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易碎的投资梦

境内并购的诱人回报与潜在风险

Striking gold?

The risks and rewards of domestic M&A

Vantage Asia

www.cblj.com

共饮一江水: 中国对东盟投资热情升温

Opportunity flows: Chinese ASEAN investment mounts

专利安全: 如何在中国保护您的创造发明

Secure patents: How to protect your innovations in China

双重并购: 企业法务对投资中外合资企业的心得

Two-step acquisitions: In-house experience for JV investment

北京仲裁委员会 BEIJING ARBITRATION COMMISSION

巴西企业并购争议的仲裁与调解
Arbitrating and mediating Brazilian M&A disputes

企业并购交易中的争议总是以林林总总的方式发生，例如并购交易中的财务融资争议、新设项目企业的股权架构或者目标企业股东变更后的日常运营争议，或者是基于并购交易中卖方对买方作出的“陈述与保证”的争议（即信息披露争议）。从这个意义上而言，并没有一种“典型”的争议。

巴西企业并购争议和股东争议

近年来，中国投资者对于巴西的投资热情高涨，这得益于巴西丰富的自然资源和充足的农产品供应，当然也得益于巴西具备一定的工业基础和信息技术实力。

今年五月份中国总理李克强访问巴西，为巴西众多大型基建项目带去了富有吸引力的投资方案，这其中就包括横跨巴西直达秘鲁太平洋沿岸港口的铁路建设项目。

在这类投资项目中，可能会有巴西企业参与其中。而这些巴西企业可能已经卷入了某些企业并购争议和股东间争议之中。在巴西，每个商业领域都有一些超大型的企业在证券市场公开上市，这些企业被称为“股份有限公司”（sociedades anônimas, SAs），更多的则是未上市且没有公开披露义务的小型企业，这些企业被称为“有限责任公司”（limitadas）。

美国在其证券交易规则中不允许仲裁——这可能是因为作为众多商业实体住所地的美国德拉华州的法院对于处理公司争议有相当高的专业水准。

与之相反，巴西的证券交易规则中明确规定，符合特定企业治理与透明度水准（即水准 2）的相应板块（即新市场 [Novo Mercado]）上市企业，在其股东协议中通常必须有仲裁条款。（Novo Mercado 是巴西证券交易所公司上市的一个板块。除非法律有强制性规定，否则在该板上市的公司必须自愿接受交易所关于“良好的公司治理”的规则并修改其公司治理规则，这些规则通常要严于法律的规定。）

《巴西仲裁法》（9.307/96）为各类争议的仲裁提供了良好的法律支持和规范指引，企业并购争议和股东间争议的仲裁也不例外。今年五月颁布的《巴西仲裁法》修正案明确扩大了企业争议事项的仲裁范围，消除了仲裁管辖相关争议的所有法律障碍。除了少数的例外情况，股东可以通过企业议事程序中的多数投票订立仲裁条款，给予少数股东通过仲裁请求清算公司并归还其股票价值的权利。

笔者曾多次作为仲裁员、调解员参与到多起涉及巴西企业的并购争议案件中。其中一起案件涉及某石油天然气领域的跨国企业收购一家巴西的石油企业的交易。该案中，买方就卖方（另一家巴西企业，目标企业的原股东）违反其“陈述与保证”提出仲裁申请。买方认为卖方在出售目标企业时并未披露目标企业所应负担的环境和纳税责任。本案的争议解决条款是一个“先调解后仲裁”（Med-Arb）条款，我受邀调解此案。调解中，我们解决了其中一部分的争议，剩余未决事项则进入仲裁，当事人由此节省了可观的时间和费用成本。

在另一起涉及巴西企业的并购案件中，笔者和另外两名巴西仲裁员组成了仲裁庭。该案同样涉及卖方违反陈述与保证义务的事项，具体是针对生产产品的质量缺陷，以及更为棘手的目标企业在政府采购中的腐败问题——买方由此可能产生域外反腐败法的法律责任。这反映出买方在并购交易中，特别是在一个其不熟悉的域外领域，可能面临的一系列问题。

夜幕笼罩下的里约热内卢。中国投资者在收购巴西企业时，要留意收购目标是否正身陷仲裁纠纷中。
Rio de Janeiro at night. Chinese acquirers should be wary of possible disputes involving their Brazilian targets.

撇开企业并购交易本身看，在巴西，通常以仲裁解决的股东争议也各种各样。事实上，巴西对于以仲裁处理该类争议持较为开放的态度。因此，在国际商会仲裁院(ICC)的仲裁案件中，涉及巴西企业的争议数量长年位居第三、四位，这得益于巴西国内的股权争议案件与其他国际仲裁案件一样可以通过 ICC 仲裁解决。

对中国投资者并购外国企业的影响

不久前，笔者作为美国仲裁协会(AAA)某仲裁庭的首席仲裁员，处理了两个美国企业之间标的额为 3900 万美元的反向收购案件。在仲裁进行过程中，被申请人被中国的投资者收购了。然而中方在进行交易时忽视了这个巨额的仲裁案件，中方对其作为被申请人卷入这个仲裁案件十分惊讶。

总之，在中方投资者垂涎于类似巴西众多的优质企业和资产，并意欲向域外扩张的同时，必须重视相应的法律风险并妥善处置。对目标企业重大合同中的争议解决条款进行核查，甚至于可以设置相对熟悉的仲裁条款，例如选择北京仲裁委员会，是法律尽职调查和交易安排非常重要的基本步骤。

Disputes over Merger & Acquisition (M&A) activity can occur in many ways. In this sense, there is no one typical type of M&A dispute. They can occur over financing of the acquisition, over how the new or revised entity will be structured or operated, or over the so-called representations and warranties made by the sellers to the buyers of the merged or acquired entity, for example.

Brazilian M&A and disputes

Brazil is a country of considerable interest for Chinese business investors these days. It is rich in natural resources and agricultural products and also has a considerable industrial base and IT knowhow. The Chinese premier visited Brazil in May carrying with him a large attractive financial package to support a number of mega-projects, including a trans-Brazilian railway to be constructed all the way to the ports of Peru on the Pacific Ocean.

Brazilian companies may be involved in projects such as these. At the same time they have been involved in many M&A and shareholder disputes. Brazil is a country with a few very large corporations (sociedades anônimas, SAs) in each major business sector listed on the public stock exchange. It also has many smaller companies (sociedades limitadas) which are not publicly listed and have no duties of public disclosure. In the US, stock exchange rules do not allow arbitration clauses in shareholder agreements in corporations listed on these exchanges – this is probably because the courts of the state of Delaware, where many US businesses are incorporated, already have built up considerable expertise in resolving corporate disputes. In Brazil, however, stock exchange rules provide the opposite. Companies listed there at certain levels of corporate governance and transparency – level 2 and the new market (novo mercado) – normally must have arbitration clauses in their shareholder agreements.

The Brazilian Arbitration Law has been working well to provide legal support and regulation of arbitration for many types of disputes, including M&A and corporate shareholder disputes. The May 2015 amendments to the law expressly authorize arbitration of corporate disputes, removing any legal doubt over this matter. Shareholders may approve arbitration clauses in corporate by-laws by a majority vote, giving minority shareholders the right to liquidate and be reimbursed for the value of their shares, with a few exceptions.

The author has served as arbitrator and mediator in a number of Brazilian M&A disputes. One was in the oil and gas sector where the multinational company making the acquisition of a Brazilian oil company filed a claim against the seller, another Brazilian company, for breach of its seller representations and warranties. The buyer alleged that the target company was sold with undisclosed environmental and tax liabilities. The dispute resolution clause required mediation before arbitration, and the author was invited to mediate the case. Not all issues could be resolved, but some were, leaving the rest for the arbitration and thus saving the parties time and considerable cost.

In another Brazilian M&A case, the author was invited to sit as arbitrator on a panel with two Brazilian arbitrators. In that case, the allegations again were for breach by the seller of representations and warranties. This time the case involved industrial product defects and, more seriously, allegations of corruption in procurement of government contracts by the target company, which could have exposed the buyers to liability under foreign anticorruption laws. This illustrates the range of issues and problems a buyer may have when purchasing a company, especially in an unfamiliar foreign environment.

Even when not involving M&A questions, shareholder disputes take many forms. In Brazil, these are commonly resolved by arbitration. Brazil is a pioneer in using arbitration to resolve such disputes. As a result, Brazil has been ranked in the third and fourth place in recent years in number of ICC arbitrations, as the ICC is used to arbitrate many Brazilian domestic shareholder cases as well as international cases of all kinds.

Effect on Chinese entities

Not long ago this author served as chair of an American Arbitration Association (AAA) arbitral panel in a US$39 million financial sector dispute involving reverse mergers between two American companies. Midway through the arbitration, the respondent company was purchased by Chinese interests. It appeared that the purchasers were not aware of the open arbitration when they acquired the respondent and were quite surprised to find themselves having to defend a sizable claim.

It is worth noting that Chinese companies looking to expand abroad in countries where there are distressed companies and assets for sale like Brazil need to be aware of these issues so they can be anticipated and handled properly. Checking the dispute resolution clauses of the target company's major contracts or even inserting a familiar arbitration clause like the Beijing Arbitration Commission's is an important initial step in the legal due diligence process and the transaction in whole.

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