

# 跨国并购 法律实务

◎ 李志强 著



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LEGAL PRACTICE OF MULTINATIONAL  
MERGER & ACQUISITION

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 上海遠東出版社

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# 序 一

全国人大常委会法工委副主任 李 飞

李志强律师的新作《跨国并购法律实务》一书即将出版,这是一部理论与实践紧密结合的法律实务性著作。我阅读原稿后感到有三个特点。

其一,作者结合新修订的我国《公司法》和《证券法》和2006年新出台的《关于外国投资者并购境内企业的规定》、《上市公司收购管理办法》等规范性文件,结合并购业务的实例,详尽地分析外国投资者并购中国境内企业的主要方式和途径、跨国并购对东道国经济安全的影响、并购过程中的外汇管制、税收、反收购、信息披露、反垄断以及外资并购金融机构和上市公司的主要模式、特点,令人耳目一新。

其二,作者结合多年从事律师实务的经验,评析了《关于外国投资者并购境内企业的规定》有待完善之处和我国《反垄断法》(草案)需进一步研究之处,作者关心立法,积极建言的精神,值得推崇。

其三,作者对正在兴起的中国企业从事跨国并购活动所面临的法律风险和应对法律风险的对策等,提出自己的见解,相信对有

志于走出国门的中国企业和中国企业家有所帮助。

在这本新作出版之际,我由衷地祝愿李志强同志继续努力,在法律实践活动中取得更新更多的成果,为依法治国的伟大事业继续添砖加瓦。

李 飞

2006 年 11 月

## Preface One

by Li Fei

Deputy Director of Working Committee on Law of  
the Standing Committee of the National People's Congress

The new monograph of Lawyer Li Zhiqiang, *Legal Practice of Multi-national Merger & Acquisition*, will be published around the corner. This monograph integrates the theory with the practice tightly and it is featured with the characteristic of legal practice. After reading the manuscript, I feel that this monograph shines with three characteristics.

Firstly, referring to the newly amended *Company Law*, and *Securities Law of People's Republic of China* as well as the newly promulgated *Provisions on the Takeover of Domestic Enterprises by Foreign Investors* and *Measures for the Administration of the Takeover of Listed Companies*, combined with successful projects of merger and acquisition, the author elaborately analyzed the main modes and approaches of the merger and acquisition of domestic enterprises by foreign investors, the influence of multinational merger & acquisition to the host country's economic safety, and the foreign exchange control, taxes, anti-takeover, information disclosure and anti-monopoly in the process of merger and acquisition, the takeover of the financial institutions by the foreign investors, as well as the main modes and characteristics of the listed company. All the above contents make the reader feel new and fresh.

Secondly, combined with the experience from the numerous years of legal practice, the author analyzed the further consummation of *Provisions on the Takeover of Domestic Enterprises by Foreign Investors* and the issues which need further research in the draft of the Anti-Trust Law of China, the author's great concern and his spirit to participate and promote the legislative development should be praised greatly.

Thirdly, the author delivers his own opinion on the legal risks as well as the countermeasures to the risks of the merger and acquisition of the foreign enterprises by the domestic companies. I strongly believe that it will give great assistance to the Chinese enterprises and entrepreneurs with the ambition of walking out the door of our country.

On the occasion of the publication of this monograph, I sincerely hope that Comrade Li Zhiqiang will achieve more and newer fruits in the future legal practice, and also he will make greater contributions to the noble course of ruling the country by law.

## 序 二

中华全国律师协会会长 于 宁

我从事律师工作不久就知道李志强律师,他是一位年轻有为的青年律师,26岁就被评为上海五位“律师涉外服务标兵”之一,29岁被评为上海市优秀青年律师,34岁被评为上海市专职律师中的第一位“十大杰出青年”,37岁被推选为国际最大的律师组织——国际律师协会的理事。他也是一位辛勤耕耘的学者型律师,25岁就担任《涉外经济法通论》副主编,该书已成为大专院校法律专业的教材。从业16年来,已经有了十几部较有影响的作品,是青年律师学习的楷模。1999年,中华全国律师协会组织编写中国名律师办案实录系列丛书,法律出版社出版了他的专著《律师的舞台——李志强执业手记》,该书被评为上海市律师个人专著一等奖,在业内产生了很大的反响。他也是律师行业的领军人物之一,作为国内首批证券律师,他在公司改制重组、收购兼并和国际金融证券法律服务领域成果丰硕。他还是一位优秀的律师管理人才,社会活动的积极分子,热心立法和公益活动,积极建言时政,是一位有社会责任感的执业律师。

看了《跨国并购法律实务》,我以为对广大有志于从事这项服



务领域的专业律师和法律工作者有帮助。我愿推荐此书,寥寥数语,是为序。

于宁

2006.10.18.

## Preface Two

by Yu Ning

President of All-China Lawyers Association

I am familiar with Mr. Li Zhiqiang after I dedicated in legal service for not long time. He is a young and an achieved lawyer and he was praised as one of the five Models for Foreign Legal Advisor of Shanghai at the age of 26, and also he was praised as an Outstanding Young Lawyer of Shanghai at the age of 29. And when he was 34, he was praised as one of the Top Ten Outstanding Youths of Shanghai, and up to that time, he was the first full-time lawyer achieved that honor. And when he was 37, he was elected as councilor of the International Bar Association, which is the biggest bar association worldwide. He is also an industrious scholar lawyer with more than ten books published in his 16 years' legal practice history. At the age of 25, he acted as the vice-chief editor of *The General Foreign Economy Law*, which had been the teaching material of the major law school. In 1999, the All-China Lawyers Association organized the series of the books on record of the outstanding lawyers' legal practice and it was at that time the Law Press published his monograph *Platform for Lawyers-the Record of the Legal Practice of Li Zhiqiang*, which achieved the first-prize of Shanghai lawyers' monographs and it stirred great echoes among the legal industry. And he is also one of the leaders of the legal industry. As one of the first securities lawyers in China, he achieved fruitfully in the legal service of the restructuring of the corporation, merger and acquisition, and international financing and securities. He is also an excellent management talent of law firm, an activist in social activities, an advocate of legislative and social welfare, an active participant in politics, and also he is a lawyer with great social responsibility, and he is a genuine and great model for the young lawyers.

After going through this monograph of the *Legal Practice of Multinational Merger & Acquisition* carefully, I feel it really helpful and valuable to the lawyers dedicated in this area. I am willing to recommend this monograph. The above word is my preface to this monograph.

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# 第一章

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## 跨国并购概述

2006年12月11日,我国结束进入“世界贸易组织”的五年过渡期。入世使我国的经济和社会发生了深刻的变革,一批又一批的外国企业进入中国市场,投资规模迅速扩大,跨国公司的制造中心、研发中心和采购中心逐步向我国转移,中国市场的开放程度日益显著。

“从跨国公司发展的历程来看,自19世纪80年代发育以来,先后经历横向并购、纵向并购、混合并购、融资并购和跨国并购五个阶段,并购浪潮一次比一次大,其结果,不仅促进了资本的集中和集聚,有效地整合了企业间的资源,提升了企业的竞争力,而且促进了产业结构的调整,增强了产业集中度,为经济的发展注入了新的活力和动力。”(出自《中国证券报》2006年8月29日,中国证监会范福春副主席《规范上市公司收购行为,完善上市公司收购制度》一文)

在我国,以外资为主体进行的跨国并购经历了从无到有,从小到大。2000年以前外资并购很少,几乎没有。根据联合国贸发会发布的报告,2000年我国外资并购占了国际直接投资(FDI)的5.5%,而国际上这一比重一般大于三分之二。我国2001年加入世界贸易组织并于2003年出台了《外国投资者并购境内企业暂行规定》,外资并购不断发展,2004年我国外资并



购就占了国际直接投资的 11%。

2006 年 9 月 6 日,商务部副部长易小准在上海出席“中国入世五周年”研讨会论坛时指出,中国入世 5 年,对世界经济的贡献已经占到 13% 的比重,在我国投资的外商投资企业已经累计汇出 579 亿美元的利润回国。我国经济结构发生了新的变化,以上海为例,外商投资企业已和国有企业、民营企业等同在国民生产总值中占据相当的比重。相当一批外国居民和跨国公司的管理人员也在我国扎下根来。

外资并购境内企业进行国际直接投资主要有两种形式,其一是新设投资,亦称绿地投资,即投资者在东道国设立新的企业,新设企业可以是独资企业,也可以是中外合资经营或中外合作经营企业;二为并购投资,所谓并购是企业合并和收购的简称。实际上,在外资对境内企业的并购中,合并的案例很少,绝大多数情况是收购。在国际范围内跨国并购也以收购为主,合并仅占跨国并购的 3%。真正的合并如此之少,以至于并购实际上基本意味着收购。在全球并购浪潮的推动下,随着外资并购中国国内上市公司政策限制的放松,外资并购中国国内上市公司将演绎成中国证券市场的热点,而跨国公司将通过不同的途径进入中国证券市场。

外资企业以控股股东身份进入国内证券市场,或以非控股股东及战略投资者身份参与国内上市公司经营,将是国内证券市场及我国经济进一步全球化的重要标志。目前我国已有的外资上市公司也证明了其存在对改善目前我国上市公司股权结构和丰富投资品种具有明显的促进作用,其带来的国际上市公司的经营管理模式也使国内公司受益。因此,让更多的外资企业进入中国证券市场是势在必然。