投资都进入了重机械和汽车行业。”

金杜律师事务所就今年中国在澳大利亚投资的最大笔能源并购交易提供了法律意见,今年中国海洋石油总公司以超过 20 亿美元的价格收购了昆士兰柯蒂斯液化天然气项目的某些权益。

虽然澳大利亚的自然资源仍然十分吸引中国企业,不过据金杜律师事务所墨尔本办公室合伙人 Louis Chiam 介绍,有关的监管挑战主要分为两类:

“第一,许多投资者认为难以掌握澳大利亚的外商投资规则。造成这种现象的部分原因在于澳大利亚没有一份清晰列明哪些领域是允许或者禁止投资的‘负面清单’,澳大利亚外国投资审核委员会的程序适用于所有超过有关金额阈值的并购案件。此外,由于中国许多投资者是国有性质的,因此他们需要遵守针对外国政府的特别规定,包括零元阈值,这意味着所有的并购交易都需要获得外国投资审核委员会的审批……” Chiam 说。

“第二类挑战是对澳大利亚的商业和行业监管措施进行尽职调查,例如采矿业或农业。与中国不同,澳大利亚的监管措施是非常详细和规范的,这意味着在澳大利亚的经营成本比其他法域要高。中国投资者非常有必要对当地的监管措施进行彻底的尽职调查,以保证他们就资产支付了合理价格。”

建立关系

在俄罗斯总理德米特里·梅德韦杰夫与中国主席习近平于十月份在北京进行会见之后,中俄关系的发展势头肯定迅猛。据新华社

contrast to China, very detailed and prescriptive, which can mean operating costs in Australia are high compared to many other jurisdictions. It is imperative that Chinese investors undertake thorough due diligence on local regulations to make sure they pay a fair price for the asset.”

Relationship building

Sino-Russian relations are sure to gain momentum following Russian Prime Minister Dmitry Medvedev and Chinese President Xi Jinping's October meeting in Beijing. Xinhua New Agency reported that Chinese investment in Russia has increased 40 times in the past eight years, reaching a total of nearly US\$5 billion, amid plans to further strengthen business relations between the two countries.

“The Russian market is enjoying a positive investment climate and witnessing many new projects, such as the Rosneft and China National Petroleum Corporation East Siberian Oil Production Venture, or plans by the China Development Bank to invest up to US\$5 billion in Russia,” says Dmitriy Glazounov, managing partner of Russian law firm Liniya Prava, in Moscow.

In September, China Investment Corporation (CIC) successfully completed one of the biggest deals of the year, acquiring a 12.5% stake in the Russian industrial chemicals company Uralkali for US\$2 billion. Glazounov calls it “groundbreaking”, as CIC gained the right to appoint one of the nine members of the board of directors. Yet, he adds: “The deal is still under scrutiny of the Federal Antimonopoly Service, which poses some risks, as well as an emerging Russian-Belorussian conflict.”

In terms of regulatory challenges, Glazounov says Chinese investors in Russia face the same hurdles as other foreign investors. “As the state still plays a huge role in the economy, political risks remain significant. As for the regulatory challenges, Chinese investors are subject to certain restrictions on the acquisition of strategic enterprises. Antitrust and currency regulation should be taken into account as well, when entering into deals.”

Anton Sitnikov who heads the corporate and M&A practice of Goltsblat BLP, the Russian practice of Berwin Leighton Paisner in Moscow, says: “Russia has relatively liberal treatment for foreign investment that in many areas is limited to merger control-related

近期修订的《公司所得税法》…… 会对外国投资者造成挑战

Recent changes to the Corporate Income Tax Code ... [will] present challenges to foreign investors



Paula Duarte Rocha
MLC 律师事务所
合伙人
马普托
Partner
MLC Advogados
Maputo

报道,随着进一步加强两国商贸关系规划的实施,中国对俄罗斯的投资在过去八年中增长了40倍,已接近50亿美元。

“俄罗斯市场的投资气候十分良好,并且有许多新项目上线了,例如俄罗斯 Rosneft 石油公司和中石化建立的东西伯利亚油气开发合资公司,以及中国国家开发银行计划向俄罗斯投资50亿美元,”俄罗斯 Liniya Prava 律师事务所莫斯科办公室管理合伙人 Dmitriy Glazounov 说道。

九月份,中国投资有限公司(中投公司)以20亿美元收购了俄罗斯化学原料公司 Uralkali 12.5% 的股份,成功完成了今年最大笔交易之一。Glazounov 称这笔交易具有“历史开创意义”,因为中投公司获得了指派董事会九名成员中一名的权利。但是,他补充说道,“这笔交易目前仍然在俄罗斯联邦反垄断局的严格审查之中,而且俄罗斯与白俄罗斯之间出现的冲突都会造成一定的风险。”

在监管挑战方面,Glazounov 说在俄罗斯的中国投资者与其他外国投资者都面对着同样的障碍。“由于政府在经济中仍然起着重要作用,政治风险仍然很高。说到监管挑战,中国投资者在收购战略企业时会受到一定的限制。进行交易时还应当考虑反垄断和外汇管理规定。”

Goltsblat BLP 是英国博问律师事务所驻莫斯科负责俄罗斯业务的分支机构,其公司及并购业务主管 Anton Sitnikov 说道:“俄罗斯在许多领域中对外国投资的管理相对宽松,只有在涉及重大

clearances and strategic clearances for a number of significant sectors, including major oil and gas developments, the nuclear sector, major telecoms, and media.

“It is worth mentioning that both antitrust legislation and legislation with regards to foreign investment into strategic sectors have been additionally liberalised via raising thresholds for merger clearances and limiting the number of strategically important sectors.”

China also appears to be gaining more traction in developing markets in continental Africa, within the energy sectors. While markets in Africa have generally been welcoming to investment from China, the risk profile and political factors, as always, should be considered in dealings within the region.

According to Paula Duarte Rocha, a partner in the Maputo office of MLC Advogados in Mozambique, Chinese foreign direct investment in the country has been constant following recent natural gas discoveries in the offshore Rovuma basin. She says that in addition to energy, the country is seeing Chinese investment in infrastructure, as well as the agriculture and forestry sectors. “Although the Mozambican government is certainly open to, and welcomes, foreign investment, recent changes to the Corporate Income Tax Code extend the basis of taxation now with capital gains resulting from shares or other participation, particularly when the transaction occurred between non-resident entities, being subject to the normal corporate income tax rate of 32%. This will, in the short term, present challenges to foreign investors in Mozambique,” she says.

Kasirye Byaruhanga & Co Advocates

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- Principal Partner: William Byaruhanga
- Managing Partner: Andrew Kasirye
- Senior Partner: Enoch Rukidi
- Number of partners: 4
- Number of associates: 10

- 首席合伙人: William Byaruhanga
- 执行合伙人: Andrew Kasirye
- 高级合伙人: Enoch Rukidi
- 现有合伙人: 4
- 现有律师: 10

Firm Overview: Kasirye, Byaruhanga & Co Advocates is one of Uganda's leading business law firms, committed to understanding our clients' needs and objectives and working with them to provide effective, tailor-made solutions. The firm began as Binaisa & Co Advocates in 1987, and has operated under its present name since 1991. Throughout this period, we have provided legal services to a broad spectrum of Ugandan and international clients; we have served different forms of businesses, financial institutions, the Ugandan government, charities and private individuals.

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Key Practice Areas: Commercial and Corporate Transactions; Mergers and Acquisitions; Energy Law; Company Secretarial Practice; Finance and Banking; Property and Real Estate; Employment Relations and Labour Law; Insolvency Practice; Telecommunications; Intellectual Property; Environmental Law; General Litigation.

Associations:
- Mackrell International
- IFLR1000
- East African Law Society

事务所简介: Kasirye, Byaruhanga & Co 律师事务所是乌干达领先的商法律师事务所之一。我们致力于理解客户需求和目标,与客户合作提出有效的个性化法律解决方案。Kasirye, Byaruhanga & Co 律师事务所的前身是于1987年成立的 Binaisa & Co 律师事务所,1991年更名为 Kasirye, Byaruhanga & Co。一直以来,我们为众多的乌干达和国际客户提供了优质的法律服务,客户群体包括不同类型的企业、金融机构、乌干达政府、慈善机构以及个人。

Kasirye, Byaruhanga & Co 律师事务所提供全方位的法律服务,从规划到实施一系列的商业和财政安排及交易。

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油气开发、核能、主要电信和媒体等部分重要行业时，才需要经过并购控制审批和战略审批。”

“值得一提的是，通过提高并购审查阈值以及限制具有战略意义的行业的数量，反垄断法和有关战略领域的外商投资法都得到了进一步放宽。”

中国似乎也越来越多地被非洲大陆发展中国家的能源行业所吸引。尽管非洲市场普遍很欢迎中国投资，但是在该地区进行交易时应一如既往地考虑风险情况和政治因素。

莫桑比克 MLC Advogados 律师事务所马普托办公室合伙人 Paula Duarte Rocha 表示，自从近期在鲁伍马盆地近海区发现了天然气之后，来自中国的直接投资就源源不断地流入该国。她说道，除了能源行业之外，中国还投资了该国的基础设施建设、农业和林业。“尽管莫桑比克政府对外国投资肯定是保持着开放和欢迎的态度，但近期修订的《公司所得税法》扩大了计税基础，现在通过股票或其他权益取得的资本收益，特别是在非居民实体之间进行的交易，需要按正常标准缴纳 32% 的公司所得税。这在短期内会对在莫桑比克的外国投资者造成挑战。”

Banwo Ighodalo 律师事务所拉各斯办公室管理合伙人 Ken Etim 表示，尽管尼日利亚政府一直很欢迎中国投资并参与该国的自然资源和基础设施建设，但是当地的利息和税收法律可能会对外国投资者构成挑战。

Ken Etim, managing partner at Banwo Ighodalo in Lagos, says that while the Nigerian government has been generally inviting of Chinese investment and involvement in natural resources and infrastructure development in the country, local interests and tax laws may prove challenging for foreign investors.

“The Nigerian Oil and Gas Industry Content Development Act, enacted in April 2010, may be viewed as a challenge to Chinese investment,” he says. “[It] requires that companies with a Nigerian majority equity ownership are to be given preference in the award of oil and gas licences, leases and contracts.”

In South Africa, Gregory Nott, director at Werksmans Attorneys in Johannesburg, says mining laws are once again under scrutiny, with amendments being considered together with new legislation in regard to broad-based black economic empowerment. “While obviously considered, these factors don’t seem to be much of a hurdle to China as compared to their Western counterparts,” he says.

Xiao Yong, head of China practice for Vinson & Elkins in Hong Kong, who oversaw some of this year’s largest Chinese-African acquisitions, says the risks in dealings in these regions are mostly political in nature, noting that government approvals on the closing of the Egyptian Apache Corporation and Total Nigeria deals are still pending.

In overcoming political obstacles, David Clinch, head of the Greater China energy, mining and infrastructure practice at Herbert Smith Freehills in Hong Kong, says: “Part of mitigating this includes partnering with local companies, including in particular host state-owned oil and gas companies, creating public



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以成为擅长处理复杂跨境交易及争端解决案件的中国精品涉外律师事务所为目标，胡光所成立至今已经为不下百家的跨国公司在华投资等商业活动提供了优质的法律服务。同时，凭借其广阔的国际合作网络，胡光所也曾协助多家中国优秀企业赴境外进行融资和投资等。胡光所的客户包括诸多世界五百强公司、国内及海外上市公司、高新成长型企业以及海内外闻名遐迩的高等学府等。这些客户遍及金融、新能源、制造加工、网络电信、高科技产业、教育、贸易零售、房地产、食品、医疗等各个领域，其中不乏全球范围内的行业佼佼者。胡光所律师无一例外均毕业于国内外著名的法学院校，其中不少律师在美国、澳大利亚及日本获得法学硕士或博士学位，近半数的律师还同时拥有美国、澳大利亚及其他国家执业资格。2010年，胡光所荣获权威英国法律评级机构“钱伯斯”为其颁发的奖项，并被评为“在并购及公司法领域中国领先的律师事务所”。

Martin Hu & Partners (MHP Law Firm) is a fully licensed Chinese law firm focusing its practice on high-profile, cross-border transactions and international dispute resolutions. Since 1999, MHP attorneys have been providing comprehensive legal services for various renowned multinational companies on their Chinese businesses and cross-border projects. MHP has also successfully represented some Chinese enterprises in seeking overseas investment, M&A, and offshore listing. MHP has been maintaining both an international level of professional disciplines and the on-the-ground understanding of Chinese markets and extensive knowledge of industry-specific issues needed to handle complex cross-border transactions. “Chambers and Partners” in 2010 awarded the firm and recommended it as “a Leading Chinese Law Firm in Corporate and M&A”. MHP masters a wide and diversified client base, which includes Fortune 500 companies, publicly-listed companies, dynamic small-and-medium enterprises, as well as prestigious foreign and domestic universities, many of whom are active leaders in their own industry.



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缓解[政治]障碍的方法包括 与当地公司建立合伙关系

Part of mitigating [political obstacles] includes partnering with local companies



David Clinch
史密夫·斐尔律师事务所
合伙人
香港
Partner
Herbert Smith Freehills
Hong Kong

“2010年4月制定的尼日利亚《油气工业本土化发展法案》对中国投资可能是一个挑战，”他说。“该法规定尼日利亚人拥有多数股权的公司会被优先授予石油和天然气经营许可证、租约以及合同。”

在南非，Werksmans Attorneys 律师事务所驻约翰内斯堡合伙人 Gregory Nott 表示，矿业法被再次审查，其修正案和新的《南非扩大黑人经济振兴法案》都在酝酿当中。“虽然这些法律正在酝酿之中，但是相比于西方国家，这些问题似乎不会对中国造成很大的障碍，”他说道。

文森·艾尔斯律师事务所驻香港办公室中国区主席肖勇负责了今年中国在非洲投资的几宗最大笔并购交易，他认为在这些地区进行交易面临的风险主要是政治风险，他提到埃及阿帕奇石油公司与 Total Nigeria 的交易仍然在等待政府审批。

史密夫·斐尔律师事务所香港办公室大中华地区能源、矿业及基建部主管 David Clinch 指出，为了克服这些政治障碍，“缓解这些障碍的方法包括与当地公司建立合伙关系，将东道国国有油气公司纳入合伙，建立公众意识并展示能源项目和出口可以为当地带来的利益，例如创造本地就业机会、增加税收以及促进学校、医院和道路等社会基础设施的发展。”

缺乏经验以及并购后管理和运营能力薄弱是威胁中国并购企业长期成功的因素。建议中国企业与法律顾问紧密合作，要看到交易执行之外的问题，要考虑收购前后的运营风险和挑战。

“我们认为这些挑战不会在短期内消失，但是我们预计全球从事私募股权业务的律所在帮助缺乏经验的中国公司克服这些挑战中会起到越来越重要的作用，” Dutton 说。

“也正是因为这些挑战，我们看到了投资者从控股收购转变为进行少数投资加期权，以便在未来收购控制权这种明显的趋势。”

awareness of and demonstrating local benefit being derived from energy projects and exports – for example, local employment opportunities, tax revenues, and development of social infrastructure such as schools, hospitals and roads.”

Lack of experience and weak management and operational capability post-acquisition is a factor threatening the long-term success of some Chinese acquired businesses. Chinese companies are encouraged to work with their legal advisers to look beyond the execution of a deal, and consider operational risks and challenges, before and after the sale.

“We don't think these challenges will disappear in the short term, but we expect global private equity firms will play an increasingly important role in assisting less experienced Chinese companies to overcome these challenges,” Dutton says. “Also, driven by these challenges, we have seen a clear trend away from controlling acquisitions to minority investments, with the option to acquire control in the future.”

Carlos Roberto Siqueira Castro, a partner at Siqueira Castro Advogados in Rio de Janeiro, agrees that post-deal is one aspect that needs to be improved by Chinese ventures in general. However, “it is possible to see already efforts in motion aimed at reverting this perception”, he says. “In the automobile industry, for instance, JAC Motors, a Chinese company in Brazil, has been praised for its post-operating management. The more sophisticated the industry, the more likely Chinese companies will become more efficient in all aspects of the deal, including the post-deal.”

The situation is similar in Germany. “Management of German companies often appear to appreciate that Chinese investors are willing to adapt to German practice and do not try to impose their own business culture and structure,” Zimmer says.

But for Tan at Fangda, moves towards the successful management of the acquisition target after closing will require a change in mentality for Chinese investors. “We don't see too many successful precedents. Following one of our recent transactions, the acquisition target filed for bankruptcy one year after closing. This is because the client was too optimistic. They really wanted the deal to go through without thinking too much about what would happen after closing. This is the biggest challenge that we see,” he says.

To mitigate post-sale risks, he says his firm tries to stay with their clients through to the integration stage. But he warns: “We can advise on risk but not many clients ask us to do that. They



Siqueira Castro Advogados 律师事务所里约热内卢办公室合伙人 Carlos Roberto Siqueira Castro 对此表示同意，他认为中国企业普遍需要改善收购后阶段的表现。不过，“可以看到中国企业已经开始努力改变了，”他说道。“例如在汽车行业，中国 JAC 江淮汽车在巴西因为收购后的经营管理而受到了赞誉。越是复杂的行业，中国企业越是有可能在交易各个方面都变得更加有效率，包括收购后阶段。”

德国也是类似的情况。“德国公司的管理层常常表扬中国投资者愿意适应德国的做法，而不试图将他们自己的企业文化和架构强加于人，” Zimmer 说。

但是方达律师事务所谭鹏表示，在收购完成后得以成功地管理目标公司需要中国投资者从心态上进行转变。“我们没有看到许多成功的先例。近期我们完成了一笔收购交易，收购目标在交易完成的一年后申请了破产。这是因为我们的客户过于乐观，只是希望交易可以顺利地完 成，而没有想太多关于交易之后的问题。这是最大的挑战所在，”他说道。

为了减少收购后的风险，谭鹏说方达正在尝试与客户一起参与整合阶段。但是他提醒道：“我们可以就风险提供法律意见，但是并没有许多客户要求我们这么做。他们仅仅是把我们当作他们进行和完成交易的助手。客户需要时间才能认识到法律顾问的价值不仅体现在交易和执行阶段，在后续阶段也是有价值的。” ■

例如在汽车行业，中国 JAC 江淮汽车在巴西因为收购后的经营管理而受到了赞誉

In the [car] industry ... a Chinese company in Brazil has been praised for its post-operating management



”
Carlos Roberto Siqueira Castro
Siqueira Castro 律师事务所
合伙人
里约热内卢
Partner
Siqueira Castro Advogados
Rio de Janeiro

just see us as being there to help them carry out and close the deal. It will take time for clients to realise the value of legal advisers, not only at the transaction and execution stages, but in the later stages as well.” ■

温故知新 继往开来

Hindsight is a wonderful thing



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海外并购中的尽职调查策略

Due diligence strategies for overseas M&A

在中国公司的海外并购过程中，由于外国的法律环境和监管等方面与中国有较大区别，往往使得中方产生困惑甚至不安。实践中，法律部门进行尽职调查的时间往往比较紧张，如何在短时间内尽快抓住重点，有效地与外部律师沟通，成为了公司内部律师面临的一项挑战。

本文从收购欧美公司的角度，介绍一些海外尽调的难点和特点，并提出解决的思路。

尽调内容

股权结构。目标公司的股权结构和股东持股情况是尽调的一项最基本的内容。中国公司往往希望能够在相关政府部门的备案记录中寻找确切答案，但目标公司所在地的政府登记机构往往仅备案一些最初、最基本的内容，没有完整的股权和持股信息。

在这种情况下，除了对方提供的股权文件（股东名册等），还可通过与主要股东、债权人、管理层、主要客户等相关方的沟通，查看是否存在遗漏或矛盾的地方。

此外，可以通过审查公司的财务报表、纳税申报和融资文件核实股权情况，这些文件中往往反映出公司的股权、债权信息。董事会记录对于欧美公司而言也是一项重要的文件依据，因为很多公司重大的股权调整或变更需要董事会的认可。

股东权益。与中国公司不同，欧美公司的股东权益更为复杂，尤其是存在财务投资人的公司，往往发行了一系列权利和利益交错的优先股（Preferred Shares），可转股债权（Convertible Bonds）、权证、期权等。

在公司对外出售时，优先股股东往往享有很大的权力包括否决权，在利益分配上也享有各种优先权。如果并购谈判的对象是目标公司的管理层或创始人，他们往往不持有优先股；这时，收购方更应审阅公司章程、股东协议、表决协议等文件，了解各个股东的权利和利益，以避免任何股东挑战交易的合法公平性，使得交易无法进行或增加收购成本。

知识产权。由于知识产权的地域性较强，收购方需要根据其收购的目的、涉及技术的性质等判断是否仅对重点市场（如欧美等国）进行查询。必要时，还需要专利律师、代理、评估机构、内部的技术人员等组成团队。实践中不要忽视专利维护费的缴纳情况、产权形成的链条的连续性、文件和备案资料的完整性等问题。另外，鉴于专利的特殊性，专利技术是否能够自由应用而不受任何第三方专利的约束也非常重要。必要时，收购方需要进行专门的经营自由（Free To Operate）的分析，甚至要求律师出具FTO法律意见书。

In overseas mergers and acquisitions (M&A), Chinese companies are often puzzled, or even upset, because of the major differences in the legal and regulatory environment between the target country and China. In practice, the legal department of a company often needs to conduct due diligence within a tight time schedule. How to identify crucial points as soon as possible in a short time, and communicate effectively with external lawyers, has been a challenge posed to in-house counsel. From the perspective of acquiring companies in Europe and the US, this article will discuss the difficulties and features in overseas due diligence tasks, and propose some ideas for solutions.

Ownership structure. The ownership structure and holdings of shareholders of a target company are the most basic items of a due diligence investigation. Chinese companies often hope they are able to find the exact answers from records in the relevant government departments. However, the government register in the place where the target company is located often keeps only some of the most preliminary and general items, without any complete information on ownership and holdings. In this case, in addition to the ownership documents – e.g. register of shareholders – provided by the other party, companies can check if there are omissions or inconsistencies from communications with major shareholders, creditors, management staff and major customers.

Details about ownership can be verified by reviewing financial statements, tax returns and finance documents of the target company, which often reflect the company's equity and debt information. Minutes of board meetings also serve as a major basis of documents for European and US companies because many significant adjustments or changes to the ownership structure of companies require board approval.

Shareholders' interests. Unlike Chinese companies, the shareholders' interests of European and US companies are more complicated. This is particularly true for companies with financial investors, as they often issue preferred shares that involve a series of staggered rights and interests, convertible bonds, warrants and options. If a company is to be sold to an outsider, the holders of preferred shares are often entitled to great powers – including the right of veto – and various rights of priority in the allocation of the proceeds. If the negotiation team in the acquisition are the management or founders of the target company, who often do not hold preferred shares, the acquiring party should then review the company's articles of association, shareholders' agreement, voting agreement and other documents to identify the rights and interests of each of the shareholders and make sure no shareholders will challenge the legitimacy or fairness of the deal, so as not to block the deal or increase the costs of acquisition.

Intellectual property rights. As intellectual property rights are region-based, an acquiring party needs to assess whether it will conduct enquiries only about key markets – e.g. Europe and the US – according to the purpose of the acquisition and the nature



段民 Duan Min

劳工问题。欧美国家公司的劳工法律纷繁复杂,需对工会、集体合同、养老金、员工福利等问题进行详细的评估,充分了解收购后的经营成本和风险。另外,目标公司的高管往往以各种形式持有公司权益,一旦发生收购行为,这些期权或股权可能会加速实现,有可能导致收购成本的增加。

质押、抵押和不动产。

欧美国有着成熟、完善、权威的查询系统,可以通过支付较少的费用由第三方专业机构根据收购方的要求完成基本的查询工作。对于不动产,如涉及敏感地区,有时需要进行实地考察。

以美国为例,因为某外国公司收购的不动产的位置距离美国海军训练基地较近,美国的外资投资委员会(CFIUS)便以国家安全为由要求拆分该部分资产甚至否决整个交易。如果早作实地考察,也许可以避免这种结果。

重大合同。除投融资等合同外,采购、销售和技术方面的重大合同也是尽调的重点。这些合同有时会对其可转让性、交易方的控制权变更等进行限制,收购方需要分析此类限制的后果,并在必要时要求目标公司与各合同当事方及时沟通。

交易目的

最后,尽调工作应与交易的目的甚至后续方案紧密结合。如果计划将目标公司的技术转移到中国,应考虑相应的裁员问题,专利是否已在中国注册,专利许可的地域限制和分许可限制,目标国家的出口管制,重大技术转让产生的税收负担等。

措施多样

总之,对于尽调中发现的问题和风险,收购方可以采取多样措施,包括要求对方在签约前予以更正,在交易文件中作出陈述与保证,或作为交割的先决条件。对于风险不确定的事项,可考虑由声誉好的律师事务所出具法律意见书。在支付条款方面,也可通过分期付款、延期支付(Holdback)、账户监管甚至对赌条款等方式控制风险。风险控制条款的设计应根据尽调的结果和交易的相关情况调整。

of technology involved. If necessary, it also needs to form a team comprising patent lawyers, agents, appraisal firms and in-house technical staff. In practice, it should not overlook issues such as the payment of patent maintenance fees, the continuity of the chain formed by IP rights and the completeness of filed records. Given the special nature of patents, it is also very important to make sure whether a patented technology can be freely applied without the constraints of any third party patent. If necessary, the acquiring party needs to conduct a special "free to operate" (FTO) analysis, or even require a lawyer to present an FTO opinion.

Labour issues. Given the complexity of labour and employment laws governing European and US companies, it is necessary to conduct a detailed assessment of issues like trade unions, collective contracts, pensions and employee benefits, to obtain sufficient understanding of the operation costs and risks after the acquisition. In addition, the executives of a target company often hold equity interests of the company in various forms. In the event of a takeover, vesting of these options or equities may be accelerated, which will likely lead to an increase in the acquisition cost.

Pledge, mortgage and immovable property. Europe and the US have a developed, comprehensive and authoritative search system under which a third-party professional agency, at the request of the acquiring party, can conduct a basic search with the payment of a small fee. If an immovable property is located in a sensitive place, it is sometimes necessary to conduct a field visit. Taking the US as an example, an immovable property to be acquired by a foreign company was located close to a navy training base in the US. The Committee on Foreign Investment in the United States required the acquiring party to carve out the property, and still rejected the entire deal on grounds of national security. This might have been avoided if a field visit had been paid in advance.

Major contracts. In addition to investment and financing contracts, major contracts for procurement, sales and technologies are also the focus of a due diligence process. Under these contracts, restrictions will sometimes be imposed on their transferability and change in control of the counterparties. An acquiring party needs to analyse the consequences of such restrictions, and where necessary require the target company to communicate with the contract parties in a timely fashion.

Finally, due diligence should be closely connected with the purpose of a transaction, and even follow-up plans. If a company plans to transfer the technology of a target company to China, it should consider various issues such as layoffs of staff, filing status of the patent in China, geographical restrictions on licensed patents and sub-licensing restrictions, export controls by the target country and tax burden arising from the transfer of significant technology.

In conclusion, if issues and risks are identified during a due diligence process, the acquiring party can take various measures, including requesting the counterparty to make corrections before signing the contract and make representations and warranties in the transaction documents, or imposing closing conditions. For matters bearing contingent risks, the acquiring party may consider the issue of a legal opinion by a reputable law firm. As to the terms of payment, risks may be controlled by means of instalments, holdback, escrow account and even an earn-out arrangement. The design of risk control clauses should be fine-tuned according to the findings of the due diligence investigation and the circumstances of the transaction.

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成本规避意识：中国海外并购一大风险

Cost awareness – a big risk for Chinese overseas M&A

近年来，位于西欧心脏地带的瑞士因其周边的欧盟市场，以及其先进的产业体系、优秀的研发环境、优质的劳动力、领先的金融中心、开明的劳动法、低税率、低国债和政治的稳定性，正在吸引越来越多的中国投资者。

我们在2013年3月和6月《商法》中已经介绍了有关并购及IPO的技术问题和相关瑞士法的特点（见第4辑第3期“中国去瑞士直投的并购选择”和第4辑第6期“探究瑞士要约收购规定”）。在此，借本期海外并购专题之机，梳理一下我们所看到的中国收购方在参与并购交易时通常会遇到的三个障碍。

成本规避意识

对中国收购人而言，成本与其说是交易障碍不如说是一项重大风险。首次进入西方市场进行并购的中国新手往往不很重视咨询，尤其是法律咨询。他们认为律师都是一样的，因此往往选用最划算的、开价便宜的律师。

急于寻找业务的律师虽然接受远低于市场标准的费率、收费上限或给出大量优惠，但若缺乏专业知识、经验和尽心，则可能导致交易无法顺利达成，从长远来看代价更高。虽然知道物有所值的道理，但新手看不清法律咨询的质量对于业务的意义，按照他们在中国的经验，获得政府的支持、与官员建立良好关系比严格的合规、严谨的合同更能决定交易成败。他们还不知道西方的情况正好相反，分权原则不允许政府和官员营商，并禁止其对市场运作施加影响。

然而，轻视法律服务质量的通常只是新手。有西方并购经验的中国投资者通常不强求选用的西方律所低于市场标准的价格提供服务。相反，他们会通过分阶段尽职调查来降低法律成本，从非描述性的高层次（危险信号）法律尽职调查入手，仅限于针对某些环节的资料的审查（如法律实体、产权链、经营许可、重大协议、保险、养老基金和诉讼等），视需要扩展到其他环节（如知识产权、雇佣关系、社会保障、不动产），同时保留深化或扩大有限法律尽职审查的权利——如果卖方在资料间披露相关信息后，拒绝对已披露信息的环节作出陈述和保证。

如果高级别尽职调查报告的负面结论导致谈判中止，分段尽职调查即告结束；但如果对目标没有作进一步的调查（仅依靠陈述和保证）而继续收购并最终完成交易，则最终可能会悔恨莫及。基于已知的信息（包括对实质性瑕疵的了解）来决定是否继续交易，可能比基于“陈述及保证”条款进行多年的诉讼而最终仅能挽回部分损失要好得多。正所谓做多错多，不做交易的公司很少失败，因做了错误的交易而失败的公司则很常见。

In the past few years Switzerland, located in the heart of Western Europe and economically integrated with the surrounding EU markets, has become increasingly attractive to Chinese investors due to its leading industries, excellent research and development environment, highly educated and trained workforce, leading financial centres, liberal labour laws, low taxes, low national debt and political stability.

We have had several opportunities in the past few years to provide legal services to Chinese companies bidding for Swiss companies, or parts thereof, and to Swiss groups selling companies or licensing technology to Chinese companies.

As we already featured the technical aspects and particularities of Swiss law on mergers and acquisitions (M&A) and initial public offerings (IPOs) in the March 2013 issue of China Business Law Journal (What are the M&A options for Chinese FDI in Switzerland?, volume 4, issue 3) and the June 2013 issue (Delving into the finer details of Swiss takeover regulation, volume 4, issue 6), we take the occasion of this special overseas M&A issue to feature three obstacles that we have seen typically arise in M&A transactions involving Chinese bidders.

Cost awareness

Cost awareness is less a transaction obstacle than a considerable risk factor for Chinese bidders. First timers – meaning Chinese embarking for the first time on an M&A deal in the Western world – usually do not hold consulting in general, and legal consulting in particular, in high esteem. Consequently, they perceive lawyers as interchangeable, which is why they often consider the cheapest one as the best buy and end up being worse off as the effects of lack of expertise, experience and diligence of underemployed lawyers accepting rates, caps or broken deal rebates far below market can have deal-breaking results and end up being more costly in the long run. Although being generally aware that quality has its price, the true problem of the first timers is that they simply cannot see what quality in legal consulting might bring to their business, as their Chinese experience is that the ability to obtain government support and establish excellent relations with the ruling class is much more decisive for success than strict legal compliance and careful contract drafting. As a consequence, they are (as yet) unaware that the exact opposite is true for success in the Western world, as here governments and ruling classes keep out of business and are prevented from having a bearing on justice by the separation of powers doctrine.

Nevertheless, such undervaluation of the quality of legal advice usually happens only to first timers. Chinese experienced in Western M&A usually select their Western law firms without asking for terms below market, attempting, however, to reduce their legal transaction costs by staggering the due diligence process, starting with a non-descriptive high level (red flag) legal due diligence limited to certain data room sectors only (such as, for example, legal existence, title chain, permits, material agreements, insurance, pension funds and



Felix W. Egli



吴帆 Wu Fan

融资

试图从西方银行寻求收购融资的中国投资者常常惊讶地发现，前者基本上不愿接受他们为债务人，除非其贷款有位于西方法域的担保人或资产提供担保（如中资银行在西方的分行）。

以母公司为目标公司债权人提供担保也同样如此（如母公司为目标公司的银行贷款提供抵押担保、履约保函、租赁合同或应缴关税等）。中国内地买家将了解到，债权人通常拒绝由买方母公司承接担保责任，而财力雄厚的香港集团公司作为担保人则会被接受。由于中国投资者往往在收购迫在眉睫时才处理这些问题——主要是出于尽可能规避成本的原因，因此此类问题可能会在交易的纵深阶段造成严重拖延。

并购结构

在欧洲没有实体的中国收购人通常希望设立一个并购媒介来收购目标公司。大型集团有时也希望在中间设立一个中国次级控股公司作为在欧洲从事并购的媒介。

由于这类并购结构通常在交易的签署和交割之间建立，交易文件通常规定买方在交易签署后即进入集团内部。然而，中国买家往往延误设立收购结构的准备工作，他们往往低估分析和决定集团内部税务优化问题所需的时间。因此，交易进程有时会因旷日持久的收购结构设置而遭拖延。

如果卖方坚持要“荷包鼓鼓”的中国母公司作为无限连带责任的债务人，而不是接受其作为担保人或并购媒介的保证人，则可能出现其他困难。由于中国法律没有以担保为目的协议性无限连带责任的先例，中国对母公司承担无限连带责任的许可情况目前还不清楚（即此类安排是否需要经商务部、国家发改委、国资委、国家外汇管理局和特殊行业许可主管部门的许可），这可能会大大延缓交易过程，最终还是要迫使卖方接受担保或保证。

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litigation), carving out others (such as intellectual property, employment, social security, real estate) and reserving to deepen or extend the limited legal due diligence review should the seller refuse to grant representations and warranties (R&W) bridging the gaps without regard to its relevant data room disclosures.

If the negative findings of the high-level due diligence report cause them to break off the negotiations, the staggered due diligence paid off, but if they continue and finally close the transaction without further examining the target (relying only on representations and warranties) they may bitterly regret it. Deciding whether or not to proceed with a deal on an informed basis, including the knowledge of substantial flaws, may be much better than litigating for years under R&W clauses that may prove to only partly cover the resulting damages and losses. There is quite some truth in the saying that companies rarely fail because they did not do a deal, but often fail because they did the wrong deal.

Financing

Chinese investors looking for acquisition financing from Western banks are often surprised to learn that the latter are not at all inclined to accept them as creditors unless their loans are secured by guarantors or assets located in a Western jurisdiction (such as a Bank of China subsidiary). The same is true with respect to the replacement of parent guarantees securing creditors of the target (such as parent guarantees securing the target's bank loans, performance bonds, lease contracts or customs dues, etc.). Mainland Chinese buyers will learn that security holders usually refuse to turn in the seller's parent guarantees against their guarantees while financially strong Hong Kong group companies may be acceptable as guarantor. As Chinese investors tend – mostly for cost reasons – to tackle such problems only when the acquisition is imminent, such issues may considerably delay the transaction at an advanced stage.

Acquisition structure

Chinese bidders without a local presence in Europe usually wish to establish a European acquisition vehicle to acquire the target(s). On top of that, larger groups sometimes also wish to edge a Chinese subholding in between as the founder of the European acquisition vehicle.

As such acquisition structures are usually set up between the signing and closing of the transaction, transaction documents for Chinese buyers routinely provide for post signing intra-group accessions on the buyer side. Nevertheless, Chinese buyers often delay the start of the preparations for setting up the acquisition structure as they tend to underestimate the time needed for analysing and deciding intra-group tax optimisation issues. Therefore, the transaction schedule is sometimes considerably delayed by the protracted set-up of the acquisition structure.

Additional difficulties may arise if the seller insists on keeping the Chinese “deep pocket” parent as a jointly and severally liable obligor rather than accepting it as a guarantor or surety of the acquisition vehicle. As Chinese law does not know joint and several debt accession as a security, the Chinese permit situation (under the Ministry of Commerce, National Development and Reform Commission, State-owned Assets Supervision and Administration Commission, State Administration of Foreign Exchange and sector-specific permits, as applicable in the particular case) of the joint and severally liable parent is unclear and may considerably delay the transaction process, and finally still force the seller to accept a guarantee or suretyship.