

公司并购法律热点问题

有预见性地解决并购中员工疑虑的重要性——固铂案研究

摘要:

在百事-康师傅战略合作中,由于百事瓶装厂员工大规模抗议康师傅对工厂的收购,交易双方最终向员工支付了大额费用来解决这一风波。固铂轮胎和阿波罗的并购交易现在也面临着相似的难题。固铂案提示了跨国并购中双方在交易初始阶段就应有预见性地处理员工疑虑的重要性,从而保证并购能顺利完成。

● 背景

6月11日,美国固铂轮胎公司(以下简称“**美国固铂**”)宣称,将其全球8个工厂,包括美国固铂和中国成山集团的合资子公司固铂成山轮胎有限公司(以下简称“**固铂成山**”)的股权,以25亿美元的价格卖给印度阿波罗轮胎有限公司(以下简称“**印度阿波罗**”)。印度阿波罗并购美国固铂被业界公认是“蛇吞象”式的交易。仅仅十天之后,固铂成山工会即组织员工集体停工,反对这笔交易。6月27日,工会开出了唯一的复工条件——终止并购。工会代表向媒体表达了员工对这笔收购的两点担忧:(1)印度阿波罗的并购过度依赖于来自负债的融资,(2)文化差异难以磨合。工会代表表示,由于印度阿波罗是全额杠杆融资收购,一旦市场波动、资金链紧张,工厂就可能陷入经营困难。员工们也担心并购后中印企业文化之间有着难以磨合的鸿沟。事实上,固铂成山当初为了融合中美企业文化就经历了数年的艰难磨合。7月12日,美国固铂宣布并购将继续进行,工会当即决定再次停工。这笔全球轮胎业最大并购案目前仍进退两难。

与之相似,在康师傅品牌的拥有者顶益控股有限公司(以下简称“**顶益**”),和百事(中国)有限公司(以

下简称“**百事**”)的战略合作过程中,百事将其合资瓶装厂转让给顶益,这笔交易也引发了百事瓶装厂员工的大规模抗议。虽然抗议没有影响交易按时完成,但双方为此支付了大笔意料之外的费用。

● 中国法下员工参与并购决策的权利

中国法律明确规定,雇主的投资人的变更不影响劳动合同的效力。因此,在股权收购的情形下,雇主没有向员工支付遣散费的义务(非国有企业并购国有企业的情形除外)。

另外,在类似固铂案的交易中,目标公司也没有寻求工会对并购决议批准(或咨询其意见)的义务。中国法律仅在原则上规定,中外合资经营企业董事会会议讨论特定的影响员工权益的重大事项时,工会的代表有权列席会议,但并没有投票权。中国法律并没有具体规定员工参与并购和目标公司整合过程决策的程度。因此,并购双方需要自行确保目标公司的员工对其留任后的待遇满意。

固铂案和百事案提醒了境外收购方,在达成交易前,需要对中国目标公司的劳动状况/劳动关系更深入的了解。尤其在并购涉及控制权转移和/或文化冲突时,这些问题将更为关键。

● 经验和建议

A. **交易前规划:** 境外收购方在收购中国目标公司前,应当认识到并在初始阶段即尝试解决任何可能影响或拖延交易完成的整合问题。收购方应特别注意目标公司的员工对交易过程有无异议,以及目标公司的劳动关系/实务操作是否均遵守中国法律。

B. **合同安排:** 如收购方预感到员工会产生不满, 交易双方可以在收购合同中约定一个特别条件, 即在收购方有义务完成收购前, 被收购方必须提供一份工会/过半数员工的书面同意文件。如果交易双方预感到员工的留任将会引发额外的费用(该等费用并不一定是法律强制要求的), 双方需要提前预提该等费用,

并就该等费用的分担在收购协议中作出明确约定。

C. **文化差异和沟通:** 在跨境并购的整合过程中完全避免文化差异的影响是很难的。但是, 预判、沟通、理解和适当的处理将减轻这些整合过程中这些问题带来的影响。

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M&A

Importance of Proactively Addressing Employees' Concerns – Cooper Case Study

Highlights:

Following the PepsiCo-Tianyi transaction, where the acquisition aroused mass protests from workers of PepsiCo bottling factories and ended up with significant unexpected expenses paid to the employees, the Cooper-Apollo transaction is now facing similar challenges. It highlights the importance of addressing employees' concerns proactively at the early stage, to ensure smooth consummation of an acquisition.

Main Article:

● Background

The ink has not even dried yet on the press release, and the workers at Cooper Chengshan (固铂成山轮胎有限公司), a joint venture in China between Cooper Tire & Rubber Company (USA) ("Cooper Tire") and Chengshan Group (China), are already on a strike. They are protesting against the acquisition of the company by Apollo Tyres ("Apollo"), an Indian tire manufacturer, as part of Apollo's USD\$2.5 billion leveraged buyout of the USA-based Cooper Tire. The industry describes the Cooper-Apollo deal, declared on June 11, 2013, as a "snake-swallowing-elephant" maneuver. On June 27, 2013, representatives of the trade union of Cooper Chengshan announced that the strike will continue unless the acquisition halts. The trade union expressed

their two concerns to the media: (1) Apollo's over-leveraged debt level at the closing of the deal, which would make the factory financially vulnerable to market demand declines; and (2) difficulties of accommodating a new Indian management style, after the factory has spent years transitioning into an American management style. On July 12, 2013, Cooper Tire publically announced that the acquisition was still moving forward but it is still unknown how the parties will address the employees' concerns.

Similarly, in the strategic alliance between Tingyi Holding Corporation ("Tingyi"), known as the owner of Master Kong brand in China, and PepsiCo Inc. ("PepsiCo"), where Tingyi bought out PepsiCo's joint venture bottling operations, the acquisition aroused mass protests from workers of PepsiCo bottling factories. Even though the strike did not impede the deal, the parties paid significant unexpected expenses.

● Employee Participation Rights under PRC Laws

Under PRC laws, it is explicitly stipulated that the employee's employment contract is not affected by the change of the employer's shareholder. The employer has no obligation to pay any severance in the context of an equity acquisition

(except for the acquisition of an SOE by a non-SOE).

Additionally, in a deal like the Cooper case, target companies have no obligations to obtain the consent of (or even to consult with) labor unions. PRC laws provide only a general principle that trade union representatives have the right to attend, without the right to vote in, meetings of the board of directors of a Sino-foreign joint venture held to discuss certain significant issues (in particular, the issues relating to employee benefits). The PRC laws are silent on the detailed extent of employee participation in decision-making in the M&A process or integration process of the target company. This means that the burden falls on the buyer and the seller to ensure that the target company's workforce is retained in a satisfactory manner.

The Cooper case and PepsiCo case shall warn international acquirers to pay more attention to the PRC target's labor conditions/labor relation before entering into a transaction, and the issues will become more relevant where the acquisition contemplates change of control and/or entails culture challenges.

- **Lessons and Recommendations**

A. *Pre-deal planning*: International acquirers of Chinese target companies shall

recognize, and attempt to deal from the outset with, any integration issues that could complicate or delay the successful implementation of a transaction. Acquirers shall place special emphasis on ensuring the target company's workforce's satisfaction and its labor practice/conditions comply with the PRC laws.

B. *Contractual arrangement*: If the acquirer anticipates workforce dissatisfaction, the parties may set out in the acquisition agreement a specific condition that consent from trade union/a majority of employees must be provided before the acquirer has an obligation to consummate the acquisition. If the parties anticipate the retention of employees will incur costs (which may not necessarily be mandatory), a provision of such cost should be made upfront and agreed in the acquisition agreement.

C. *Culture difference and communication issues*: It is difficult to avoid the impact of culture difference during the integration of a cross-border M&A. However, foresight, communication, understanding and proper handling of these differences can reduce the difficulties during the transition period.

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