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Structuring considerations for takeovers of BVI companies

Insights - 07/01/2022

BVI law provides for a number of structuring mechanics which can be used to structure a takeover bid in addition to a simple offer for all the shares. A point of note for BVI takeovers is that there is no legislation specifically regulating takeover bids, such that the regulation of a bid will have three sources, common law, in statute under the BVI Business Companies Act 2004 (the "Act") and the target company's memorandum and articles of association (the "Articles") (although the continuing obligations for the particular stock exchange upon which the target company is listed will also be relevant).

Additionally, there is no prohibition on the use of poison pills defenses by a BVI target company, such that provided the poison pill is properly provided for within the Articles, in the event of a hostile approach, a poison pill defense can legitimately be invoked. For a company looking to defend itself from a potential hostile approach by amending its Articles to provide for a poison pill defense, an important consideration for the directors will be the need to ensure that, in approving the requisite amendments to the Articles to provide for the poison pill, they do not breach their fiduciary duties to act in the best interests of the company.

In structuring a BVI takeover, the principal structuring options are as follows:

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Following an offer for all of the shares, a bidder having acquired 90 percent of the shares can (but is not required to) elect to "squeeze out" the minority shares under Section 176 of the Act. The "squeeze out" is structured as a compulsorily redemption of those shares. Shareholders whose shares are being "squeezed out" are however able to exercise dissent rights under Section 179 of the Act. These dissent rights are, significantly, limited to the ability to dissent from the price being offered and receive "fair value" as determined by independent appraisers, rather than a right to block the transaction.

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A Section 179A scheme of arrangement is not dissimilar to the English law equivalent and schemes have been successfully used in relation to acquisitions of BVI companies in the past, including Amber Petroleum Ltd's reverse takeover of AfNat Resources Limited. Under a Section 179A scheme of arrangement, once approved by a majority in number representing 75% by value of the BVI company's shareholders present and voting at a Court convened meeting and then sanctioned by the Court, the scheme will be binding on all shareholders.

Significantly, the dissent rights provided for in Section 179 of the Act are not available to shareholders in a company subject to a Section 179A scheme of arrangement, which is a clear attraction of the use of a Section 179A scheme of arrangement in BVI takeovers.

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A Section 177 plan of arrangement is similar to a Section 179A scheme, however there are some significant differences worthy of comment, one being that a Section 177 plan of arrangement can be instigated by the directors making an application to the Court. A further distinction is that, significantly, shareholders subject to a Section 177 plan of arrangement do have dissent rights under Section 179 of the Act and so, despite clearing the relevant shareholder approval threshold to satisfy the Court, it may still be necessary for a bidder to cash out those shareholders who elect to dissent from the proposed arrangement.

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A further structuring tool which is popular for takeovers, particularly in the US market, is the use of the statutory merger regime under Sections 170 to 174 of the Act, pursuant to which two or more BVI companies (or a BVI company and a foreign company provided that the laws of the jurisdiction of the foreign company permit a statutory merger) can merge in accordance with a procedural process involving approval by each respective companies' directors and shareholders of a plan of merger and the filing of this plan of merger, together with articles of merger, with the Registrar of Corporate Affairs in the BVI.

Following a statutory merger, with effect from the effective date, the assets and liabilities of each constituent company automatically vest in the surviving company, whilst the shareholders receive the merger consideration in exchange for their shares. Shareholders again have dissent rights under Section 179 of the Act.

A virtue of structuring a takeover as a merger is that the threshold for shareholder approval of the transaction will, subject to the Articles, be a simple majority.

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