JUNHE
SPECIAL REPORT

JUNHE

June 11, 2021

Validity and Performance of Valuation Adjustment Mechanism Agreement – An Overview of Judicial Practice

I. Key Features of Valuation Adjustment Mechanism Agreements

A valuation adjustment mechanism agreement ("VAM agreement"), commonly known as "bet-on agreement", as referred to in the *Minutes of the National Court's Work Concerning Civil and Commercial Trials* (the "Minutes"), is an agreement entered into between an investor and a party seeking financing (the "investee company"), agreeing upon certain terms of equity repurchase and monetary compensation (the "VAM terms"), with an intention to adjust the valuation of the investee company if it fails to achieve certain goals described therein.

A VAM agreement is customarily adopted in private equity investment aiming to manage the risk of uncertainties in forecasts of business development, information asymmetry as well as conflicts of interest concerning the investee company, by which an investor may exercise its contractual rights against the obligor, usually the original shareholders of the investee company or the investee company itself.

VAM terms will take effect only upon pre-determined conditions described in the VAM agreement are met. Such conditions generally include: (i) shares of the investee company fail to be listed on a stock exchange within a prescribed time limit; (ii) the investee company fails to achieve prescribed financial performance objectives; (iii) the investee company, its shareholders, directors, supervisors or senior management personnel breach the VAM agreement, (for example, a breach of non-competition obligation by the de facto controller or other shareholders or a breach of commitment of non-fraud by the investee company or its shareholders), and (iv) the investee company fails to achieve certain business goals, such as failure to complete product research and development or to obtain requisite approval or license for certain businesses, etc.

Commonly, the legal effect of a VAM agreement include obligating the investee company or its shareholders (as the case may be) to purchase back equities from the investor or make monetary compensation to the investor, or a combination of both. In addition, some VAM agreements stipulate other protections for the investor, such as shares compensation, a grant of preferred shares, compulsory tag-along rights as well as reversal of control rights.

II. Judicial Opinions about VAM Agreements

Based on our observations of judicial practices concerning VAM agreement disputes, below we summarize the key issues thereof.

(1) The validity of a VAM agreement between an investor and a shareholder of investee company

For a long time, there has been no explicit laws or judicial precedents concerning the validity of a VAM-related agreement. In the first VAM case in China, i.e. *HaiFu Investment Co. Ltd. v. ShiHeng Non-ferrous Recourses Recycling Co. Ltd., Hong Kong Diya Limited and LU Bo* (the "Haifu Case")[1], the Supreme People's Court ruled on the re-trial of this case on November 7, 2012 that a VAM agreement between an investor and a shareholder of investee company is valid. This judicial rule is followed by subsequent judicial practices and finally recognized by the Minutes. According to the Minutes, a VAM agreement concluded between an investor and a shareholder or de facto controller of investee company shall be valid and enforceable unless there is any statutory circumstance that renders it invalid. Given the foregoing, there is no controversy in judicial practice concerning the validity of a VAM agreement between an investor and a shareholder of investee company.

(2) The validity of a VAM agreement between an investor and an investee company

Regarding a VAM agreement between an investor and an investee company, however, the Supreme People's Court in Haifu Case completely denied its validity on the grounds that it violates mandatory laws and regulations. Following the Haifu Case, courts gradually converged on the standpoint that a VAM agreement is invalid if it is concluded between an investor and an investee company, as such an agreement shall be deemed as a violation of the mandatory laws or regulations governing the validity of any agreement. According to relevant judicial cases, the "mandatory laws or regulations governing the validity of any agreement" include the provisions prohibiting shareholders from illegally withdrawing their capital contributions, the provisions concerning repurchasing of its own equity by a company and the provisions concerning profit distribution under the Company Law, as well as the provisions of proportionate profit distribution as stipulated by the *Sino-Foreign Equity Joint Venture Law of the People's Republic of China*.

Another case delivered by Jiangsu Higher People's Court on April 3, 2019, known as the "Huagong Case" (see *(2019) Su Civil Re-trail No.62 Civil Award*), reversed the judicial rule established by the Haifu Case. The Jiangsu Higher People's Court held that such VAM agreement should be valid since: (i) it does not violate the principle of capital maintenance because the investee company performs its repurchase-of-equity obligation after completion of mandatory capital reduction procedure; and (ii) the payment of the repurchase price by the investee company will not result in impairment of the company's assets or its solvency, thereby not damaging the interests of its creditors. The court further ordered the investee company to pay the equity repurchase price to the investor. As the first case that the court recognizes validity of a VAM agreement between an investor and an investee company, Huagong Case has a positive impact on resolving later disputes brought to the courts. However, it is at once argued that ordering the investee company to pay the equity repurchase price to the investor without ordering it to perform relevant capital reduction procedure may result in an impairment of its solvency, thereby causing damages to the interests of creditors of the investee company.

The Minutes incorporate the opinions in the verdict of the Huagong Case with certain adjustments. Specifically, the Minutes

[1] See *Suzhou Industrial Park HaiFu Investment Co. Ltd. v. Gansu ShiHeng Non-ferrous Recourses Recycling Co. Ltd., Hong Kong Diya Limited and LU Bo,* the Supreme People's Court, *(2012) Civil Re-trial Zi No.11 Civil Award.*

recognize and reiterate the judicial rule that the court should not uphold an investee company's claim for invalidity of a VAM agreement it entered into with an investor only on a basis that such agreement contains an equity repurchase or monetary compensation clause, if there is no other statutory circumstance that would render such agreement invalid. The Minutes further stipulate that (i) in the event that an investor requests an investee company to purchase back equities, the court should dismiss its claim if the investee company has not completed capital reduction procedure; (ii) in the event that a monetary compensation lawsuit is brought by an investor against an investee company, the court should proportionately dismiss its claim if the investee company has no profit or its profit is not sufficient for compensation, but the investor shall be entitled to file another lawsuit once the investee company becomes profitable.

Although the Minutes explicitly confirm the validity and enforceability of a VAM agreement, the actual performance of these VAM terms are still subject to strict examination, which exposes an investor to great uncertainties. For example, being a minority shareholder of an investee company, an investor may be unable to facilitate passing the capital reduction resolution, which must be examined as a precondition for the court to recognize the investor's claim for equity repurchase, or the relevant implementation of capital reduction and equity repurchase from the investor may be intervened by creditors; in addition, in a monetary compensation situation, given the Minutes set evidentiary barriers for an investor, it is difficult for a financial investor, who has no control of the investee company's operations, to access sufficient financial and profitability information about the investee company to demonstrate that the company has distributable profits under the *Company Law*.

(3) Considerations in the situation that an investee company provides guarantee for performance of the VAM agreement

Based on judicial practices, the validity and enforceability of such a guarantee shall be simultaneously examined from two aspects. Firstly, it shall be determined whether the investee company's undertaking to guarantee complies with *the Company Law*. According to the *Company Law*, the provision for guarantee shall be approved by way of a resolution of the board of directors or the shareholder's meeting as prescribed by the Articles of Association, while in the event of providing guarantee for the company's shareholder(s) or de facto controller, such matter must be submitted to the shareholder's meeting for approval. Hence, in determining the validity of a guarantee, a court shall examine whether the investee company has passed relevant resolution, as well as whether the creditor is accountable when the investee company undertakes to guarantee without prior resolution(s); Secondly, it shall be also determined from a pure "VAM agreement" perspective, that is, if the company's decision-making mechanism mentioned-above has passed a resolution on the guarantee and the guarantee obligation is actually triggered due to a default of the contractual obligor of the VAM agreement, then the court shall determine whether the VAM agreement is valid, because the performance of a guarantee obligation by the investee company shall be in effect a performance of the concerned VAM agreement. (2) Accordingly, the court shall refer to the Minutes for determining the validity of a VAM agreement as mentioned in Part II of this briefing.

(4) Considerations in claiming payment of the equity repurchase price/compensation for poor performance

Regarding how courts will treat the provisions of equity repurchase or poor performance compensation, the prevailing opinion of courts is that either payment for equity repurchase price or compensation for poor performance is a contractual obligation in its nature, rather than a liability for breach of contract, so the liquidated damages adjustment rule (i.e., the court may at its discretion adjust the amount of liquidated damages determined by the contractual parties in advance if it is decidedly not proportionate to the actual losses suffered by the non-defaulting party) does not apply. However, we observed that in some cases the court determined the nature of compensation for poor performance as liquidated damages and thus subjecting it to the liquidated damages adjustment rule.

Moreover, with respect to whether an equity repurchase provision and a poor performance compensation provision can be enforced simultaneously, opinions vary greatly in judicial practices. Some courts allow an investor to seek the payment for both the equity repurchase price and poor performance compensation. In their view, they are two independent and valid provisions that serve different compensatory functions. Nevertheless, some courts dismiss investor's claim as they believe that the purposes of the two provisions are the same as to obligate the investee company/original shareholders to assume liability for breach of contract, hence, if enforcement of one provision would be sufficient to compensate losses resulting from a broken contract, another one should not be recognized. In addition, other courts may award the payment or compensation at the same time. However, they may adjust the calculation method and the amount of compensation for poor performance on a fair basis. In light of the above, it remains to be seen how a court may determine a specific case.

(5) Influence on the performance of VAM agreement if an investor participates in operations of an investee company

Where parties bet on future performance of an investee company, it is undoubtable that the investor will not be held accountable for triggering VAM terms as a result of the investee company's failure in realizing a specific performance goal if the investee company is still operated by its original management team. However, if an investor, through exercising shareholder's rights or by investment agreement, appoints one or more directors to the investee company to have influence on the decision-making of daily operations of the investee company, there are different opinions in judicial practice as to whether the investor has contributed to the realization of the preconditions of VAM terms.

According to the prevailing judicial opinion, investors' participation in operations of the investee company shall not be deemed to be a promotion factor influencing realization of the preconditions of VAM terms, as it is the statutory shareholder's right enjoyed by the investor. To demonstrate that the investor is a cause to the investee company's failure in achieving the performance goal, the investee company or the founding shareholders shall take a relatively high burden of proof.

Notwithstanding the foregoing, we note there were precedents that an investor is held liable for a decline in the investee company's performance, thus the court ruled a pro rata

amount of compensation payable by the investee company based on the parties' proportion of responsibilities of their management conducts; there were also precedents that an investor removes the person-in-charge of the investee company elected by the original shareholders from his position, the court then held that the original shareholders shall not bear the compensation liability arising after the removal of the person-in-charge. It can be inferred that, in determining whether an investee company or its original shareholder's compensation liability is affected by, and thus needs to be adjusted due to, an investor's participation in the operations of the investee company, a court may give consideration of the facts of whether the investor has over intervened the operations of the investee company, or whether the original shareholders' taking compensation liability may result in an imbalance between rights and obligations, moral hazard or other adverse effects, in the situation that they have been deprived of the right to operate the investee company.

Li CAI Partner Tel：86 10 8553 7669 Email：cail@junhe.com

Delong ZOU Associate Tel：86 10 8553 7810 Email：zoudl@junhe.com

（Translator: Luo Dan Chen） Inter Tel：86 21 2283 8320 Email：luodch@junhe.com

2021 年 6 月 11 日

对赌纠纷类案实务探讨

一、 对赌协议简介

根据《全国法院民商事审判工作会议纪要》（下称“**九民纪要**”），实践中俗称的“对赌协议”，又称估值调整协议，是指投资方与融资方在达成股权性融资协议时，为解决交易双方对目标公司未来发展的不确定性、信息不对称以及代理成本而设计的包含了股权回购、金钱补偿等对未来目标公司的估值进行调整的协议。对赌协议的权利主体通常为投资方，义务主体根据具体情况，可能包括目标公司原股东、目标公司等。

对赌协议本质上属于附条件的民事法律行为，即各方当事人约定的对赌条件触发时，当按照合同的约定履行对赌义务。常见对赌条件通常包括如下几类：（1）在对赌协议约定期限内无法上市；（2）未达到对赌协议约定的财务指标；（3）目标公司、股东或者董监高存在违反对赌协议约定的情形（例如实际控制人或股东竞业禁止、目标公司或股东承诺不得欺诈等）；（4）目标公司未实现一定的经营目标，例如未能研发某种产品、未能获得开展业务必须的行政许可等。

最常见的对赌义务通常包括义务人回购股权、对投资人进行现金补偿、或者回购股权加现金补偿同时适用。此外，也有一些对赌协议中约定的对赌义务涉及股权补偿条款、优先股条款、强制随售条款以及控制权反转条款等。

二、 司法实践中关于处理对赌协议纠纷的实务观点

结合法院在过往判决中对于对赌协议纠纷的常见争议提出的裁判意见，我们将相关要点梳理如下。

1、 与其他股东对赌的效力

2012 年 11 月 7 日，最高人民法院对“海富案”作出的再审裁定[1]中，认定“投资人与原股东对赌有效”，这项裁判规则在后续的司法实践中并未发生实质变化。九民纪要对此也明确规定，投资方与目标公司的股东或者实际控制人订立的“对赌协议”，如无其他无效事由，认定有效并支持实际履行，实践中并无争议。

2、 与目标公司对赌的效力

在“海富案”中，最高院认定投资人与目标公司之间的对赌协议违反法律和行政法规的强制性规定，应属无效。后续司法实践中逐步形成“与目标公司对赌违反法律法规的效力性强制规定而应当认定为无效”的法院裁判观点，该等“效力性强制规定”通常为《公司法》关于股东不得抽逃出资、公司回购本公司股份、利润分配的规定，以及原《中外合资经营企业法》关于企业利润根据合营各方注册资本的比例进行分配的规定等。

2019 年 4 月 3 日，江苏省高级人民法院作出（2019）苏民再 62 号民事判决书（即“**华工案**”），成为首份认定“与目标公司对赌有效”的判决。法院认定：（1）目标公司在完成减资程序后履行回购义务并不违反资本维持原则；（2）目标公司支付回购款后不会导致公司资产减损，不会损害目标公司的清偿能力并导致目标公司债权人利益受损。在该等认定的基础上，法院认定投资方与目标公司之间的对赌协议有效，并直接判令目标公司向投资人支付股权回购款。“华工案”作为法院认定投资方与目标公司对赌协议有效的第一案，对于类似纠纷的处理有积极意义。但是该案中并未判令目标公司履行减资程序而直接判令其支付回购款、在目标公司

[1] 最高人民法院，苏州工业园区海富投资有限公司与甘肃世恒有色资源再利用有限公司、香港迪亚有限公司、陆波增资纠纷再审案，（2012）民提字第 11 号民事裁定书

债权人并未参加诉讼的情况下直接认定履行回购义务不会减损目标公司清偿能力，使得该裁定本身受到一定的质疑。

“华工案”的裁判意见后续被九民纪要吸收并进行了相应完善。九民纪要对“与目标公司对赌的效力”作出了进一步肯定：投资方与目标公司订立的“对赌协议”在不存在法定无效事由的情况下，目标公司仅以存在股权回购或者金钱补偿约定为由，主张“对赌协议”无效的，不能成立。但九民纪要也同时为投资方要求目标公司履行股权回购或者金钱补偿义务设定了明确的限制条件，具体而言：（1）投资方请求目标公司回购股权的，目标公司未完成减资程序的，人民法院应当驳回其诉讼请求；（2）投资方请求目标公司承担金钱补偿义务的，目标公司没有利润或者虽有利润但不足以补偿投资方的，人民法院应当驳回或者部分支持其诉讼请求。今后目标公司有利润时，投资方还可以依据该事实另行提起诉讼。

九民纪要虽然为投资方与目标公司对赌设定了明确的路径，但是该等前提条件的实现仍然有较大难度和不确定性。例如，由于投资人对目标公司进行股权投资，所占目标公司的比例往往有限，在投资人与目标公司签署的对赌协议约定的对赌条件触发时，目标公司可能无法通过减资的决议，即便通过减资决议，也可能因为债权人干涉等因素无法顺利实施完毕。此外，投资人并不实际掌控公司的运营，对于公司的财务状况、利润状况可能难以实时掌握，在要求目标公司承担金钱补偿义务时，举证层面也可能存在较大难度。

3、 目标公司对回购义务提供担保

目标公司对回购义务主体提供担保的情况下，审判实践中从以下两个层面进行效力判断：（1）从公司提供担保角度进行效力判断。依照《公司法》规定，公司对外担保须依章程规定，由董事会或者股东（大）会决议；公司为公司股东或者实际控制人提供担保，须经股东（大）会决议。司法审判中法院将审查公司机关的担保决议是否存在以及越权担保时债权人是否善意来判断公司担保是否有效。（2）从“对赌协议”履行角度进行效力判断。

司法审判认定公司担保有效，“对赌协议”主义务人未履行金钱补偿或者回购股权义务，投资方请求担保人承担责任的，目标公司履行的实质是从承担担保义务转化为承担“对赌”义务，其履行的效果与投资方和目标公司“对赌”一致。因此，审判机关仍然会围绕九民纪要中规定的投资方与目标公司进行对赌之协议的效力、履行该等协议的前提条件等进行认定。

4、 股份回购款/业绩补偿款项的主张

在股份回购款/业绩补偿款性质认定问题上，法院的主流意见是认定为合同义务（而非违约责任），因此该等合同义务的履行不受违约金调整规则的限制。但是，个别案例中，法院将业绩补偿款的性质认定为违约金并加以调整。

对于同时约定股份回购和业绩补偿的，发生争议时是否可以同时主张，司法实践中观点差异较大，且支持、反对观点说理各异。部分法院认为股权回购和业绩补偿并不矛盾，可以同时主张；部分法院认为业绩补偿款和回购股份均具有因违约行为承担损害赔偿责任的性质，如一项主张能满足投资人的损失，则不支持同时主张；部分法院虽然支持同时主张股权回购和业绩补偿款，但是在支持的同时会基于公平原则调整业绩补偿款的计算方式和金额。对于这一问题，可能仍需要结合案件实际情况综合考量。

5、 投资人参与经营管理对于履行对赌协议的影响

投融资双方接受业绩对赌，在目标公司由融资方原管理团队运营的情况下，业绩不达标触发业绩补偿条款的，一般不会因“投资方对于触发回购条件是否负有责任”而产生争议。但是，如果投资方基于行使股东权利或者根据协议约定委派董事等高管而实际参与目标公司经营，则对于履行对赌协

议是否存在影响，司法实践中存在不同的观点。

根据主流观点，投资人以股东身份参与目标公司经营，是其依法享有的权利，原则上不影响对赌条件的成就。目标公司及其创始股东需要承担较高的证明责任，以证明目标公司未达对赌目标系投资人行为所致。

但是，我们亦检索到了法院认定“投资方实际参与目标公司经营管理时投资人对经营业绩下滑负有责任而根据责任比例对业绩补偿款金额进行相应调整”、“投资方免去原股东委派至目标公司负责人职务，原股东不需要承担该负责人被停止职务后的业绩补偿责任”的相关案例。这些案例也充分说明，法院也会根据投资方对目标公司的经营是否形成过度干预，是否会造成权利义务的不对等以及道德风险（如原股东实际丧失经营权，但又需要承担业绩补偿责任）等实际因素，对于投资方参与目标公司经营是否影响对赌义务的履行进行具体判断。

蔡　黎　合伙人　电话：86 10 8553 7669　　邮箱地址：cail@junhe.com
邹德龙　律　师　电话：86 10 8553 7810　　邮箱地址：zoudl@junhe.com