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中国要创新 知产是核心



China strives to innovate

Intellectual property comes under the spotlight



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离岸法域
抢滩中国市场

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fight for business

公司法
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专家策略

中国对外投资和BVI公司的角色

中国投资者越来越关注海外投资机会,以期借此开辟新市场、引入先进技术及促进品牌发展。即便在全球金融危机时期,中国的对外投资活动依然有增无减,“不差钱”的中国企业更是借机以低成本大举购入外国资产。中国在亚洲、澳大利亚、非洲和拉美等地进行投资的目的之一是获得自然资源,以满足中国国内需求。当然,在美国、英国等发达市场的品牌收购项目中也不乏中国投资者的身影。

近年来,通过设立于英属维尔京群岛(BVI)的公司开展对外投资的做法在中国企业中日渐盛行。BVI公司没有任何企业税、利得税或所得税的负担,在BVI本地也无须缴纳印花税等与交易或文件相关的税项。

合资形式的BVI公司

BVI公司可作为投资海外市场的合资载体,由中国投资者和其他国合作伙伴共同持股。在BVI设立合资公司的优势之一是可以为合资双方开展业务提供一个中立区域。举例而言,在中国公司和巴西公司设立的BVI合资公司中,双方均持有股份并向合资公司的董事会指派董事。合资公司及任何股东协议均受BVI法律管辖。这意味着,任何一方都无法以地利之便,凭借熟悉当地法律或商业惯例而占据上风。从商业角度上讲,这样才能确保任何一方不会以其与当地政府官员的关系而近水楼台先得月。这无疑是中国在某些新兴市场开展对外投资需要考虑的一个因素。

董事职责

董事是合资公司管理架构的一个重要方面。合资公司的各方投资者都会要求在合资公司董事会中占据至少一个席位。除却BVI破产法律所述的董事职责和普通法中的董事职责以外,2004年《BVI商业公司法》(BVI Business Companies Act 2004)也对董事的主要职责作出了规定。关于合资公司董事的最重要的一项规定,同时也是BVI公司的特殊之处,就是公司的组织章程大纲及章程细则中可规定,BVI合资公司的董事可以以合资公司一名或多名股东的最大利益行事,而不论该等行动是否符合合资公司的最大利益。当某一股东要求其董事以特定方式行事时,这一规定较为实用。

控制投资风险

多数设立BVI公司的中国投资者都会确保其所承担的责任以其投资金额为限。例如,中国公司设立一家BVI公司并对其投资,使BVI公司能够在境外开展贸易业务。作为投资回报,中国公司获得BVI公



Peter Tarn



Ian Mann

司的股份。在投资失败并导致亏损的情况下,如果BVI公司为有限责任公司形式,则中国公司所承担的损失不会超出其投资金额。

首次公开招股

BVI公司也可作为在香港、伦敦或纽约等成熟的金融中心进行融资的“利器”。只要稍加调整,BVI公司就可以变身为符合成熟型股票市场监管要求的上市工具。无本土证券法掣肘的BVI公司只需要满足目标市场的要求。2009年,在BVI政府与中国政府签订税收信息交换协议之后,香港交易所宣布允许BVI公司在香港上市。此政策一出,旋即就有首家BVI公司股份在香港成功挂牌上市。

持有资产的工具

出于税务效益的考虑,BVI公司也常作为持有不动产等资产的工具。中国投资者如果通过BVI公司在美国等地购入财产,则BVI公司可受益于财产的增值,并可获得财产所产生的收益。BVI公司出售不动产无需缴纳资本利得税。

有效的争议解决机制

随着BVI公司受到中国对外投资的热捧,BVI商事法庭也常常接触与中国对外投资有关的争议。在各个投资领域,如刚果(布)的铁矿项目和印度尼西亚的煤矿项目(仅为其中区区两例),都有BVI合资公司投资人向BVI法庭寻求保护。BVI法律规定,BVI公司的股东可通过BVI法庭所给予的一系列救济获得保护。例如,股东可申请遵守令(compliance order),强制相关方遵守公司章程的规定或对其违反章程规定的行为加以制约。如果股东认为公司事务的处理方式存在或可能会存在压迫、不公平的歧视或不公平的损害,则可在BVI法庭提起所谓的“关于不公平损害的法律程序”(Unfair prejudice proceedings)。在此情况下,BVI法庭有权对公司实施清算,或要求大股东以公平合理的价格收购小股东的股份。

Peter Tarn是衡力斯律师事务所伦敦办公室合伙人。您可通过以下方式与他联系,电话:+44 (0)20 7842 6082,电子信箱:peter.tarn@harneys.com

Ian Mann是衡力斯律师事务所英属维尔京群岛办公室诉讼和破产业务部律师。您可通过以下方式与他联系,电话:+1 284 494 4310,电子信箱:ian.mann@harneys.com

将不予考虑。

律师认为，如果公司不希望被划入不予考虑之列，则须向中国税务机关证明非居民企业从事“实质性经营活动”。“实质性经营活动”的存在有七大标志：在税收协定缔约对方境内设有实体办事处；在当地招聘雇员和公司董事；在当地银行开立并维持账户；在当地召开董事会会议；公司记录保存于该实体办事处；办事处在当地税务机构办理税务登记；以及在当地作出管理决策。

据律师们分析，两份通知的意图并非禁止使用离岸法域，而只是对滥用离岸法域的现象加以遏制。“离岸工具的滥用，尤其是中国企业滥用离岸工具进行返程投资的情况已引发关注，”毅柏律师事务所香港办公室合伙人胡麟斯解释说。

招兵买马

在努力适应更为严峻的监管环境的同时，离岸法域的律所开

“substance over form” principle in deciding whether a non-tax-resident enterprise is a beneficial owner (and therefore subject to tax). Circular 601 covers dividends, royalties and interest. Under 601, a special purpose vehicle (SPV) established outside China will be disregarded for determining country of residence if the SPV has a limited function.

Lawyers advise that if companies want to avoid the “limited function” description, Chinese tax authorities must be able to identify “substantive business activities” in non-tax-resident enterprises. There are seven major identifiers: a physical office is located in that treaty jurisdiction; local employees and corporate directors are hired; a local bank account is opened and maintained; board meetings are held in that jurisdiction; corporate records are kept in the physical office; the office is registered with local tax authorities; and management decisions are made in that jurisdiction.

Lawyers also say the circulars are not meant to discourage the use of offshore jurisdictions, only their abuse. “There was concern about the misuse of offshore vehicles, especially by PRC nationals for round-tripping,” says Frances Woo, a

Practitioner's perspective

Chinese outbound investment and the role of the BVI company

Chinese investors are increasingly looking abroad for investment opportunities to gain access to new markets, advanced technology and brand development. Chinese outbound investment has grown even during the financial crisis which, for cash-rich Chinese companies, has provided a market for lower-cost foreign asset acquisitions. Access to natural resources has been a driving force behind Chinese outbound investment in Asia, Australia, Africa and Latin America to meet China's domestic demand. However, Chinese investors have also engaged in brand acquisitions in developed markets such as the US and the UK.

In recent years, it has been an increasingly popular practice for Chinese companies to conduct outbound investment through companies incorporated in the British Virgin Islands (BVI). A BVI company does not attract any corporate, profit or income tax and is not subject to any transaction or document-based taxes such as stamp duty in the BVI.

Joint venture BVI companies

BVI companies can be used to establish a joint venture (JV) vehicle to invest in an overseas market. Chinese investors can jointly own the JV with a partner from another country. One advantage of establishing a JV in the BVI is that it provides neutral ground for doing business with foreign companies. A company in China and a company in Brazil could establish a BVI JV in which each has a shareholding and each has certain appointed directors to the board. BVI law would govern the JV company and any shareholder agreements, which means that neither JV partner would have the benefit of better knowledge of the local laws or business customs. In turn, it makes good

commercial sense to ensure that the JV vehicle is established in a jurisdiction where one's partner is not in a position to use local influence with government officials to its advantage. This can be a legitimate cause for concern for Chinese outward investment in certain emerging markets.

Directors' duties

A key consideration in the management of any JV is the role of directors. Each investor in a JV company is likely to insist on having at least one representative on the board of directors of the JV vehicle. Supplemental to the duties of a director set out in the BVI insolvency legislation, and common law directors' duties, the BVI Business Companies Act 2004 codifies the principal duties of a director. The most significant provision in relation to JV directors is that a BVI company has the unusual ability to include a provision in its memorandum and articles of association which provides that a director of a BVI JV can act in the best interests of one or more shareholders of the JV, regardless of whether such actions are in the best interest of the JV itself. This is useful in the situation where a particular shareholder requires a director to act in a certain manner.

Limiting investment risk

Many Chinese investors set up BVI companies to ensure that liability is limited to the amount invested. For example, a Chinese company might set up a BVI company and invest money in it so that the BVI company can carry out trading operations overseas. In return for the money invested, the Chinese company

始招兵买马，网罗英才。2010年底，衡力斯律师事务所增聘了三名律师，分别是陈清清、郭家慧和赵菲菲。他们的加盟使该所香港办公室律师人数增至八人。郭家慧表示，衡力斯将其招至麾下说明公司“加大了开拓中国业务的力度”。

其他律所也在关注这一地区。“亚洲对于我们的发展战略至关重要，我们在这方面已部署了一些重大举措，”Ogier首席执行官 Nick Kershaw 在今年一月宣布 James Bergstrom 出任该所香港办公室执行合伙人时说。“我们的香港办公室是发展最快的业务区，”他补充道。

扩充人员的一个主要原因是，离岸法律中心正日渐成为中国公司的宠儿。去年10月，北京的永晖焦煤股份有限公司成为首家在香港交易所（港交所）上市的BVI注册公司。“毫无疑问，BVI公司因为能够在港交所上市，成了市场关注的热点，”Plowman说。

包括Ogier在内的一些律所正在加紧筹备一系列上市项目。Plowman补充道：“我认为这一需求将会持续升温。亚洲BVI

Hong Kong partner at Appleby, an offshore firm.

Building capacity

While learning to adapt to a tougher regulatory environment, offshore firms appear to be building capacity. At the end of 2010, Harney Westwood & Riegels (Harneys) hired three lawyers – Cheng Cheng Tan, Kane Guo and Zhao Feifei. Their arrivals bring to eight the number of lawyers based in the firm’s Hong Kong office. Guo says his hiring by Harneys reflects the firm “expanding its focus on China”.

Other firms are also focusing on the region. “Asia is critical to our growth strategy and we have already made significant steps in this regard,” Nick Kershaw, chief executive of Ogier, said in announcing James Bergstrom’s appointment as managing partner of its Hong Kong office in January. “Our Hong Kong office is the fastest growing in the group,” he added.

One major reason for the staffing increase is the rising use of offshore legal centres by Chinese companies. Last

will receive shares in the BVI company. If the investments go wrong and the BVI company makes a loss, the Chinese company will not lose more than it has invested because the BVI company is set up as a limited liability company.

Initial public offerings

Equally, a BVI company is a useful tool to raise capital in established finance centres such as Hong Kong, London or New York. The BVI company can be used as a listing vehicle because a BVI company can be tailored to meet the regulatory requirements of established stock markets with relative ease. The BVI does not have any of its own securities laws and therefore the BVI company need only reflect the requirements in the chosen market. In 2009, the Hong Kong stock exchange announced that it would allow BVI companies to list. The move followed the BVI government signing a tax information exchange agreement with China in 2009 and quickly led to the first initial public offering of the shares of a BVI company in Hong Kong.

Asset holding vehicles

For tax efficiency reasons, BVI companies are also regularly used as asset holding vehicles for assets such as real property. Chinese investors use BVI companies to acquire property in places such as the US, which means that the BVI company benefits from any increase in the value of the property and also receives any income that the property is able to provide. When a BVI company disposes of real property, it is not subject to tax on its capital gains.

Confidence in dispute resolution

A result of the popularity of BVI companies for Chinese outbound investment is that the BVI Commercial Court is well used to dealing with disputes arising from Chinese



Peter Tarn



Ian Mann

investments around the world. BVI JV partners have sought the protection of the BVI court in relation to investments such as iron ore projects in the Republic of Congo and coal mines in Indonesia, to name but two examples. BVI legislation provides protection to shareholders of BVI companies by granting a suite of possible remedies from the BVI court. A shareholder can apply for a compliance order, for example, which is an order to enforce compliance with the provisions of the constitution of the company or to restrain conduct in contravention of it. Unfair prejudice proceedings are also available in the BVI court in circumstances where a shareholder considers that the affairs of the JV company have been, or are likely to be, conducted in a manner that is oppressive, unfairly discriminatory or unfairly prejudicial. In such circumstances the BVI court has, for example, the power to wind up the company or require a majority shareholder to buy out a minority at a fair and reasonable price.

Peter Tarn is a partner at Harneys in London. He can be contacted on +44 (0)20 7842 6082 or by email at peter.tarn@harneys.com
Ian Mann is an associate, litigation and insolvency, at Harneys in the British Virgin Islands. He can be contacted on +1 284 494 4310 by email at ian.mann@harneys.com