M&A Litigation

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

Hogan Lovells

2018

GETTING THE DEAL THROUGH

Hogan Lovells

Providing valuable strategic and litigation counseling from the outset of an M&A transaction through post-closing disputes.

Hogan Lovells' Corporate and Shareholder Litigation team is proud to support Getting the Deal Through.

Hogan Lovells is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.

www.hoganlovells.com

© Hogan Lovells 2018. All rights reserved.

GETTING THE DEAL THROUGH

M&A Litigation 2018

Contributing editors

William M Regan, Jon M Talotta and Ryan M Philp
Hogan Lovells US LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Law Business Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2018
First edition
ISBN 978-1-78915-117-6

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer–client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between March and May 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

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

London
May 2018

Introduction

William M Regan, Jon M Talotta and Ryan M Philp
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 pretrial 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.

Netherlands

Manon Cordewener, Carlijn van Rest and Bas Keizers

Hogan Lovells International LLP

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

Under Dutch law, shareholders can bring various types of claims in connection with M&A transactions.

Litigation by shareholders (in publicly traded companies) often takes place in inquiry proceedings before the Enterprise Court of the Amsterdam Court of Appeal. A recent example of such proceedings is the case of *Eliot Advisors against AkzoNobel*, initiated in 2017. Inquiry proceedings are often used to protect the interests of minority shareholders.

This type of proceedings entails three steps:

- a request for an inquiry into the policies and course of affairs of the company;
- the actual inquiry (in which there is room for disclosure and discovery); and
- an assessment on the basis of an inquiry by the Enterprise Court as to whether the company has been mismanaged.

If the Enterprise Court rules that the company has been mismanaged, it can take a number of measures based on the request of the shareholder (who initiated the proceedings). Inquiry proceedings are based on article 2:345–2:357 Dutch Civil Code (DCC). It is only possible to start inquiry proceedings against a company, and not against individual officers or directors. There are also certain requirements (a group of) shareholders have to meet to qualify as a shareholder eligible to bring this type of claim. These requirements can be found in article 2:346 (b) and (c) DCC. Furthermore, inquiry proceedings can only be brought against companies who have their place of business in the Netherlands (Dutch Supreme Court, *e-Traction*).

In addition, shareholders can bring unlawful act claims against companies, officers and directors on the basis of article 6:162 DCC read in conjunction with the special provision contained in article 2:8 DCC. In these types of claims, the shareholder will have to argue that the conduct of the company or the officers or directors constituted a tort against the claimant. If the district court at which the claim has to be filed rules that such tortious behaviour did indeed happen, damages can be awarded, and in very rare cases the M&A transaction itself can be challenged.

Finally, the shareholders can request the court to declare decisions taken by the board of directors to engage in an M&A transaction null and void. In addition, a shareholder could claim that management decisions are subject to annulment. The legal basis for such a claim is article 2:15 DCC. These kinds of actions are possible with regard to companies that have been established under Dutch law and thus have their statutory seat in the Netherlands. A claim can be asserted either before or after the acts necessary to implement this decision are taken by the board of directors. The implementing acts in situations concerning M&A transactions include, for example, negotiations with a third party and entering into an agreement with this third party.

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

For inquiry proceedings, shareholders must show that there are reasonable grounds to believe that the company in which the shareholders hold shares has been mismanaged.

The standard for liability of a corporation based on a wrongful act is set by the standard of due care following from article 6:162 DCC interpreted in the light of the requirements set out by the principles of reasonableness and fairness described in article 2:8 DCC (Dutch Supreme Court, *Tuin Beheer*). These principles are dependent on the circumstances of each case (Dutch Supreme Court, *Zwagerman Beheer*).

With regard to requests to declare decisions taken by the board of directors to engage in a type of M&A transaction null and void, such decision has to be in conflict with the law (article 2:14 DCC). A management decision could be subject to annulment on the basis of one of the following three grounds:

- the decision has been taken in violation of the statutory provisions or rules in the company's articles of incorporation that govern the ways in which decisions have to be taken;
- the (method of formation of the) decision is contrary to the principles of reasonableness and fairness that all corporate bodies need to take into account in their relationship with each other (article 2:8 DCC); and
- the decision was taken in violation of any by-laws of the corporation.

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?

No. Both NVs (publicly traded companies) and BVs (privately held companies) are subject to inquiry proceedings based on article 2:346 DCC. The same applies to the possibility to claim damages on the basis of the general tort provision of article 6:162 DCC read in conjunction with article 2:8 DCC. The validity of management decisions is subject to the same statutory provisions.

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

No, the types of claims shareholders can bring do not differ depending on the form of the transaction. Needless to say, however, the question of whether a shareholder will be successful in initiating proceedings towards a corporation, its directors or its officers highly depends on the circumstances of the case, which will differ depending on the form of the transaction.

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?

Yes, the types of claims differ depending on whether the loss is suffered by the corporation or by the shareholder.

A derivative action, on the basis of which an individual shareholder claims damages in its own name, instead of a claim by the company, does not exist under Dutch law. Under Dutch law, it is not considered appropriate that both the company and the individual shareholders would have the possibility to claim the same kind of damages. For damage suffered by the company, in principle only the company itself is able to start liability claims against directors or officers and third parties.

Therefore, under Dutch law, shareholders are unable to claim damages on the sole ground that the value of the shares has depreciated. Derivative losses do not qualify for compensation. Thus, in the Netherlands there is no such thing as the derivative suit as applied in the United States, or the *action sociale* as applied in Germany and France.

Only under specific circumstances is a shareholder able to claim damages directly from a third party. The Supreme Court held in the *Poot v ABP* judgment that a shareholder is able to claim damages from a third party (including the management of the company in which the shareholder holds shares) if such person did not act in accordance with a specific standard of due care to be observed towards the individual shareholder. In such case, the individual shareholder must prove that he or she has suffered a personal loss. Only these specific circumstances might give an individual shareholder the possibility to claim damages from the third party or director directly.

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?

Dutch law provides for a collective action based on article 3:305a DCC. This article stipulates that a collective action can be instituted by a foundation or association whose statutory goal is to represent the interests of groups of injured parties having similar damage claims and having a similar interest in holding a third party liable for the damage suffered by such group of injured parties. This means that a shareholder itself cannot pursue a claim on behalf of similarly situated shareholders.

The collective action can (currently) be used to seek a declaratory judgment against the third party that the third party acted wrongfully, so it is not possible to claim damages. Despite the fact that no damages can be claimed through an action based on article 3:305a DCC, such collective actions have been employed successfully to obtain declaratory judgments in which it is confirmed that one or more defendants acted wrongfully and are liable to pay damages. Although individual victims still need to (individually) file follow-on suits to obtain damages (or enter into a settlement with (former) defendants), they can rely on the findings of the court that heard the collective action on common issues such as wrongfulness and the duty of care.

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?

No. Derivative actions do not exist under Dutch law.

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?

The Enterprise Court may at any time during the inquiry proceedings order interim measures. In takeover situations, these interim measures play an important (often decisive) role in the outcome of the matter. The Enterprise Court can take (inter alia) the following measures: suspending executive or supervisory board members, appointing interim executive or supervisory board members, and suspending shareholders' voting rights.

It is worth noting that it is possible in civil proceedings initiated by the shareholder that the preliminary relief judge of the district court will only grant interim relief measures for the time the Enterprise Court has not decided on the question of interim measures. From then on, to avoid contradictory judgments, the measures granted by the Enterprise Court will take precedence.

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

Only in inquiry proceedings are there grounds upon which the company can seek early dismissal of a shareholder's request to start an inquiry. The request for an inquiry will not be handled by the Enterprise Court if the shareholders have not communicated their concerns about the policies or course of affairs of the company to the board of directors and the supervisory board in written form (prior to initiating inquiry proceedings). The shareholders have to allow the boards reasonable time to respond and to take measures themselves before initiating inquiry proceedings.

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

Shareholders can indeed bring claims against third-party advisers that assist in M&A transactions on the basis of the general tort provision of article 6:162 DCC.

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

A shareholder can bring a claim against the counterparty to M&A transactions. To do so, it will have to demonstrate that the counterparty to the M&A transaction has breached the standard of due care when concluding the contract or the transaction. An example of such a breach by a counterparty to an M&A transaction is continuing to conclude and execute the transaction agreement while knowing that approval from the shareholders' meeting was required but not given (Dutch Supreme Court, *Bibolini*). Such action could result in the annulment of the transaction.

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?

A director can be discharged by the shareholders from internal liability against the company during the adoption and approval of the annual accounts (articles 2:101 and 2:210 DCC). Such discharge has to be adopted in a shareholders' resolution, and is limited to the information presented in the annual accounts or otherwise provided to the shareholders prior to the discharge. The company can also indemnify its director or officers, although such indemnification is not unlimited (see question 21).

To some extent, the company can indemnify the director against external liability (ie, claims of third parties). Such indemnity could be included in the articles of association or the management or employment contract concluded with the director. Along the same line as regards internal liability, indemnity for external liability may not apply in the event the director's liability is based on intent or deliberate recklessness, or if serious blame can be attributed to the director.

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?

There are no statutory or regulatory provisions under Dutch law that expressly limit the ability of shareholders to bring claims against directors and officers in connection with M&A transactions. Shareholders have to rely on the general tort provision of article 6:162 DCC to bring their claims. As explained in question 6, the ability of shareholders to bring claims against directors and officers of a company in connection with M&A transactions is limited, because Dutch law does not facilitate derivative actions.

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

The Netherlands is a civil law jurisdiction, and it has no common law rules. However, in line with the business judgment rule, the discretionary power of board members is to some extent safeguarded owing to the fact that the Supreme Court has ruled that the board of directors, or directors individually, can be held liable in cases where they are to blame for serious instances of mismanagement (Dutch Supreme Court, *Willemsen/NOM*). As a result, the threshold for liability of board members is higher than it is in other cases of liability, and this offers board members the opportunity to take commercial risks to some extent.

In cases where the conduct of board members or supervisory board members is challenged in inquiry proceedings or proceedings based on article 2:15 DCC, the Dutch Corporate Governance Code and the principles of reasonableness and fairness play a role.

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?

Under Dutch law, shareholders are unable to claim damages against a director on the sole ground that the value of the shares has depreciated.

These damages are considered to be derivative losses, which do not qualify for compensation (see question 6). Thus, in the Netherlands there is no such thing as the 'derivative suit' as applied in the United States or the *action sociale* as applied in Germany and France. For a shareholder to successfully bring an action against a director, it is required that a specific rule to be observed towards such shareholder has been breached.

Individual shareholders can initiate a claim against one or more directors or officers arising from a wrongful act (article 6:162 DCC). The Supreme Court has ruled that the board of directors, or directors individually, can be held liable in cases where they can be blamed for serious instances of mismanagement (Dutch Supreme Court, *Willemsen/NOM*). The requirement of a serious imputable act also applies in relation to the 'internal liability' of directors against the company itself (article 2:9 DCC). A claim initiated by an individual shareholder is regarded as the 'external liability' of the directors. The standards of reasonableness and fairness as stipulated in article 2:8 DCC imply that the high threshold of internal liability (ie, the requirement of a serious imputable act) also applies to a claim from an individual shareholder against a director.

In the event it is established that the director has breached a specific rule protecting the shareholder (eg, a rule incorporated in the articles of association), this results – in principle – in the liability of the director against the shareholder.

By establishing a high threshold of directors' liability, the company's interest is served as it prevents directors from being too defensive in their decision-making.

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

No, the standard does not vary depending on the type of transaction at issue, except for the fact that, as explained in question 6, there will always be regard for the specific circumstances of the case.

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

No, the standard does not vary depending on the type of consideration at issue, except for the fact that, as explained in question 6, there will always be regard for the specific circumstances of the case.

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

No, the standard does not vary in cases where the directors have a (potential) conflict of interest. It should be noted, however, that articles 2:129(6) and 2:239(6) DCC stipulate that a director shall not participate in the deliberation and adoption of resolutions if he or she has a direct or indirect personal interest that is in conflict with the interests of the company. Should the director – in disregard of these statutory provisions – participate in the adoption of a resolution, such resolution is subject to annulment (article 15(1)(a) DCC). However, the annulment does not affect the authority of the directors to represent the company, unless the third party was aware of the conflict of interest. The directors can be held liable by the shareholders in cases of breaching the decision-making rule on conflicts of interest on the basis of article 6:162 DCC (wrongful act).

Furthermore, the existence of a potential conflict of interest and the failure of a director or officer to address this in a correct way is a violation of the Corporate Governance Code (article 2:391(5) DCC).

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 if one or more directors or officers have potential conflicts of interest in relation to the receipt of any consideration in connection with an M&A transaction. It should be noted that the directors shall be guided in the performance of their duties by the best interests of the company and the undertaking connected with it (articles 2:129(5) and 2:239(5) DCC).

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?

It is considered to be unacceptable for the company to indemnify the director for any internal liability against the company due to serious mismanagement. This would be in contradiction of article 2:9 DCC as the statutory basis of internal liability against the company. This provision is of a mandatory nature (article 2:25 DCC). However, the director can be discharged by the shareholders from internal liability against the company during the adoption and approval of the annual accounts (articles 2:101 and 2:210 DCC). Such discharge is limited to the information presented in the annual accounts or otherwise provided to the shareholders prior to the discharge.

The company can indemnify the director against external liability (ie, claims of third parties). Such indemnity could be included in the articles of association or the management or employment contract concluded with the director. Along the same lines as regards internal liability, indemnity for external liability may not apply in the event the director's liability is based on intent or deliberate recklessness, or if serious blame can be attributed to the director.

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

No, shareholders cannot challenge particular clauses or terms in M&A transaction documents.

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

In inquiry proceedings, the Enterprise Court determines whether the company has been mismanaged. The Enterprise Court also assesses the conduct of the shareholders' meeting. In the event that the shareholders (collectively) refuse to vote in favour of a plan in the interest of the company and its continued existence, this may cause the Enterprise Court to decide that the company has been mismanaged.

In relation to publicly traded companies, some resolutions of the board of directors require approval at the general shareholders' meeting when they relate to an important change in the identity or character of the company or the undertaking (article 2:107a DCC). For example, such approval is required in the event of a transfer of the undertaking or virtually the entire undertaking to a third party, or the acquisition or divestment by it or a subsidiary of a participating interest in the capital of a company having a value of at least one-third of the amount of its assets. It could be argued by a defendant that the shareholders in hindsight cannot dispute a decision of the board in connection with a M&A transaction if such decision has been approved by the shareholders.

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

There is an increasing role for directors' and officers' (D&O) insurance. Such D&O insurance can be taken out in relation to both internal liability (against the company) and external liability (eg, against third parties). Possible damages and legal fees can be covered by D&O insurance. Generally, there are different degrees in coverage, such as coverage for personal liability of the director, corporate reimbursement covering indemnities provided by the company and corporate entity coverage, which also protects the company from direct claims.

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?

Pursuant to Dutch procedural law, in principle, the burden of proof is on the party relying on the legal consequences of certain facts (article 150 Dutch Code of Civil Procedures (DCCP)). An exception to this general principle may apply in cases where the requirement of such proof would be contrary to the standards of reasonableness and fairness (eg, in the event of an unreasonably difficult case caused by the other party).

As a result of this general rule, the burden of proof is often on the shareholders claiming damages from directors or officers on the basis of a wrongful act (article 6:162 DCC). To substantiate their claim, shareholders will have to furnish the facts. If such facts have been contested (with reasons) by the defendants, a claiming shareholder will have the burden of proof as regards the facts that result in the wrongful

Update and trends

A current trend in M&A litigation in the Netherlands is the growth of 'shareholder activism'. In a growing number of cases, active shareholders have tried to influence M&A transactions involving the company in which they hold their shares. They try to pressure the board of these companies by bringing inquiry proceedings and asking for provisional measures while these inquiries are being conducted. An example of this type of litigation is the case of Elliot against AkzoNobel (in which the claims of shareholder Elliot were denied) (Amsterdam Court of Appeals 29 May 2017, ECLI:NL:GHAMS:2017:1965).

act. After the submission of evidence by the shareholder, the defendants are allowed to submit counter-evidence.

A 'reversal rule' may mitigate the burden of proof in liability cases. The reversal rule does not result in a shift of the burden of proof. Instead, the causal link between the act and the damage is presumed if the damage results from a breach of a specific rule (eg, in the articles of association) serving the purpose to prevent the occurrence of specific harm to the shareholders; and if the violation of this rule increased the materialisation of the risk the rule envisions to prevent. If so, the directors as defendants have the right to submit counter-evidence in relation to the causal link between the act and the damage.

Inquiry proceedings have their own specific investigative provisions. The inquiry into the management of the company is conducted by experts appointed by the Enterprise Court (article 2:351 DCC). The outcome of the inquiry is an investigative report (2:353 DCC). The decision of the Enterprise Court on whether there has been mismanagement is based on this investigative report.

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

Under Dutch law, there are various pre-litigation tools that can be used to investigate potential claims. There are no pre-litigation tools specifically available for M&A litigation only.

There is one exception. Shareholders are entitled to request information from the board of directors and the supervisory board. The board of directors and the supervisory board are obliged to provide such information, unless there are compelling reasons not to comply with such request (articles 107(2) and 217(2) DCC).

The following pre-litigation tools apply to various disputes, including M&A litigation. Pursuant to article 843a DCCP, a party has a right to request documents when the following criteria are met:

- the party making the request has a legitimate interest;
- the party making the request has specified the relevant documents; and
- the documents relate to a legal relationship to which the requesting party or its legal predecessor was a party.

Such a request can be made by submitting a motion during the proceedings or in separate preliminary relief proceedings, and will be assessed by the court. Prior to proceedings, it is possible to order a provisional examination of witnesses or a preliminary expert opinion, or to seize evidence. However, when evidence is seized, this does not automatically give the attaching party the right of inspection. Subsequently, a request on the basis of article 843a DCCP will have to be made.

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

Unless otherwise provided by the articles of association or shareholders' agreements, there are no specific rules limiting the jurisdiction. It should be noted that the general rule is that the court where the defendant is domiciled has jurisdiction.

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

In the Netherlands, it is possible to initiate preliminary relief proceedings. In preliminary relief proceedings, it is possible to obtain a provisional remedy in urgent matters only. A claimant in preliminary relief proceedings could request the judge of the competent district court to order the defendant to comply with a mandatory injunction or a prohibitory injunction subject to a penalty in cases of non-compliance. Such injunctions provide an alternative to the immediate reliefs that can be imposed by the Enterprise Court in inquiry proceedings. It should be noted that a judgment in interim relief proceedings does not prejudice the consideration of the case in proceedings on the merits of the case.

The concept of document discovery or disclosure does not exist under Dutch law. There is, however, the possibility to demand the production of exhibits as explained in question 26 (article 843a DCCP).

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

Pursuant to article 6:95 DCC, damage must be compensated in the event of a statutory ground leading to an obligation to compensate financial loss. Financial loss is further specified in article 6:96 DCC, which states that financial loss comprises both losses suffered and profits missed out on. In addition, reasonable costs to prevent or mitigate damage, reasonable costs incurred in assessing damage and liability, and reasonable costs incurred in obtaining extrajudicial payment are considered to be included in financial damages.

The main principle under Dutch law is that the aggrieved party should be placed as much as possible in the situation in which it would have been in the event that the damage had not been caused. From this principle, it follows that only damage actually suffered must be compensated, and that this damage must be fully compensated.

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

One special issue under Dutch law with respect to the settling of M&A litigation initiated by shareholders is the possibility to have a collective settlement that can be declared binding for all injured parties in the same situation by the Court of Appeals of Amsterdam (article 7:907 DCC). In this respect, such collective settlement seems only to be of use in cases where many shareholders have suffered (similar) damage. For a settlement to be declared generally binding, a petition has to be submitted to the Amsterdam Court of Appeal. The Court of Appeal will have to determine whether the settlement is reasonable. After the declaration of the Court of Appeal, the injured parties have (at least) three months to choose to opt out of the collective settlement. In that case, an injured party is able to initiate proceedings individually.

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

Under Dutch law, there are no specific provisions that enable third parties unrelated to the company to initiate legal proceedings to break up or stop a potential M&A transaction. However, in the event such M&A transaction implies a wrongful act against a third party (potentially) resulting in damages, the third party could try to obtain a provisional injunction in preliminary relief proceedings. Subsequently, proceedings on the merits of the case will have to be initiated.

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

Under Dutch law, there are no specific provisions that enable third parties unrelated to a company to initiate legal proceedings to enter into an M&A transaction. In addition, the same possibility of initiating (preliminary relief) proceedings applies as described in question 31.

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?

The board of directors is responsible for determining the strategy of the company, which is supervised by the supervisory board. This means, in general, that the board of directors may decide on a proposal to enter into an M&A transaction without consulting the shareholders. However, the board of directors has to report (afterwards) its strategy to the shareholders in relation to an M&A proposal (Enterprise Court, *Elliot/AkzoNobel*).

By determining the strategy of the company, the board of directors shall be guided in the performance of their duties by the best interests of the company and the undertaking connected with it

(articles 2:129(5) and 2:239(5) DCC). The interest of the company lies most often in the advancing of the success of the company. Based on the standards of reasonableness and fairness that apply to all the parties involved with the company (article 2:8 DCC), the directors have to prevent the interests of other interested parties from being disproportionally harmed due to pursuing the best interests of the company (Dutch Supreme Court, *Cancun*).

According to the Enterprise Court in the *Elliot/AkzoNobel* decision, directors are generally not obliged to actually enter into negotiations for the purpose of an M&A transaction. Such obligation to enter into negotiations may exist depending on the circumstances of a specific case. The board of directors has no obligation to enter into negotiations against a bidder (in the case of a hostile takeover). The directors of a target company are obliged, however, to respect the justified interests of a bidder, and they are not allowed to disproportionally harm the interests of the bidder by frustrating a (potential) offer (Dutch Supreme Court, *ABN AMRO*).

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

The most common types of claims following M&A transactions result from an alleged breach of the representations and warranties in the share purchase agreement.

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

Litigation between the parties to an M&A transaction differs from litigation brought by shareholders as follows:

- the debate in legal proceedings between parties to an M&A transaction is focused on the transaction documents and their clauses. The interpretation and the performance of the contractual provisions will be the main focus of the debate, which often results in claims on the basis of a breach of contract; and
- shareholder litigation is of a very different nature: shareholders only have the ability to bring claims on the basis of mismanagement of the company (inquiry proceedings) or the tortious conduct of the board of directors (either collectively or individually). At the centre of that debate are the actions taken by the corporate bodies and the consequences of these actions for the company. Shareholders find themselves in a difficult position particularly as derivative losses are not eligible for compensation under Dutch law: such damages may be successfully claimed only in cases where a specific standard of due care to be observed towards such shareholder has been breached.

Hogan Lovells

Manon Cordewener **manon.cordewener@hoganlovells.com**
Carlijn van Rest **carlijn.vanrest@hoganlovells.com**
Bas Keizers **bas.keizers@hoganlovells.com**

Atrium - North Tower
Strawinskylaan 4129
1077 ZX Amsterdam
Netherlands

Tel: +31 20 55 33 600
Fax: +31 20 55 33 796
www.hoganlovells.com

www.hoganlovells.com

© Hogan Lovells 2018. All rights reserved.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com

ISBN 978-1-78915-117-6