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博 士 学 位 论 文

中国外资并购的专有法律及实务研究

A Study on the Law and Practice on Foreign
Capital Merger & Acquisition in China

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摘要

从东道国的角度看，与其相关的跨国并购可以分为两类：东道国企业对境外企业的境外并购和外资（投资者）对东道国境内企业的外资并购。本文的研究主体是针对后者中的特殊形式——外资（投资者）对中国为东道国的境内企业的外资并购。

跨国并购自上世纪八十年代以来迅速发展，成为跨国投资领域超过传统投资方式（包括新建项目投资和扩建项目投资）的主流投资方式。我国也不例外，自本世纪初以来，跨国并购超过传统投资方式的趋势已经日益明显。从中长期来看，中国的外资并购必将迅速发展，成为外商直接投资的主流，外资并购也将成为国际投资法的最重要新兴研究领域之一。

我国目前的外资并购立法体系比较分散而且变动较快，外资并购的参与各方难以对其把握或形成整体框架概念；我国目前对外资并购的研究也更多偏重理论或经济分析，而对相关实务操作研究、特别是紧密结合我国外资并购实际案例的法律操作实务的系统研究则相对较少。本文选题的出发点和研究目标也是希望能在这一方面空白进行努力探索。

本文的研究重点主要集中在如下几个方面：

第一，梳理我国外资并购立法的历史，将相对分散的我国外资并购立法总结出框架和体系的脉络。

第二，结合笔者近年来在多起外资并购和境外并购交易中的各国监管申报实际操作经验，将外资并购中的监管审批梳理出三条主线——上市公司监管、外资审查监管、反垄断监管，并且加入了中国特殊历史时期的一条特殊监管主线——红筹上市公司的监管。

第三，结合笔者在外资并购领域的实际工作经验和对相关文件资料的研究和整理，对外资并购的交易流程进行了系统性总结，并对这一流程中涉及的重点法律文件（包括法律尽职调查报告和交易文件等）进行了论述。在文章的最后，用专章对核心交易文件的起草和谈判要点进行了较系统、详尽的论述。

本文的成稿中，笔者认为有如下几个特点：

第一，大量参考、研究了最新的立法和国内实务界的研究成果、文件资料，资料新

、实务操作性强、并使用了大量实务案例以增强可读性。

第二，根据篇幅所限和自身的能力界限，对文章的涉及范围自愿设置了几个限制。在笔者多年的外资并购、境外并购操作实务中，深感超越自身能力界限所做的判断或建议具有很大的失误风险；根据笔者目前的学识、精力和掌握资料，自愿设置了几个限制：（1）对境外各国的跨国并购法律制度不展开论述，不展开研究中国企业在境外并购的法律问题；（2）只专注于外资并购的“专有”法律框架，而对相关的“基础”支持性法律（如公司法、劳动法、合同法、税法等基础法律，以及原主要适用于绿地投资的外商投资企业的企业登记制度、外汇管制制度等）不做过多论述；（3）在关注学理、学术性的同时特别关注于实务操作，在包括操作程序、实务分析、实务示例等方面提升本文的可操作性。

本文仍有若干缺憾。其中，最主要的是由于笔者的自身能力所限，未对外资并购的整体立法提出整体性的改进或建议意见。立法机构具有局外人的笔者所不能比拟的优势，在正常情况下他们对合理性的判断肯定比笔者要准确，其明显优势包括：第一，有大量一线实务案例和丰富的理论做支撑；第二，相关国内外机构、企业直接或间接提供信息和资料支持；第三，有大量经费支持其做专项研究与考察。因此，笔者除对局部立法技术和法律冲突细节有所评述和研究外，未对外资并购的整体立法提出整体性的改进或建议意见。另外，尽管笔者在论文撰写前期阅读了大量外文书籍和资料、并结合笔者的境外并购操作经验形成了框架性的概念和观点，但随着文章内容逐渐清晰并集中于我国外资并购的专有领域，在论文中直接引述的外文资料更多是局限于国际组织、中介机构或网站发布的专项报告或数据，而基本没有直接引用相关外文著述。这些著述资料的阅读成果可能要等到笔者有机会撰写境外并购的文章时，才有机会直接体现出来。希望随着笔者在相关领域能力的进一步提升，日后有机会能弥补这些缺憾。

关键词：外资并购；专有法律；法律实务

Abstract

From the standpoint of a host country as a related party, the international Merger & Acquisition (“M & A”) could be divided into two groups: either an entity from the host country acquire the interests of a foreign entity (“overseas M & A”) or a foreign entity acquire the interests of a host country entity (“foreign capital M & A”). A specific subgroup of the later group, the so-called Foreign Investors' Merger and Acquisition (“FIMA”) is the topic and object of this dissertation.

Since the middle of 1980s, the international M & A has quickly overwhelmed the traditional international investment (including the new construction project (“greenfield project”) and expansion project (“brownfield project”)) and grown into the most important way of FDI. China is no exception. Since the start of this century, this overwhelming trend becomes very obvious. In the mid- and long-term, the FIMA in China will be growing up rapidly and turn into the main stream of Chinese FDI. As a result, the FIMA is expected to turn into the most key new battlefield in the study field of the international investment laws.

The parties of a Chinese FIMA will be very hard to understand or follow up the whole Chinese legal systems for the FIMA, because it's quite unsystematic and keep changing rapidly. The current studies on Chinese FIMA are more likely to be in favor of the theoretical or economic analyses, while relatively fewer systematic studies focus on the practical operation studies, particularly the real Chinese FIMA cases. That's why I chose this topic and subject, and was trying to do something to explore the area.

This dissertation focused on the following aspects:

Firstly, combed through the legislative history of the Chinese FIMA and extracted an overall framework and key points of our FIMA legislation from a quite widely dispersed laws and regulations.

Secondly, summing-up from my rich personal experiences in getting global

regulatory approvals in a number of overseas investments, I summarized three main lines in the FIMA regulatory matrix, they are the Listing Authority's approval, the Foreign Investment approval and the Anti-trust approval. Also, in this dissertation, I added the regulatory road map of the so-called RED CHIP LISTING (Chinese private companies go to listing on a foreign/overseas exchange), which is a special phenomenon just happened during a Chinese special historical period.

Finally, based on my practical experiences and studies on the related materials or documents regarding to the FIMA operations, I formulated a summary on the common transaction steps and discussed the key legal documents (i.e. legal due diligence report and transaction agreements/deeds) during the procedures in detail. At the end chapter of this dissertation, I discussed the key points to be included, discussed and negotiated in a number of the key transaction agreements/deeds in much detail.

In my personal view, this dissertation is of the below characteristics:

Firstly, researched or studied quite a lot of practical and internal research reports, documents and articles in China and updated the new FIMA regulations; so the dissertation is loaded with new information, easier to understand and follow-up with a number of real FIMA cases, and very user-friendly for any real dealmaker or researcher.

Secondly, due to limitations on space and especially my personal limited capability, I intentionally set up several limitations in this dissertation. I got quite some good lessons from my personal experiences in the FIMA and overseas transactions over the past years, one of them is that whenever I made any adjustment or comments stretched out beyond my capability, I was always exposed to a very high risk of mistake. So, according to my current limited knowledge, energy and collected materials, I made some personal limitations as below: 1) not discuss in detail on either the international M & A laws or regulations

of other jurisdictions or the Chinese overseas M & A;2only focused on the exclusive legal framework of the FIMA,not discuss in detail on much more underlying legal framework (e.g. the Corporation Law,Labor Law,Contract Law,tax regulations and some existing mechanisms such as company registration or FX regulations,which mainly supported the Greenfield Projects) ;3while paying special attentions on the theoretical and academic aspects,made best efforts to ensure it is operative by way of discussing the operation procedures,case analyses and giving out some terms or conditions' examples.

Notwithstanding the above,there still leave some regrets due to my personal limited capability; e.g,there are no comments on the general reformation of the Chinese FIMA legal framework in this dissertation. That's mainly because the regulators generally have much advantage over and more likely to make a relatively correct decision any outsiders like us. Some of their advantages are very obvious: (1) backed up by a lot of real cases and rich theories; (2) backed up by the great deal of information and materials that provided by the entities or their counterparties; (3) a lot of money to support their special programs and researches. Due to the above,except to some very technical points of regulations or detailed conflict of laws,I have made no comments on the general FIMA framework. In addition, although I have read quite a number of foreign books and materials regarding this field when I started to draft this dissertation and formulate some underlying general conceptions and opinions, however, there are basically no direct reference to those foreign books and materials; the main reason is that the content of this dissertation is gradually focused only on the Chinese M & A, and therefore the direct foreign-material references are mainly extracted from some of the special reports or statistics of international organizations, professional advisors or websites; the products of the above mentioned readings maybe can't shown off until I have the opportunity to write somethings on overseas M & A someday. I hope I can compensate for the regrets someday

when I have enough capabilities.

Keywords: Foreign Investors' Merger and Acquisition (“FIMA”)Exclusive
RegulationsLegal Practices

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