Strelia M&A Series

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David and Goliath - How Minority Investors Can Arm Themselves

Minority investments are certainly on the rise. They enable established players to accelerate the digital transformation of their business or facilitate PE houses in getting businesses ready to ride out the post-pandemic world. When investors invest in minority stakes, they want to protect their investment, control their exit, and also up their game against the majority shareholder. To do this, minority investors should understand the rights that are and are not available to them under the law, the Belgian Code on Companies and Associations (BCCA), and have additional protection stipulated in shareholder agreements and the company's articles of association (AoA). Investors can also resort to courts to seek relief by invoking their rights under company law. These rights take the form of protection against dilution, the right to appoint directors, the right to sue and seek remedies on behalf of the company, rights to participate in decision-making, specific rights when a company is experiencing financial difficulties, and the rights against other shareholders. This last category of minority shareholder rights is our focus in this Strelia M&A Series. Understanding these rights and strategically devising a plan on how and when to use them will be vital to the minority investors' success in dealing with majority shareholders.

Exiting

Minority investors holding at least 30% of the voting rights or the economic rights of the securities may seek exclusion of another shareholder if there is "just cause" for the exclusion and if it can prove that it has made unsuccessful attempts to resolve a conflict or that there are no other means to resolve it. They may also seek to be withdrawn from the company, without the need to meet the 30% threshold, in which case the "just cause" being invoked should relate to the other shareholder. The BCCA allows minority investors in non-listed BVs/SRLs the right to withdraw or exclude a shareholder at the company's expense if the company's AoA explicitly provide for this. The conditions for such exclusion or withdrawal should preferably be detailed in the AoA, as the default rules are rather onerous. The board of directors decides on shareholder withdrawals, whereas in principle, the general meeting is the body that decides on shareholder exclusions. A minority investor who wants to withdraw at the company's expense does not need to prove it has "just cause" to do so, but this would be required if it seeks the withdrawal at the expense of another shareholder. Conversely, if the minority investor wants to exclude another shareholder at the company's expense, it must prove "just cause" or prove the occurrence of a trigger event that is described in the AoA.

Minority investors that are squeezed out by a majority shareholder holding 95% of shares carrying voting rights in the framework of a stand-alone bid or a public takeover bid are offered protection under the BCCA.

Another way for minority investors to exit the company is through a disproportionate capital decrease (in an NV/SA) or equity distribution (in a BV/SRL). This procedure requires a unanimous vote from all shareholders. For the BV/SRL, a net-asset test and liquidity test are required. There is also a similar ad hoc mechanism in the form of a share buyback. The disproportionate share buyback also requires the shareholders' unanimous decision in addition to the fulfillment of other formalities under the BCCA. The advantage of using these mechanisms is that, just as the exit procedures described above, that can be pursued at the company's expense, hence the company—and not the shareholders—is funding these types of exit transactions.

Finally, minority investors should not forget that there are other exit arrangements at their disposal, which they could negotiate and have them in shareholder agreement and/or the AoA. These include put- and call options, tag-along and drag-along rights.

Seeking nullity of a resolution or filing for company wind-up

Minority investors have the right to apply to the court for certain kinds of relief. For example, they can seek nullity of a resolution made by a corporate body, and minority investors in an NV/SA and a BV/SRL can apply to the court to wind up the company if there is a lawful cause for it. The BCCA defines the term lawful cause non-exhaustively, and case-law has held that a lasting disagreement between shareholders, whereby any form of cooperation or buyout becomes permanently impossible, resulting in a company's normal operation to a standstill is a lawful cause. Despite this definition, it is still up to the court to determine if there is a lawful cause to wind up the company, given the severity of the measure.

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