

A LEGAL STUDY ON THE PROTECTION OF LABOR RIGHTS AND INTERESTS IN TRANSNATIONAL M&A

Longyang XIA

Ph.D. Candidate of Faculty of International Law, China University of Political Science and Law, Beijing, CHINA

Abstract: With the development of globalization and the strengthening of international cooperation, the transnational mergers and acquisitions (M&A) attract much more attention in the whole world. According to correlation research, labor problems are becoming the main reason for mergers and acquisitions that fail to achieve their expected results. Therefore, protecting labor's legitimate rights and interests properly in transnational M&A is important and meaningful. This paper attempts to analyze the legal issues in cross-border mergers and acquisitions of Chinese enterprises, trying to protect the legitimate rights and interests of workers in M&A and achieve the goals that Chinese enterprises have better performance in the field of cross-border mergers and acquisitions.

Keywords: Labor Right; Merger; Acquisition; Enterprise

1. Introduction

1.1. Social and Economic Background

Transnational mergers and acquisitions is one of the most important direct investment behavior in today's world. In the meantime, there are certain new trends have been emerging related to this research.

Firstly, since the commencement of the opening-up and reform policy, we have saw the rapid development of transnational M&A of Chinese enterprises. In December of the year 2014, China has accumulated more than \$3.84 trillion of foreign exchange reserves, which hits a record high[1]. The annual report of Price water house Coopers Consultants Ltd shows that the number of the cases of transnational mergers and acquisitions by enterprises in mainland China reaches 272, which create a new record in the meantime. [2] On the one hand, the huge amount of foreign exchange reserves can satisfy the funding needs of Chinese enterprises for overseas mergers and acquisitions. On the other hand, China's "Go-Out policy" as a national strategy is encouraging China's enterprises to go out to take an active part in international cooperation and exchanges. All these advantages provide a great opportunity about transnational mergers and acquisitions for both Chinese and other nations' companies."

Secondly, the infringement of labor rights have become a great challenge for the expected effect of transnational

M&A. On January 1, 2008, Law of the People's Republic of China on Employment Contracts came into effect. However, since the long distance and different cultures between two different companies, the labor rights are more likely to be infringed in transnational M&A. In addition, there is still a different protective level of labor right in legislation between developed and developing countries. Not familiar with labor laws and regulations of the host country and cultural conflict should not be ignored either in transnational M&A.

1.2. Overview of the Research Literature

The domestic research related to transnational M&A is not balanced in Chinese academic circles. The majority of scholars mainly studied from the view of the following two aspects: One aspect is from the view of companies' interests. The representative domestic research are such as doctor Chuntao Yang' paper : *The Present Situation of Mergers and Acquisitions and Analysis on the Legal Risk of Chinese Companies*[3], and the doctoral dissertation of Lin Sha : *The Study on Legal Risks Acquisitions Overseas Of China Companies*[4], etc. All of them are mainly care about the acquiring companies' interests and neglecting labor' interests in mergers and acquisitions. The other aspect is from the view of nation' interests. The representative domestic research are including Professor Yaping Mu'paper: *National Security Review System of Merger and Acquisition Involving Foreign Capital of China*[5]. Scholars in this aspect are mainly care about the nation' interests and also neglecting the labor' interests in

This paper is funded by the *China Scholarship Council (CSC)*.

mergers and acquisitions. From my point of view, we should not only focus on investors and nation's interests, but also care about labor's rights and interests in transnational mergers and acquisitions, while there is few scholar who has a depth and systematic study on the subject in current Chinese academic circles.

2. Connotations of Transnational M&A and the Definition Of Labor Rights

According to Black's Law Dictionary, "Merger" means "The absorption of one organization (esp. a corporation) that ceases to exist into another that retains its own name and identity and acquires the assets and liabilities of the former. Corporate mergers must conform to statutory formalities and must be approved by a majority of the outstanding shares. Also termed corporate merger "[6].

Stock merger is one of the most popular form of mergers in contemporary society. "Stock merger" means "A merger involving one company's purchase of another company's capital stock"[7].

The acquisition of enterprises is referring to a company buying stocks or assets of another enterprise by means of Cash, bonds and shares in order to acquire the rights for controlling the enterprise. This act is characterized by acquiring controlling power of management from the target company, while the target company reserves the status as a legal person. There are two main kinds of acquisitions: asset acquisition and stock acquisition. Transnational merger is a general name of cross-border merger and acquisition, which are referring to an enterprise of a state to purchase all assets or enough shares of another enterprise of another state by certain channels and means of payment In order to achieve certain goals. Foreign investor to conduct a merger or acquisition for stock ownerships of existing enterprises of host country fully or partially is acquiring controlling power of management to the enterprise. Transnational merger relates to enterprises of two or more countries, in which one is acquiring enterprise also called acquirer or attacking enterprise. The enterprise of another country was acquired enterprise also called target enterprise.

Labor right is an important constitutional rights of citizens. Paragraph 1st of article 3rd of Labor Law of the People's Republic of China rules: "All labors equally share rights of employment, to acquire labor reward, holiday entitlement, and labor safety, to accept skill training, social insurance, to apply for settlement of labor dispute, welfare and other legal rights."

The author thinks that labor right is the foundation of survival and development of human society as a fundamental right of labor. It refers to all labor related rights in the course of work. Labor right includes: the rational right to labor reward, rest, vacation, vocational training, social insurance, welfare, knowing, raising an objection, collective bargaining and other rights. The accomplish-

ment of labor rights is favorable to resolve problems of living, and social stability and economic development.

3. Case Analysis - Cases of Infringed and Protected Labor Rights in M&A

3.1. Summary of the Basic Content of the Case

The main situations of labor's rights had been infringed in the process of M&A are as follows:

Hiding the related information at the beginning of the M&A, which may invade the labor's right to know and the right to raise an objection for the M&A. Large numbers of employees could be fired during the process of M&A or after the M&A. Labors' working condition and reward may be reduced unfairly after the completion of the merger. And the lower monetary economic compensation paid to labors that was fired also can invade labors' rights to acquire fair labor reward. All of the above cases may infringe labor's lawful rights and interests in the related enterprises.

Chinese private enterprise Sany Heavy Industry Co., Ltd. and Aichtal, the German Putzmeister Holdings Ltd. announced officially that the acquisition was completed on April 17, 2012, which enhanced the duplicate effect of the brands of "the world's largest concrete machinery manufacturer" and "the world's first brand of concrete machinery" further[8].

The first protection during the process of the acquisition was held by German employees in January 30, 2012. Hundreds of German workers held a demonstration in the door of Putzmeister' headquarter in the day before Sany Heavy Industry announcing the acquisition. They worried about losing their jobs, also wanted to protest that they were kept in the dark and know nothing about the acquisition.

In January 31, 2012, Putzmeister Machinery Company promises that they don't layoff, which is because of the second protesting action by German workers. Sany Heavy Industry announces that they will purchase all Putzmeister's stock right. Hundreds of workers held a demonstration at the door of Putzmeister' headquarter. President of Sany Heavy Industry Xiang Wenbo promises that no one German worker will be fired, and both sides will increase employment by effective division of work and expand the production line of Putzmeister.

Compensation scheme was published in February 15, 2012, which was refused by hard protests of Chinese employees. Putzmeister Machinery (Shanghai) Co., Ltd. said in the letter to staff, "the acquisition between Putzmeister and Sany Heavy Industry will not cause negative impact to your employ-your working location stays the same and safe, and your labor contract and condition of employment will also stay the same." The open letter attach to solutions, and its main content as follows:

Solution 1: Employees' working condition, location does not change by the acquisition since the date of signing within 3 years. The company will pay monetary economic compensation to affected employees if any situation happens in the acquisition. The standard of the monetary economic compensation is N+4 of according to employees' wage (in which N is the accumulated length of service in the company under Putzmeister Group, and the calculation base is the pre-tax average monthly wage before 12 months of the day of the termination of the labor relation). The company shall compensate employees according to legal provisions if it terminate labor contract illegally.

Solution 2: The company to compensate employees with monetary economic compensation by N+0 in line with employees' wage. The company pays 40% compensation as the mentioned provisions above since the date of signing of the agreement within 30 days. The company pays the rest of the statutory standard of economic compensation (deducting 40% which has been paid) after the agreement was terminated within 10 days if the negative impact occurs within 2 years since the date of signing of the agreement. The scheme caused employees' objection, hundreds of them going to Songjiang District Government of Shanghai for protesting. Employees offered that the company shall conduct buy-out for their length of service, but the company refused. On February 19th, the issues were protesting by labors had been resolved because the company declared that they did not conduct layoff. Putzmeister' CEO Norbert Scheuch said the issue of protest had been solved. He promised that Putzmeister (China) do not layoff or pay cut.

3.2. Case Analysis on the Related Labor Rights

It can be seen clearly from the above case that different related rights and interests of labors were invaded in the process of acquisition of the enterprise:

1) labors' right to know was infringed in the transnational acquisition

There are potential commercial risks existing in the process of acquisition of enterprises. Many enterprises choose hiding the fact of the merger to ensure the merger is smoothly in order to pursue the benefit maximization because it is complex system engineering. It causes labors to know nothing about the transaction before the implementation even it is crucial to their fate. They know the enterprise where they worked acquired by other enterprise or acquired other company after the completion of the acquisition, but they missed the chance to suggest and express an opinion already, which caused a potential risk to labors of the enterprise. Once the acquisition completed and policies which adverse to workers' labor rights then nothing could help the situation. German workers held a protest in the front of Putzmeister's quarter in January 30, 2012 because the news of merger

was blocked by the enterprise, which enables their labor rights to have a potential threat.

The rights to know which was referring to employees of the acquiring enterprise and the acquired enterprise have the right to know the significant event which related to their benefits in the process of the merger. The protections of the right to know which allow employees to know the crucial information, and will allow them bring self-worth into full play, and to make more contribution to the enterprise and the society. Meanwhile, the right to know is also the foundation of realization of other rights. However, acquisition of enterprises is enterprises' business strategy in reality. It will increase merger risk if enterprises to inform employees too early. On the other hand, it will also cause panic of employees, because they worried about the losing of their interests due to the acquisition of enterprises, so that to affect enterprises' normal running. That also allows many enterprises to give up announce the merger, which was invaded labors' right to know.

2) The commitments in this case was favorable to protect the labor rights

The acquiring enterprise bound to conduct resource integration with the completion of mergers in the property and stock transactions and transfer because the acquisition of enterprises was not a simple process of transactions and transfers of property rights. Integration stage in the late stage mainly related to issues of layoffs. Layoffs can be divided in three reasons: structural, economical and optimizing. It will cause many personnel facing the pressure of unemployment and the losing of labor rights while bring enterprises with economic benefit whatever which layoff it is. In January 31, 2012, Putzmeister Machinery Company promises that they don't layoff, which was because of protested by German workers again. That avoided the situation of massive job cuts.

Employees' existing labor contracts can be inherited in this case. Many enterprises will terminate labor contract on the ground of merger cause the foundation losing of the labor contract, or to reduce wages, adjusting working positions on grounds of business difficulties. Putzmeister Machinery (Shanghai) Co., Ltd. promised in the letter to staff, "your employ and your working location stay the same and safe, also your labor contract and condition of employment will stay the same." in this case. This commitment is favorable to realize rights of labor protection acquired by labors. There shall be a relatively safe and stable environment for employment, and the labor shall get the corresponding labor reward, so that labors work in a stable environment and have nothing to worry about. However, the acquisition of enterprises will allow some of employees were put into a different position or the salary been cut, or the working condition was changed, which allow labors to face a dilemma, and their working condition is not guaranteed, and their sala-

ry unable to meet the needs of family life if they choose to stay.

It is in line with enterprise's intention if they choose to leave, and have to face the unfamiliar environment unwillingly.

3) *Issues of related economic compensation for labors after rescission of the labor contract*

The merger related enterprise ought to make agreements on employees' settlement and issues of compensation for the labor contract. However, merger related enterprises mutually making excuses in reality. They don't sign agreements about compensation or have agreements but do not pay compensation on time, so labors have to claim compensation by complicated judicial process. The corresponding economic compensation is lower frequently even if there is a corresponding indemnification clause, because these clauses are proceeding from enterprises' own interests. Putzmeister Machinery (Shanghai) Co., Ltd.'s employees don't accept the company's commitment in this event. Of course, there is interests of their respective starting points, so it should not criticize the enterprise lower employees' economic compensation blindly, but most compensation of enterprises are lower, which causes some dismissed employees falling into another dilemma of life.

4. The Legal Theories of Protecting Labor Rights in Transnational M&A

4.1. Meeting the Demands of Fundamental Human Rights

Labor right is the most fundamental contents of human rights which is including the rights to live and development, and all the countries in the world has reached an agreement about that generally. Simultaneously, transnational corporations infringe labors' fundamental rights indeed, which constitutes indirect responsibility of the International Human Rights Law. therefore, the Labor Law about transnational merger was designed to: how to protect labor rights, and to provide labors with conditions which is supporting to their work, and avoid negative impact caused by merger or provide them with legal support so that they pursuit personal lawful rights and interests. China's social and economic policy has shifted in recent years. To focus on the sound development of society which means protecting labors' lawful rights is the important contents of social development in the future. The shift is from pursuing the amount of GDP to pay attention to the interests of every citizen. And the standpoint in the international mergers and acquisitions will also turn to protection of laborers' rights from focusing on capital in the past. They are the most important subject in the process of the merger. It also embodies the Chinese thoughts of "people-oriented" in the field of merger.

4.2. Meeting the Demands of the Theory of Protecting Vulnerable Social Groups

Since the 20th century, the western countries start to establish a principle of conduct "inclined protection" to vulnerable social groups and conduct restrict to employers' act of layoff. Employees are belonging to vulnerable groups which are comparing to employers. Managements' absolute advantage enlarged the gap between the negotiation of labor and capital Government departments and the legislative branch have the responsibility to protect the interests of the weak party as they are community manager and maker of social rule. Therefore, Labor Law of every country make efforts to protect labor rights and enhance their strength in the dialog with the management with the value orientation, and give trade union the right to participate in enterprise decision.

4.3. Meeting the Requirements of the Theory of Corporate Social Responsibility

This theory is mainly designed to require enterprises assuming responsibility for the human society during the process that they pursuit the maximizing self-interest. Protecting labors' rights is one of the very important contents in this theory. Enterprises shall not settle the employees of merger enterprises only taking its own interests as starting point based on this theory, and can't dismiss the labor contract, layoff in the process of the implementation of the merger at will. It shall consider situations of the host country, such as unemployment, treatment of labors, and to assume responsibilities of labor welfare of the host country.

5. Shortcomings and Legal Suggestions of Chinese Law

5.1. Perfecting the Related Constitutional Regulations about Labor Rights

On the one hand, there are regulations in constitution of China relate to part of labor rights. The first paragraph of article 42nd of Constitution of the People's Republic of China rules: "citizens of the People's Republic of China have rights and obligations to work." The second, fourth paragraph of article 42nd rules: "the state creates conditions of employment to strengthen labor protection and improve working condition by various channels, and increases remuneration and welfare for labors on the basis of developing production". "States conducts the necessary labor and employment training before citizens' employment." Paragraph 1th, 2nd of article 43rd states: "labors of The People's Republic of China have the right to rest." Paragraph 3rd of article 45th states: "The state and society help arrangements for the work, livelihood and education of the blind, deaf-mutes and other handicapped citizens." Provisions of constitution of China made for the right to work in relation to employment,

labor protection, labor reward, welfare, employment training, rest and vacation and other contents, but lack of explicit rights provisions about other contents except the right to rest and vacation. However, China hasn't confirm some rights as constitutional rights, such as the right to equal employment, acquiring unemployment benefits, organizing, knowing, objection, collective bargaining, collective disputes, participation of democratic management, work, and other important contents.

Social development and personal cognitive ability are growing, changing and improving continuously generally, which causing the content of constitutional rights are changing with it as well, and it shall be regard as an open system, and the new content of constitutional right will generate at anytime[9]. The author suggests that there should add an important right and the legal concept of collective labor rights into Constitution of the People's Republic of China especially. "The existing of collective labor rights was designed to perfect the imperfection of individual labor rights, such an imperfection enlarges the gap between labors and management, and also unfavorable to labors pursuing labor rights[10]. Collective labor rights is the labor rights which is acquiring by worker organization's collective negotiation. It has many components, such as rights to organize, collective bargaining, striking and participation. There is a lack of clear provisions about the collective labor rights in Constitution of P. R China. Collective labor rights shall has a higher position in legislation layer as an important content of labor rights, and it shall be included in the constitution because there is a large gap between labors and capitalists, so the confirmation of collective labor rights in constitution is very necessary. Labors in the transnational merger can have more power to negotiate with transnational corporations after acquiring collective labor rights, which are favorable to defend their own rights and interests.

5.2. Improving the Fair Legal Procedures of Layoff

There are many situations permission layoff in Labor Contract Law of P. R China, such as significant technological innovation, the adjustment of the mode of the operation, objective economic condition occur significant change. There are no perfect and rational detailed state about layoff or prohibition of dismissal both in Labor Law and Labor Contract Law. For instance, the procedure about layoff rules employing unit shall report and explain the situation to administrative department for labors earlier 30 days if the layoff is more than 20 or more than 10% of its total, which means employing unit can conduct layoff to employees by avoiding the control of labor union and administrative department for labors at will if the layoff is less than 20 or less than 10% of the total.

It follows that there is a need to formulate a fair layoff standard to Labor Contract Law of P. R China. The author suggests that to allow enterprises to layoff only when the labor surplus is the main reason of enterprises' operating difficult, and the labor can adapt into the new position even undergo an adjustment and skill training, and the layoff is in order to dissolve enterprises' operating difficult. The submission of employing units' layoff-report shall inform administrative department for labor 30 days earlier. Secondly, employing units shall inform labor union about the reason, number, settlement of the scheme of the layoff, and to discuss with the labor union for how to avoid the layoff. The outcome of negotiation between employing units and labor union shall attach to the written report for Administrative Department for Labor, and the report shall contain a labor union's view about the layoff. The layoff will be invalid if there are no comments of the labor union or without discussing with the labor union.

5.3. Perfecting the Legal Protection for Labors' Right to Know and the Participation Right

Company Law of P. R China rules that companies shall take advice and suggestion of Company Union, and take advice and suggestion of employees by means of the congress of workers and staff or other forms. The enterprise to inform the merger to labors is a guarantee to labors' objection rights and Labor Contract of automatic succession. Labors can make the right decision to leave or stay only when they know the related information about the merger and have a fully understanding about that. Therefore, to suggest legislative stipulation that the enterprise shall inform employees the information about the time, reason of the transaction, and the consequences of law, economy and society for labors as well as the countermeasures for them, and the new enterprises' adjustment for the production and operation. It shall inform labors the facts even the new enterprise' policies of production and operation stay the same.

5.4. Improving the Independent Status of Labor Union in M&A

German Professor Detlev Joost, in *System and Basic Principles of German Labor Law* [11], summarizes the different characteristics of labor law is balance inequality powers between employees and employers. In the meanwhile, he thought that German has established some systems such as "collective contract" and "company worker committee" to protect the rights of employees when a business or part of a business passes to another owner by legal transaction. He points that the "company worker committee" has a wide range of right ("Mitbestimmung" in German language) to co-determine the companies' personnel and economic affairs, which has great significance for the protection of labor rights and

interests during companies' M&A and has a big different from the legal status quo of China.

The author thinks that Labor Union of China lack of sufficient independence due to its dependence of human resources and financial. The deficiency of independence is the biggest problem which enables it can't defense labors' benefits independently also can't play it role effectively. Consequently, Labor Union of China's most primary activities at present are organizing labors' participation in the studying of cultural skills, comfort-extending activities, competition activities and helping poor employees. The author suggests that to add provisions about the labor union to establish independent financial system to Trade Union Law, so that the Labor Union to get rid of the relations of dependence with enterprises in order to the Labor Union independent of corporate control. Meanwhile, the organizations of labor union should be given more autonomy in order to achieve labor union's function of participate in practical management of state-society, democratic management of enterprises and defend labors lawful rights and interests which given by Trade Union Law of The People's Republic of China, so that to balance the power between management and labors.

References

- [1] <http://business.sohu.com/20150115/n407810793.shtml>, the latest access time: April 10, 2015.
- [2] http://news.xinhuanet.com/finance/2015-01/28/c_127430324.htm, the latest access time: April 10, 2015.
- [3] Chuntao Yang, "The Present Situation of Mergers and Acquisitions and Analysis on the Legal Risk of Chinese Companies," People's Tribune, vol.23.2013.
- [4] Lin Sha, "The Study on Legal Risks Acquisitions Overseas Of China Companies," doctoral dissertation of Central South University, 2010.
- [5] Yaping Mu'paper, "National Security Review System of Merger and Acquisition Involving Foreign Capital of China," Chinese Journal of Law, vol.5.2009.
- [6] Editor in Chief, "Bryan A. Garner, Black's Law Dictionary, Standard Ninth Edition," West Publishing Co. in US, 2009, p.1078.
- [7] Editor in Chief, "Bryan A. Garner, Black's Law Dictionary, Standard Ninth Edition," West Publishing Co. in US, 2009, p.1079.
- [8] http://www.chinaequip.gov.cn/2012-04/18/c_131534857.htm, the latest access time: April 10, 2015.
- [9] Guo Yuejune, Lv Tiezhen, "Comparative Study on the Right to Social Security Confirm by Constitution," The Study of the Comparative Law, vol.1.2007.
- [10] Wang Kai, "Discussion on Labor Rights and Labor Obligations in Constitution of China," Jurisconsult, vol.4.2008.
- [11] Detlev Joost, "System and Basic Principles of German Labor Law," Journal of Dalian Maritime University (Social Sciences Edition), vol.9, No.2, April 2010.