

Borrelli 继续评论道，境内资产存在的问题，包括从初始阶段夸大商业价值，到滥用借款等诸多方面，也或许问题仅仅在于经济危机导致公司没有实现盈利目标。静观“后经济衰退”阶段的情况，或许有些借款决策是被误导的。他说：“坦白说，我们再也不会计经济下滑之前那样去借款了。”

黄律师认为现在很多紧抓重组这根稻草的投资者过于乐观，“他们很可能并没有就合同和法律保护措施进行谈判，如果他们预料到会发生经济衰退，他们肯定会谈判合同中的这些保护条款”。这导致了法律权利不足，这也是对境内子公司进行重足一般不太有可行性的原因之一。她总结说：“因为投资者缺乏这些法律权利，他们真正参与重组的可能性很小，比如说派某人去中国的工厂，并试图组建他们自己的管理团队或者干涉公司业务运营等。”

叶律师在年利达律师事务所的同事 Melvin Sng 说很少有客户会向她们的团队咨询业务重组方面的事情。“除了个例外，大多数中国的债务人不倾向于接受业务重组，而英国和美国的公司对业务重组却很熟悉。”

ing business is often not a feasible option. “Because they don't have those legal rights, it is less likely that they will try to get involved in an actual turnaround, [such as] sending in somebody to the Chinese factory to try to put their own management in place or influence operations”.

Yap's colleague Melvin Sng at Linklaters comments that their team rarely gets asked about the operational turnaround side of things. “In many instances, with the odd exception, PRC borrowers are not very receptive to the concept of turnaround management that companies in the UK and US have grown familiar with.”

For all of these reasons – and in the face of a widespread lack of appreciation that the turnaround process can breathe new life into a failing company – the operational turnaround skill set is still quite rare in China. But it is beginning to emerge, and not just among foreigners. Salzer at PwC identifies a couple of ‘types’ of Chinese people who are becoming turnaround specialists. The first type comprises those who have been senior managers in organizations in distress which they have succeeded in turning around. “They are the old guard who have managed very large organizations through difficult times. They are very tough and

鉴于所有这些原因，加上大部分都不了解重组可以拯救濒危公司，在中国重组专家非常少，但是他们已经开始出现，而且不限于外国专家。普华永道的 Salzer 指出了几类中国的重组专家。一类是曾力挽狂澜的公司高管。他说：“他们是那些设法使大公司内部度过难关的老领导，他们非常强硬，通常年纪较长。”第二类是学术专家。“他们经常以教授身份进入某些研究机构或其下属智库，并由智库派入公司进行管理。”他还指出国家资产管理委员会的某些人员已开始具备重组方面的技能。

在普华永道，Salzer建立了一个“重组专家小组”，他们定期在北京、上海、香港和新加坡见面讨论。目前，参与者仅限于已领导过三个以上重组项目的高级专家，或者聘请他人进行过三个以上重组项目的高级专业人士。由于债权人和公司管理层逐渐意识到进行重组的可能性，有能力参与重组项目的人员数目将势必增加。而且重组工作看起来至少会带来成就感。“很难用语言描述重新掌握控制权的感觉，”路宇谈到她最近在中国西部的“斗争”经历时说，“有一个公司员工在亲历了整个事件的戏剧性发展后说，这象在‘见证奇迹’。” ■

they tend to be older. They gain a reputation that takes them from one project to the next one to the next one,” he says. The second type is of people who emerge from academia. “They quite often come through as professors and move into design institutes or think tanks alongside, then out of those think tanks they are taken into organizations to run alongside management,” he continues, and also notes that there are some individuals in the State-owned Assets Supervision and Administration Commission who have begun to develop a turnaround skill set.

At PwC, Salzer has started a ‘turnaround community’ which meets regularly for dinners and discussions in Beijing, Shanghai, Hong Kong and Singapore. Currently, attendees are limited to senior professionals who have led three or more turnarounds, or have engaged professionals to conduct three or more turnarounds. As lenders and managers wake up to the potential of turnaround, the number of people qualified to attend is surely set to increase. The work seems, at least, to offer job satisfaction. “It is difficult to describe the feeling of regaining control of the business,” says Luka Lu of her recent battle in western China. “One member of the company’s staff described it as ‘a miracle coming true’, after witnessing the dramatic development of the events”. ■

Practitioner's perspective

Foreign involvement in crisis financing



Davis Wang

Provisions in the new *PRC Enterprise Insolvency Law* regarding restructuring, debtor-in-possession financing and other related procedures provide opportunities for foreign involvement in crisis financing in China, including the reorganization of entities in crisis. However, the implementation of these provisions is fraught with difficulty.

Under current Chinese law, a foreign investor who wishes to be involved in crisis financing in China has to be aware of several issues, such as property ownership restrictions, foreign investment approvals and anti-monopoly assessments.

According to the *Direction of Foreign Investment Regulations* recently published by the State Council, there are still four categories of foreign investment: encouraged, permitted, restricted and prohibited. Individual industries may also impose strict requirements on the qualifications or investment ability of foreign investors.

A foreign investor wishing to acquire a Chinese entity must have prior approval from the Ministry of Commerce, regardless of whether it is an asset or a share acquisition. With regard to direct investments, the legal basis for approvals are the *PRC Company Law* and the *PRC Sino-foreign Joint Venture Law*. There are also regulations governing how foreign and Chinese investors acting jointly should acquire Chinese entities, such as general principles under the *Acquisition of Chinese Entities by Foreign Investors*

Regulations (Regulation 10), and specific regulations in relation to acquisition of listed companies and of entities in specific industries.

The foreign investor should be aware of possible monopolistic behaviour resulting from the acquisition. Since the implementation of the *PRC Anti-Monopoly Law*, the main legal basis against monopolistic behaviour is the *State Council Application for Approval by Parties Acting in Concert Regulations*.

The effect of scrutiny and approvals

Under the *PRC Enterprise Insolvency Law*, a debtor or insolvency practitioner must, within six months of the People's Court approving the restructuring of the debtor, submit a draft restructuring plan to the court and a creditors' meeting. The restructuring plan is the most important legal document in the restructuring process. It is, essentially, an agreement between various interested parties in relation to the issues which may arise under a restructuring of the debtor's liabilities. In practice, the court requires the plan to be as detailed and practical as possible.

If the debtor or insolvency practitioner fails to submit the draft restructuring plan in time, the court can order the termination of the restructuring, and declare the debtor insolvent.

In practice, it takes a long time to obtain the approvals necessary for foreign investment in the restructuring of a company under a restructuring plan. Gaining approval from the Ministry of Commerce alone may take two to three months. If industry-specific approvals are also needed, the whole process may well take more than the six months allowed for the submission of the restructuring plan. In addition, the uncertainty of the approval process also has adverse effects.

Although the debtor cannot control the time it takes for a foreign investor to obtain the required approvals, it can adopt certain measures to alleviate the problem. Firstly, before the restructuring plan is drawn up, the debtor should openly communicate with the approval departments concerned, to ascertain the viability of the proposed restructuring. Secondly, even though the proposer of the plan does not normally require great detail regarding the foreign investor, sufficient detail should be included to enable the court to approve it.

If a foreign investor already has a presence in China, it may consider using one of its existing entities as the restructuring vehicle. However, although the existing foreign enterprise is established and exists according to Chinese law, this will not exempt it from the approval requirements which are generally applicable to foreign investment.

Investment in a restructured listed company

A foreign investor wishing to invest in a listed company must comply with special regulations. In particular, when it comes to investing in a listed company which is being restructured, there are specific issues concerning obtaining investment approvals.

Article 6 of the *Strategic Investment by Foreign Investors in Listed Companies Regulations* states that a foreign investor investing in a restructured listed company must

satisfy the following conditions: (1) it must be a legal person or other entity which is legally constituted and managed, with sound finances, good reputation and credit history, and solid management experience; (2) it or its parent company must have foreign assets of no less than US\$100 million, or it must manage foreign assets of a value of no less than US\$500 million; (3) it must have a sound management and internal control system; and (4) it and its parent company must not, within the past three years, have had any significant sanction imposed on them by any regulatory authority (whether in China or abroad).

In addition to satisfying the above conditions, a foreign investor investing in a listed company must obtain the approval of the Ministry of Commerce and/or the regulatory body of the relevant industry, as well as the approval of the China Securities Regulatory Commission. Such complex approval procedures have deterred a lot of potential foreign investors in listed companies which are being restructured, to the extent that there has not been a single case of a foreign investor having successfully invested in a listed company which is being restructured.

A major reason for this is the strict criteria required for a listing in China, which have made listed status a rare resource (or what is known as a “shell resource”). The use of listed “shell” companies has rendered the insolvency restructuring of a listed company a mere theoretical discussion. In reality, it is rare to see a restructuring truly reviving and continuing the business of a listed company. Mostly, what is achieved is an asset reorganization in which entirely new assets are injected into the “shell”, even if the restructured listed company has, in essence, changed beyond recognition.

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