# M&A Litigation

*Contributing editors*
**William M Regan, Jon M Talotta and Ryan M Philp**

Hogan Lovells

2018

GETTING THE DEAL THROUGH

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# Preface

## M&A Litigation 2018

First edition

**Getting the Deal Through** is delighted to publish the first edition of M&A Litigation, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to William M Regan, Jon M Talotta and Ryan M Philp of Hogan Lovells US LLP, the contributing editors, for their assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH

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# Introduction

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**Hogan Lovells US LLP**

M&A transactions typically are transformational corporate events. From comparatively small private company transactions involving tens of millions of US dollars, to the largest multinational public company deals worth more than US$100 billion, the purchase or sale of any company involves significant risks and many uncertainties. M&A transactions impact the participants – directors, officers, employees, stockholders, creditors and customers – at every level of the corporate enterprise. And even the most strategic and well-planned M&A transactions sometimes fail to deliver the economic benefits that the parties anticipated at signing. These factors individually and collectively make M&A transactions ripe for litigation.

M&A litigation also raises many important policy issues, ranging from the appropriate role of corporate directors and stockholders both in making business decisions and in pursuing internal corporate misconduct, to the enforceability of contract provisions allocating various risks in connection with private company deals. The individual chapters that follow this introduction summarise how key jurisdictions around the world address these policy issues, and the extent to which they permit, encourage or limit M&A litigation. A survey of these chapters reveals a number of significant similarities, but also a number of important differences.

**Common themes in global M&A litigation**

Across common law and code law countries, there are a number of striking similarities with respect to how different jurisdictions address M&A litigation issues. For example, nearly every country addressed in this book expressly or impliedly embraces some form of what in the US is called the 'business judgment rule'. Whether characterised as a formal legal presumption or simply the inherent reluctance of judges to interfere with discretionary business decisions, jurisdictions around the world show a strong tendency to protect or defer to corporate decision-making in the M&A context where the board acts in good faith, on an informed basis and without conflicts of interest.

Similarly, nearly every jurisdiction requires that corporate actors in the M&A context comply with some variation of the duty of care and the duty of loyalty. To uphold a challenged M&A decision, courts broadly require that directors and management make decisions on a fully informed basis, acting with the care of a reasonably prudent person under the applicable facts and circumstances. Jurisdictions consistently require that corporate representatives disclose or avoid conflicts of interest, such that M&A decisions are made in good faith in the best interests of the corporate enterprise, and not in the personal interests of any individual director or officer.

Another commonality across jurisdictions concerns the impact of a stockholder vote. After a board has approved an M&A transaction, separate approval by the stockholders is often required before the transaction can close. In most jurisdictions, where the stockholder vote is made on a fully informed basis, subsequent claims challenging the deal or the directors' conduct in connection with the deal typically will be barred. This may be under a theory that the stockholder vote 'ratified' the board's decision, that the vote 'cleansed' the transaction of any fiduciary duty issues or that stockholders are 'estopped' from challenging a transaction approved by a majority of investors.

One final recurring theme is that nearly every jurisdiction applies additional scrutiny with respect to responsive or defensive measures taken by a board in response to unsolicited takeover proposals. Some jurisdictions impose heightened judicial scrutiny on such measures, while others require separate stockholder or regulatory approval. But in all cases, jurisdictions recognise the increased risks and potential conflicts when a board acts in response to an unsolicited offer.

**Notable differences in M&A litigation across jurisdictions**

There also are a number of stark differences in M&A litigation across jurisdictions. For example, outside of the United States, few jurisdictions allow individual stockholders to pursue broad class or collective actions on behalf of all similarly situated investors, and, in particular, few jurisdictions permit class actions that require investors to affirmatively 'opt-out' to avoid being bound by a judgment. Jurisdictions also vary significantly on the extent to which they permit individual investors to pursue 'derivative' actions to recover damages incurred by the corporation (some allow broad derivative rights, some do not recognise the procedure at all, and still others provide for minimum ownership requirements or court approval before an investor will be permitted to proceed).

Similarly, few jurisdictions permit stockholders to take broad pre-trial discovery in M&A litigation, although most recognise some form of a books and records inspection right. The majority of courts also limit the ability of corporate defendants to resolve M&A litigation through early dispositive motion practice.

Jurisdictions also follow significantly varying approaches with respect to whether a corporation may limit liability for directors involved in M&A transactions through exculpatory by-law or corporate charter provisions. Some jurisdictions broadly allow such provisions; others find them void as against public policy; and others permit them for certain types of claims (eg, claims sounding in ordinary negligence or claims by outside third parties).

One final notable difference is the extent to which jurisdictions permit corporations to require stockholders to bring M&A litigation in particular forums. Certain jurisdictions permit corporations to mandate that stockholders bring M&A litigation in particular courts or even in arbitration, while others apply their general jurisdiction and venue rules.

**Conclusion**

Public company M&A litigation is most common in the United States and certain other countries discussed in this book. This appears to be because of class action and discovery mechanisms that permit an individual investor to pursue claims on behalf of other similarly situated investors. It is important to note, however, that US public company M&A litigation is currently undergoing significant changes. Certain leading courts have changed the law to afford greater deference to arms-length transactions approved by a stockholder vote. These changes appear to have brought US law more in line with that of other jurisdictions permitting collective actions. Following these decisions, there has been a slight reduction in the overall number of suits filed, along with changes to the types of claims being asserted and the venues where cases are being filed. The ultimate impact of these recent changes remains to be seen, however, both within and outside the United States.

# Germany

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**1 Identify the main claims shareholders in your jurisdiction may assert against corporations, officers and directors in connection with M&A transactions.**

Apart from situations in which shareholders are a party to a transaction (ie, as sellers) and have all the respective rights and duties, shareholders typically assert claims in three types of cases: lack of information or disclosure; violation of stipulations that protect the shareholders; and tortious acts.

In particular, shareholders may assert claims for damages if they have not been duly informed about the transaction. Pursuant to the German Securities Trading Act, the management board of a publicly listed stock company has to publish insider information that directly affects the company. This disclosure obligation applies, in particular, to information that is relevant to the further development of the share price. In the case of an M&A transaction, this notification requirement will be triggered if its realisation is sufficiently probable. Further, the shareholder agreement, the statutes of the entity or the rules of procedure of the management board can stipulate certain requirements for M&A transactions: for example, the involvement and consent of an investment committee or a resolution of the shareholders. Shareholders may assert claims if such stipulations have been violated. Further, in certain events potentially following an M&A transaction, such as the conclusion of a profit transfer agreement, in the event of a squeeze-out or, for example, in the event of a transformation of the target according to the German Transformation Act, shareholders have a claim to appropriate cash compensation.

**2 For each of the most common claims, what must shareholders in your jurisdiction show to bring a successful suit?**

To bring a claim for damages for lack of information under the Securities Trading Act, a shareholder must assert that the management board has violated its duty of disclosure. In order to do this, the shareholder must show that the management board has failed to disclose insider information that directly affects the company. In addition, a claim can be considered if an incorrect ad hoc announcement has been published. However, it is typically difficult to prove in court that the shareholder has suffered a loss, as typically the stock price rises after a transaction.

To assert a claim for a breach of a shareholder agreement, a shareholder must show that the provisions of the shareholder agreement have been violated in an unlawful manner. The shareholder can then try to block the transaction (see question 9) or claim damages in cases where the transaction has already taken place. If the shareholder claims damages, the shareholder has to show he or she suffered a loss.

Further, shareholders have the right to receive appropriate compensation in certain cases (see question 1). In these cases, the shareholder must show that he or she has not been offered compensation or has not been offered such in an orderly manner, or that the cash compensation offered is not appropriate.

A claim for compensation for damages in tortious acts is possible if shareholders are withdrawn from their membership rights. In addition, shareholders are also entitled to a tortious claim for damages if they have been intentionally injured in a manner contrary to good morals. This may be the case, for example, if a member of the management board participates in immoral acts committed by majority shareholders or in connection with the acquisition of shares through deliberately incorrect ad hoc disclosure.

**3 Do the types of claims that shareholders can bring differ depending on whether the corporations involved in the M&A transaction are publicly traded or privately held?**

Yes, there are several stipulations that only apply to listed stock corporations. Some of the above-mentioned main claims – for example, the obligation of the management board to disclose insider information in accordance with the Securities Trading Act (see in detail questions 1 and 2) or claims for compensation after a squeeze-out – only apply to publicly listed stock companies.

**4 Do the types of claims that shareholders can bring differ depending on the form of the transaction?**

In general, the form of a transaction has no influence on the type of claim that can be brought. The main exception is the case of a merger: the Transformation Act contains special statutory stipulations for shareholder claims in the event of mergers of companies. For example, shareholders who raised an objection to a merger resolution have a claim to appropriate cash compensation against the acquiring legal entity. Further, the shareholders can challenge a resolution to merge.

**5 Do the types of claims differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer?**

No.

**6 Do the types of claims differ depending on whether the loss is suffered by the corporation or by the shareholder?**

Shareholders can only assert claims if they themselves have suffered a loss. For example, shareholders can assert claims if the shareholder agreement is violated or if the management board has not fulfilled its notification obligation (see in detail questions 1 and 2). If the corporation has suffered the loss, shareholders usually cannot assert any claims. However, in exceptional cases, shareholders can take legal action for the claims of the corporation (litigation in one's own name on another's behalf; see in detail question 8).

**7 Where a loss is suffered directly by individual shareholders in connection with M&A transactions, may they pursue claims on behalf of other similarly situated shareholders?**

German law does not provide for class actions. A comparable tool is model litigation: the Capital Markets Model Case Act facilitates the enforcement of claims for damages of shareholders in a stock company by enabling model litigation in cases based on false, misleading or omitted public capital market information. If the same factual and legal questions arise in at least 10 individual lawsuits, a model proceeding can be initiated in which these factual and legal questions are decided. After the decision in a model proceeding becomes binding, the individual lawsuits resume and the courts hearing these cases must take the decision into account as binding. Further, shareholders can bundle and enforce claims via a claims vehicle, ie, assign their claims to another entity that brings a lawsuit. In such cases, the assignments have to be in compliance with the Legal Services Act. In practice, this means that they either sell their claims or that the claims vehicle is registered for collection services.

**8 Where a loss is suffered by the corporation in connection with an M&A transaction, can shareholders bring derivative litigation on behalf or in the name of the corporation?**

The German Stock Corporation Act provides that shareholders may bring proceedings in their own name for directors' and officers' (D&O) liability on behalf of the corporation (litigation in one's own name on another's behalf). Shareholders whose shares represent 1 per cent of the share capital or a pro rata amount of €100,000 may apply to the district court responsible for the corporation for approval of such an action. The action can only be approved if the facts provide a reason to suspect that the company has suffered a loss as a result of improprieties or gross breaches of the law or articles of association, and no overriding interests of the company exist that would prevent the assertion of such damage claim. Apart from this, shareholder activism for claims of the stock company is not permissible.

In a limited company, shareholders can bring legal action in their own name on behalf of the corporation in accordance with the general principles of an *actio pro socio*. This requires that claims of the corporation against its shareholders resulting from membership (eg, breaches of trust) exist. Furthermore, an *actio pro socio* is subsidiary, and therefore inadmissible if the corporation itself asserts its claims. It shall only be admissible if the competent body refuses to pursue legal action.

**9 What are the bases for a court to award injunctive or other interim relief to prevent the closing of an M&A transaction? May courts in your jurisdiction enjoin M&A transactions or modify deal terms?**

Injunctive or other interim relief can only be awarded if a shareholder can prove that he or she has a certain right or claim and that, without interim relief, the realisation of such right or claim would be thwarted or made significantly more difficult. In particular, an M&A transaction can theoretically be blocked, if, for example, a shareholder resolution is required. In such cases, a court could block the execution of the resolution if the resolution was unlawful, against the corporate by-laws, etc (note that courts are rather reluctant to block the decision-making process itself). Another example would be that third parties that have a preemptive right can seek interim relief.

German courts cannot generally enjoin M&A transactions or modify deal terms. However, in cases where the contract has already been concluded and the seller is unwilling to transfer the shares, the buyer can sue the seller for the transfer of the shares (performance) or for damages.

**10 May defendants seek early dismissal of a shareholder complaint prior to disclosure or discovery?**

No, early dismissal and discovery only exist in very limited cases, and M&A transactions are not covered by such special relief.

**11 Can shareholders bring claims against third-party advisers that assist in M&A transactions?**

In general, only the corporation itself can assert claims against advisers on the basis of its contractual relationship. Individual shareholders are not party to this contract. However, shareholders may assert claims if the contract has some protective effect to the benefit of third parties. This can either be explicitly set out in the contract or can be a matter of interpretation. For example, a contract with a tax consultant advising on the best legal form regarding the tax law implications of a transaction or the corporate structure can have a protective effect to the benefit of shareholders, who then can bring a claim against the consultant. Further, claims based on tortious acts can also be brought by the shareholders.

**12 Can shareholders in one of the parties bring claims against the counterparties to M&A transactions?**

No, with the exception of claims based on tortious acts.

**13 What impact do the corporation's constituting documents have on the extent board members or executives can be held liable in connection with M&A transactions?**

According to the Stock Corporation Act, a stock company may not waive or compromise a claim for damages that it may have against a board member in advance: it can only do so after the expiry of three years after the claim has arisen. The stock company can of course stipulate duties of the board members that go beyond the statutory law. In a German limited company, the parties can go both ways: that is, either limit or extend the liability.

**14 Are there any statutory or regulatory provisions in your jurisdiction that limit shareholders' ability to bring claims against directors and officers in connection with M&A transactions?**

No.

**15 Are there common law rules that impair shareholders' ability to bring claims against board members or executives in connection with M&A transactions?**

German law provides for a 'business judgement rule', which states that a board member or managing director acts in a dutiful manner if he or she holds sufficient information prior to making a business decision, does not have a conflict of interest and may be trusted to act in the best interests of the company.

**16 What is the standard for determining whether a board member or executive may be held liable to shareholders in connection with an M&A transaction?**

There are no specific standards in connection with an M&A transaction. As the transaction itself is a business decision, the business judgment rule (see in detail question 15) applies. However, the management board or director has to respect all statutory duties, as well as all obligations laid down in the shareholder's agreement, statutes, etc. Regarding liability for tortious acts, a board member or director must have intentionally and immorally harmed the shareholders, and have also intended that the shareholders suffered a loss.

**17 Does the standard vary depending on the type of transaction at issue?**

No.

**18 Does the standard vary depending on the type of consideration being paid to the seller's shareholders?**

No.

**19 Does the standard vary if one or more directors or officers have potential conflicts of interest in connection with an M&A transaction?**

The business judgment rule (see in detail question 15) does not apply if there is a conflict of interest. A prerequisite for the application of the business judgment rule is that the manager's decision is based exclusively on the interests of the company. The managing director must not allow him or herself to be guided by irrelevant aspects (ie, his or her own interests) when choosing between the various alternative courses of action.

**20 Does the standard vary if a controlling shareholder is a party to the transaction or is receiving consideration in connection with the transaction that is not shared ratably with all shareholders?**

The standard does not vary. However, if a board member agrees on terms with the controlling shareholder that are not at arm's length, or if the board member grants benefits only to a controlling shareholder, the board member can usually be held liable. Further, there might be tax implications (ie, hidden distribution of profits).

**21 Does your jurisdiction impose legal restrictions on a company's ability to indemnify, or advance the legal fees of, its officers and directors named as defendants?**

Usually, D&O insurance covers legal and extrajudicial defence costs, and in particular the legal consultancy costs. D&O insurance is usually paid for by the company.

### 22 Can shareholders challenge particular clauses or terms in M&A transaction documents?

Shareholders can at most challenge the conclusion of the contract unless they are a contracting party.

### 23 What impact does a shareholder vote have on M&A litigation in your jurisdiction?

A resolution of the shareholders' meeting is binding for the management board.

However, there are only a few cases in which shareholders are required to give their consent, such as:

- in cases of the transfer of registered shares with restricted transferability;
- if the transaction results in a permanent change in the corporate purpose of the stock company;
- if the seller stock company undertakes to transfer the entire assets of the company by way of transfer of individual rights; and
- if a merger is associated with the company transaction in accordance with the Transformation Act.

In addition, the management board can theoretically obtain the approval of the shareholders' meeting for corporate transactions on a voluntary basis. In practice, however, this hardly ever happens.

### 24 What role does directors' and officers' insurance play in shareholder litigation arising from M&A transactions?

D&O insurance is usually involved in litigation against management. Most policies stipulate that either the board member or director has the obligation to follow any instructions under the insurance policy or that the insurance can directly lead the defence. Further, the board member or director can assign a claim for cover to the company, which then can initiate proceedings directly against the insurance.

### 25 Who has the burden of proof in an M&A litigation – the shareholders or the board members and officers? Does the burden ever shift?

The burden of proof varies depending on a shareholder's claim. As the claimant, the shareholder bears the burden of proof for all facts that are favourable to him or her.

For example, in the event of a shareholder's action for deficiency in a resolution, the shareholder must prove that he or she is entitled to challenge the resolution, ie, that he or she is a shareholder, and that the resolution violates the law or the company's articles of association.

In the case of a claim arising from torts law, the injured party, that is, the shareholder, bears the burden of proof for all liability conditions: in particular, he or she must prove intent on the part of a board member or director, as well as the occurrence of a pecuniary loss. In the more common case of a lawsuit brought by a corporation against its board members or directors, the board members or directors have to prove that they did not violate their duties and that they acted without fault. On the other hand, the corporation must provide evidence of the damaging act, the damage caused by it and the loss.

### 26 Are there pre-litigation tools that enable shareholders to investigate potential claims against board members or executives?

Shareholders have a statutory right to information and inspection rights regarding the company. This right includes all information related to the management and the economic situation of the company, and to the company's relations with third parties, and therefore also includes acquisitions and disposals. In addition, shareholders have the right to inspect the company's books and records (eg, all documents, files, films, computer records). The right of access to information and inspection has limitations: for example, a shareholder has to observe the principles of proportionality, and a board member or director does not have to disclose information if he or she would make him or herself liable to prosecution by providing information.

### 27 Are there jurisdictional or other rules limiting where shareholders can bring M&A litigation?

In the event of an action for deficiency in a resolution, the district court in whose district the corporation has its registered office is competent.

**Update and trends**

Compliance is becoming increasingly important. In particular, in light of rising risks of high fines for, for example, violations of antitrust law or data law, special emphasis is put on the compliance of the target (and the compliance of the transaction itself). Therefore, the number of disputes regarding 'compliance guarantees' has increased. In this regard, risks for board members have also risen. There is a trend towards stricter liability for board members in cases where they do not initiate a post-closing compliance due diligence.

Another trend concerns warranties and indemnities: for many years, insurance for warranties and indemnities has been neglected in Germany. This has changed in recent years, and such insurance is on the rise. This leads to an increase in litigation against insurers in this regard.

In all other respects, the general rules of local jurisdiction apply. Forum selection clauses are generally admissible in contracts between companies.

### 28 Does your jurisdiction permit expedited proceedings and discovery in M&A litigation? What are the most common discovery issues that arise?

No.

### 29 How are damages calculated in M&A litigation in your jurisdiction?

The object of damages is to place the party to whom they are awarded in the same pecuniary position that they would have been in if the breach triggering liability had not occurred. The usual ways in which experts calculate damages are normally used in M&A litigation.

However, in particular regarding the value of a company, the following method is applied:

- in the case of non-delivery or non-acceptance of the target company, the target's enterprise value is usually derived from future surpluses by means of the usual valuation procedures; and
- in the case of non-fulfilment, the damage incurred is calculated by deducting the purchase price from this determined enterprise value.

A business valuation is also made in cases of the delivery of a company with an impairment of its value. Consequential damages and loss of profits are also compensated.

Further, if the parties are in dispute as to whether damage has occurred and how much the damage amounts to, the court can estimate the damage. To do so, it is necessary that the plaintiff has presented sufficient facts for the court to have a basis for an estimate.

### 30 What are the special issues in your jurisdiction with respect to settling shareholder M&A litigation?

As there are no class actions in Germany, it can be more difficult for shareholders to assert their claims in court. Except for a few exceptions (see in detail question 7), each shareholder must assert his or her own claim and assume the risk of litigation. Likewise, there are no class settlements in Germany, ie, the company or board member has to settle individually with each shareholder. In the case of a settlement, the parties should reach an agreement regarding the costs, particularly in cases in which a claim already has been filed. Otherwise, the party that, following a settlement, withdraws the claim would have to bear the costs of the proceedings.

### 31 Can third parties bring litigation to break up or stop agreed M&A transactions prior to closing?

This is possible in special cases, such as if a third party has a preemptive right.

### 32 Can third parties in your jurisdiction use litigation to force or pressure corporations to enter into M&A transactions?

No, unless the M&A transaction had already been agreed upon and the third party sues for transfer of the shares.

**33 What are the duties and responsibilities of directors in your jurisdiction when the corporation receives an unsolicited or unwanted proposal to enter into an M&A transaction?**

In such cases, several duties may arise out of the loyalty obligations towards the shareholders: for example, they have to be informed about the offer.

In addition, there are several statutory provisions in the case of takeover bids regarding stock companies. To mention a few, the management board and the supervisory board have to render a reasoned opinion on the bid; and after the publication of the decision to make a takeover bid and until publication of the result, the management board of the target company may not take any actions that could prevent the success of the offer. This does not apply to actions that a prudent and conscientious manager of a company not affected by a takeover bid would have taken, to endeavours to find a competing offer or to actions consented to by the supervisory board of the target company.

Further, duties and responsibilities of board members and directors are usually defined in the respective articles of association of the company, the employment contract or the shareholders' agreement.

**34 Shareholders aside, what are the most common types of claims asserted by and against counterparties to an M&A transaction?**

In Germany, disputes between the parties to an M&A transaction are far more common than shareholder claims.

The most common reasons for disputes are impairments of a company. The buyer often tries to assert his or her claims in particular from guarantees, violations of pre-contractual obligations and liability for defects (claims based on tort are possible, but less common). Regarding guarantees, due to the great importance of disclosures in the annual financial statements for the valuation of the target company, accounts warranties are often the subject of post-M&A disputes, and are therefore a possibility for the purchaser to claim damages. Usually, accounts warranties require that the annual financial statements of the target company provide a true and fair view of the assets, liabilities, financial position, and profit or loss of the target company. Further, the liability system for M&A transactions is usually structured by guarantees; hence, claims based on liability for defects are usually also claims based on breach of a guarantee. In addition to claims arising from guarantees, the buyer often asserts claims arising from a breach of pre-contractual obligations. The pre-contractual information obligations of the seller are particularly relevant. A claim for damages due to pre-contractual breaches of the duty of disclosure is generally only considered if the buyer can prove that the seller has acted with knowledge and will. In the case of a claim arising from a pre-contractual breach of duty, the buyer must state that there was a duty to inform. In addition, he or she must prove that the information provided was incorrect and that the seller was aware of it. It must have been apparent to the seller that the relevant information was essential for the signing of the contract by the buyer (causality). For example, a claim may exist if the seller has not informed the buyer about the company's substantial debts, if the seller has provided false information about the sales made by the company or if the seller has violated the rules of proper accounting.

Further, disputes regarding the calculation of the final purchase price are very common. The parties often agree on a basic purchase price of the company, which is then adjusted on the basis of a fixed purchase price calculation method. For this reason, the purchase price is often not fixed at the time of signing the purchase contract. In most cases, the parties still have to fulfil conditions between signing and closing of the purchase contract. After signing the purchase contract, however, the company often develops further. This means that the purchase price is adjusted and may be higher than expected by the buyer. This in turn leads to the fact that the buyer often accuses the seller of having consciously caused this increase in the purchase price.

Finally, the parties to an M&A transaction often argue about the effectiveness of M&A contracts. In particular, a buyer can assert claims based on fraudulent misrepresentation on the part of the seller. In this regard, it is particularly relevant that the right to challenge a contract on the grounds of fraudulent deception cannot be effectively excluded from the contract.

**35 How does litigation between the parties to an M&A transaction differ from litigation brought by shareholders?**

Disputes between the parties to an M&A transaction are usually contract-based and solved by arbitration (as most M&A contracts contain arbitration clauses). Litigation brought by shareholders is in most cases based on tort and – due to the lack of a contractual basis, and therefore a lack of an arbitration clause – brought in public courts.

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