BNA International

Corporate Restructuring

International Information for International Businesses

Defending Against a Hostile Takeover

Kirill Andrianov
Frishberg & Partners, Ukraine

This article has been published in the August 2006 issue of
BNA International's *Corporate Restructuring*

www.bnai.com

BNA International Inc., a subsidiary of The Bureau of National Affairs, Inc., Washington, D.C., U.S.A.

Ukraine

Defending Against a Hostile Takeover

Holding your ground against a brutal hostile takeover is never easy. In Ukraine, defending against hostile takeovers is an especially challenging task, which requires comprehensive strategic and tactical steps not only in the legal arena. In addition to increasing internal and external security measures, in today's corporate world a company's management must perform careful market analysis and public relations campaigns, while undertaking all the necessary legal steps to solidify its position in the face of a hostile takeover. Below we shall limit our discussion to the legal arena only.

From a legal point of view, strategic (and thus, the most effective) steps may include *inter alia*:

- choosing a corporate form that provides the effective owner with more control over the company's business activities (LLC or closed joint stock company);
- creating a corporate structure subordinate to the owner (accumulation of at least 51 percent or, where possible, 76 percent of the stock);
- limiting management authority (by means of meticulous charter drafting) to effectuate principal decisions concerning the company's assets and debts without the owner's consent;
- transferring principal assets of the company (land, buildings, equipment, *etc.*) to friendly (usually non-resident) companies that are completely controlled by the owner with due regard to corporate legislation in relevant foreign jurisdictions in such cases;
- providing a strict mechanism of control over the company's debts, etc.

Relations between the owners should be formalised in relevant corporate documents, as conflicts between owners are often used as a tool in a hostile takeover.

In such cases, a few simple tactical measures could prove to be highly effective, such as:

- counter-purchasing minority shareholders' shares;
- issuing additional shares to dilute any shares controlled by the aggressor;
- fixing the controlled stock by investing it in the authorised capital of a friendly LLC or CJSC;
- subjecting the company's assets to encumbrance by friendly entities, which are controlled by the owners;
- alienating assets to friendly entities, etc.

Unfortunately, in many cases there is very little chance of avoiding the hostile blows after the attack has already commenced. Sometimes a hostile takeover is accompanied with an arrest of the company's assets by a court, taking the owners completely by surprise. In such cases, an aggressor probably already controls the minority shareholders, management and/or stock of the company. In situations like this, nothing can be done.

In today's uncertain legal and political climate, no measure can provide an investor with 100 percent guaranty protection from a hostile takeover attempt.

Kirill Andrianov is an associate with Frishberg & Partners, specialising in M&A activities.

Kirill Andrianov
(E-mail: kirill@frishberg.com.ua)
Frishberg & Partners, Ukraine

  CR ISSN 1744-747X