M&A Litigation

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

Hogan Lovells

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GETTING THE DEAL THROUGH

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M&A Litigation 2018

Contributing editors

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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.

France

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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.

M&A litigation initiated by shareholders is not as developed in France as it is in other jurisdictions such as, for instance, the United States. However, shareholders who are suffering a loss in connection with an M&A transaction can assert various claims under French law.

Regarding mergers or split-ups, before completion of an operation, shareholders can initiate summary proceedings to postpone the date of the board meeting during which the draft terms of the merger or split-up should be adopted, or of the general shareholders' meeting at which the contemplated operation should be approved. They may also request the court to appoint an independent expert whose mission, determined by the court, is often to review the criteria directors use to set the exchange parity in cases of mergers or split-ups.

After completion of a merger or split-up, shareholders can launch judicial proceedings to get the operation annulled, damages to compensate their loss, or both. Most of the time, this action will be launched by minority shareholders arguing that majority shareholders abused their position, and it is rarely successful in practice. Annulment may also be sought on other grounds such as fraud or failure to comply with the strict rules governing the organisation of general meetings.

More generally, in any M&A transaction, shareholders can bring claims for damages against officers and directors who concluded the transaction. This claim can be brought either in their own name or on behalf of a corporation.

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

Claims launched in summary proceedings by shareholders in relation to mergers or split-ups are usually motivated by a lack of information on the contemplated operation, non-compliance with the rules governing mergers or a challenge to the calculation of the exchange parity. Shareholders are responsible for proving they did not have enough information to be in a position to vote wisely, or that the procedural rules have not been complied with so that there is a risk that the whole procedure may be declared null and void. In practice, French courts do not often grant such claims.

Claims for an independent expert to be appointed can be made either in the scope of summary proceedings or ex parte proceedings. Shareholders must show a legitimate reason to preserve or establish evidence that may be helpful in subsequent litigation. For such claims to be successful, shareholders will also have to show that they lack information, so that the appointment of an expert is necessary.

Once the merger or split-up has been voted on at the general shareholders' meeting, minority shareholders can still dispute its validity and seek annulment of the operation before a court by proving that the formal requirements for such meetings have not been met at the general meeting, or that the required majority has not been met. In practice, it is extremely rare for a merger to be annulled.

Minority shareholders are also protected against abuses of majority shareholding. To be successful, they will have to prove that the decision that was made goes against the company's interests and was made solely in the interests of the majority shareholders. Abuse of a majority position can lead to the annulment of the decision, the allocation of damages, or to both. Given that the criteria are difficult to meet, this is not very often successful in practice.

Shareholders who wish to assert a claim for damages in their own name against a director have to prove three things: a fault, a personal loss and a causal link.

Regarding a director's fault, the French Commercial Code provides for three types of infringements: breach of French legislative or regulatory provisions, violation of a company's articles of incorporation (notably if directors exceed their powers) or mismanagement. The fault is objectively assessed by the courts, meaning that a director's behaviour is assessed in comparison with the standard of a reasonable person acting prudently and diligently. Regarding personal harm and a causal link, shareholders can only bring a claim in their own name if they prove that they are directly and personally affected by a director's fault: in other words, the loss they suffer cannot be a mere consequence of the loss suffered by the company itself. For that reason, claims brought by shareholders in their own name are rarely successful.

Shareholders can also bring a claim in the name and on behalf of a company to get compensation for the loss sustained by the latter (see questions 6 and 8).

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?

Publicly traded companies must abide by the rules governing the stock market. As such, compared to privately held companies, they must comply with additional rules aimed at affording transparency and information to their shareholders, especially in the case of takeover bids. Main claims usually relate to decisions of the AMF (the French financial markets regulator) clearing a corporate transaction or to the information given by companies involved in a takeover bid to their shareholders.

In the case of a hostile offer, specific mechanisms apply affording additional rights to shareholders (see question 5).

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

Irrespective of the operation at stake, it is always possible for shareholders to initiate proceedings against directors and officers to seek their liability, and to get compensation both for their personal loss and the loss suffered by the company (see question 1).

Any operation that requires modifying a company's articles of incorporation has to be approved by a general shareholders' meeting (the required majority depends on the type of company, and can be 66.6 per cent or 75 per cent of the voting rights, or even a unanimous vote). For such operations, claims based on majority or minority abuses can always be brought, if some shareholders have abused their position, by majority shareholders or minority shareholders.

Additional rules must be followed for some specific transactions such as mergers or split-ups (see questions 1 and 2). In these cases, additional claims may be available to shareholders in cases of non-compliance with these specific rules.

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

Directors and officers always have to act in the company's best interests, whether they are facing a negotiated transaction or a hostile offer. Failing to do so would trigger their liability towards the company and its shareholders.

This being said, the situations in which claims may be brought by shareholders may differ depending on whether a transaction involves a negotiated transaction as opposed to a hostile offer.

Indeed, since 2014, boards of publicly traded companies receiving a hostile offer can implement defensive measures aimed at frustrating the bid without the prior consent of the general shareholders' meeting, but only to the extent permitted by the company's by-laws and within the limits of corporate interests. Shareholders may have a claim against the directors if they violate the powers granted to them by the by-laws.

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

When the loss is suffered by the corporation itself, in principle, it is the corporation's legal representatives who will initiate the action to get compensation. If they fail to do so or if they are personally involved in the damage, then shareholders will launch a derivative action on behalf of the company (see question 8).

Shareholders can always bring actions to claim compensation for the loss they personally suffered, provided they can prove that they suffered a personal loss, which cannot be a mere consequence of the loss sustained by the company (see question 1).

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?

Class actions exist under French law, but they are not applicable to shareholder claims. Therefore, in principle each shareholder must bring his or her claim in his or her own name and cannot pursue claims on behalf of other shareholders.

This being said, shareholders that have suffered personal losses directly arising from the same conduct of a director or officer can give one or more of the shareholders a proxy to bring claims on their behalf and in their names before civil courts. The proxy must be made in writing, and must mention each shareholder's name and address, the number of shares they have and the amount of money they are claiming.

Affected shareholders may also create an association that will bring the claim on their behalf. This enables several shareholders to share the cost of judicial proceedings.

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?

In principle, it is the legal representative of the company who is in charge of protecting the corporation's best interests and bringing claims when necessary. When the loss is suffered by the corporation itself as a result of directors' or officers' behaviour, or when directors fail to take action, shareholders are allowed to bring a claim in the name and on behalf of the corporation. Under French law, this derivative action is called *ut singuli* and can be brought by any shareholder, no matter the number of shares he or she holds. This action is by nature subsidiary: it can only be brought by a shareholder to overcome the directors' inaction.

It should be noted that this right is not often exercised, as shareholders have to bear the litigation costs and, in the event of success, they do not get any compensation, as damages are fully awarded to the corporation.

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?

Several procedural tools are available under French law to a party wishing to get interim or injunctive relief in M&A litigation. Such measures can be sought either in the scope of summary proceedings or ex parte proceedings. In this last case, a plaintiff would have to show a good reason to derogate from the adversarial principle and not to call the other party (for instance, if there would be a risk that the measure may be jeopardised if the other party was informed).

Summary proceedings can be brought before the presiding judge of a commercial court if the plaintiff can prove that there is an emergency situation; and that the requested measure is either not disputable or that such measure is necessary because of the dispute between the parties.

Alternatively, any measures likely to prevent imminent harm can be ordered. In addition, in cases where the existence of the obligation cannot seriously be disputed, the judge can order specific performance of the obligation, even if the obligation at stake is an obligation to do something.

The powers of a judge hearing such cases are quite broad: they will usually consist of protective measures such as appointing an ad hoc agent to chair the general shareholders' meeting instead of the directors; appointing an escrow agent to block shares pending resolution of a dispute; or ordering postponement of a general shareholders' meeting. The judge may also enjoin communication of documents, if necessary subject to a daily penalty.

French courts tend not to interfere directly in the conclusion of deals, whether to modify deal terms or enjoin the signing of the deal, as one of the cornerstones of French contract law is the principle of freedom to contract. If one of the parties finally decides not to sign the deal, its civil liability will be triggered as it will be considered to be acting in bad faith – all the more if the negotiations are very advanced – but it will generally not be forced to sign the deal.

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

There are no discovery or disclosure mechanisms under French law. Defendants cannot seek early dismissal of a shareholder complaint.

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

Shareholders who have suffered a direct and personal loss caused by third-party advisers can bring claims against the advisers if they can prove that they committed a fault that resulted in a loss. The fault could consist in a wrongdoing, a conflict of interest or negligence.

The company itself may also bring a claim against such advisers, either through its legal representatives or, if they fail to act, through a derivative action initiated by shareholders (see question 8).

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

Under French law, directors have a duty of loyalty towards shareholders and their company. They should always act in their company's best interests. Shareholders can bring claims against counterparties provided they can prove that the counterparties directly caused the directors to breach their legal obligations or their obligations deriving from the company's by-laws. Third parties who voluntarily help directors to breach their obligations incur civil liability under general tort law.

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?

The legal provisions on directors' liability are of public policy: they cannot be limited or modified by agreement. The corporation's constituting documents cannot modify the extent of directors' duties towards the shareholders or the company. Provisions aiming to limit the scope of board members' or executives' liability, or provisions aiming to limit or condition a shareholder's right to act against board members or executives, shall be deemed unwritten, and would therefore have no effect. Similarly, no decision of the general shareholders' meeting could extinguish an action seeking directors' or executives' 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?

Any shareholder, no matter the number of shares he or she holds, is entitled to bring a claim against directors and officers in his or her own name or on behalf of the corporation.

Directors and officers can be exonerated from liability if they can prove force majeure, which is defined as an irresistible and unpredictable event. In practice, due to the strict criteria to be met for it to be successful, such defence is not very common.

Board members and executives should not be held liable for acts that have been approved by the general shareholders' meeting, except if they withheld material information or breached the law.

Directors can also try to be exonerated if they can prove that they formally objected to the decision that the board collectively made.

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

With France being a civil law country, case law does not have the same normative value as it does in other jurisdictions such as the United States.

When a shareholder brings a claim against a board member, the central question that courts must answer is whether the board members or executives acted in the corporate interests. The concept of corporate interests is key in French commercial law as it should serve as a guide for the board in all the decisions it has to make. Corporate interests are construed widely as covering not only shareholders' private interests but also the long-term interests of the company itself, its employees and creditors.

The onus of proof lies with the shareholder bringing the lawsuit to establish that the transaction was not in the corporate interests or that board members or executives committed a fault. Courts decide on a case-by-case basis taking into account all the circumstances of a case. There is no such thing in France as the 'business judgment rule'. Board members are not entitled to specific presumptions preventing courts from second-guessing their decisions. However, in practice French courts are reluctant to interfere in the management of companies, except if a breach of corporate interests is obvious.

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?

Board members or executives can only be held liable, either individually or collectively, if they committed a fault. The French Commercial Code provides for three types of infringements likely to trigger their liability towards shareholders or a company: a breach of French legislative or regulatory provisions, a violation of the company's articles of incorporation and mismanagement.

For board members or executives to be found guilty of mismanagement, shareholders must prove that the board or executives did not act in the corporate interests or that they violated their duty of loyalty towards the company or its shareholders. Their behaviour is assessed on an objective basis, by comparison with what a reasonable person, acting in good faith, prudently and diligently, would have done in a similar situation. The assessment will largely depend on the specific facts of each case (the company's size, the operation at stake, its public or private nature, etc).

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

Board members always have to act in the corporation's best interests, regardless of the type of transaction at issue.

This being said, the question of whether board members or executives are guilty of mismanagement very much depends on the facts of each case and the behaviour that would have been expected of a reasonable person placed in a similar situation. To that extent, the assessment of board members' or executives' behaviour will be impacted by the nature of the transaction at issue, the characteristics of the contemplated transaction and the counterparties.

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

The type of consideration paid to the seller's shareholders will be taken into account in courts' general assessment of the transaction. However, the standard remains corporate interests.

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

Board members always have to act in the corporation's best interests. This implies that they must refrain from serving their own personal interests.

To prevent potential conflicts of interest, transactions concluded between a corporation and a board member, or between the corporation and another corporation in which a board member has an interest (even an indirect one), have to follow a specific procedure. They are called 'related-party agreements', and have to be agreed by the board and then ratified by the general shareholders' meeting. If a transaction was concluded without the approval of the board or the general shareholders' meeting, it can be annulled if it had harmful consequences for the company.

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?

A transaction concluded between a controlling shareholder and the company falls within the ambit of 'related-party agreements', and as such has to be reviewed and agreed by the board of directors and submitted for approval to the general shareholders' meeting (see question 19).

If a controlling shareholder is receiving consideration in connection with the transaction that is not shared ratably with all shareholders, minority shareholders may launch an action claiming that the controlling shareholder abused its majority position. To be successful, they would have to prove that the decision that was made was contrary to the company's interests and was made solely in the interests of the majority shareholder. The abuse of a majority position can lead either to the annulment of the decision or to the allocation of damages, or to both.

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?

In most cases, directors' and officers' insurance is subscribed to by the corporation so that the legal fees of officers or directors named as defendants will be covered by this insurance (see question 24).

If this is not the case, there are no legal restrictions in France on the company advancing or repaying a director or officer the legal fees he or she has incurred given that, until and unless a judgment is handed down, the defendant is presumed not liable. Uncertainty exists as to whether this should be considered as a related-party agreement that would have to be authorised by the board and by the general shareholders' meeting (see question 19). For the sake of prudence and transparency, it is advisable, if the company decides to advance the legal fees, for this decision to be made collectively by the board of directors.

If the director or officer is eventually found liable, the question of whether the company should request repayment of the legal fees will depend on the facts of each case. If the wrongdoing committed by a director or officer was intentional or of a particular gravity (for instance, in the case of a criminal offence or fraudulent behaviour), the company would probably have to ask for repayment of the money it advanced since not doing so may be considered as not being in its corporate interests.

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

Parties to an M&A transaction have the duty to negotiate in good faith. They can incur civil liability for failing to comply with that duty, for instance if they continue negotiations while knowing that they have no intention to conclude a deal.

Freedom to contract includes freedom to negotiate each clause of a contract. Therefore, as far as privately held companies are concerned, break-up fee, standstill, no-shop, exclusivity or confidentiality clauses are all valid under French law, provided they are negotiated in good faith.

Publicly held companies are subject to stricter rules, especially concerning break-up fees, which are valid only if they do not hinder the concept of the free play of offers and counteroffers by setting an amount that would be too high and would hence deter shareholders from accepting a higher bid. The AMF closely controls such clauses.

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

If a transaction has to be approved by the general shareholders' meeting, board members cannot theoretically be held liable for such transaction's potentially adverse effects unless it is established that the transaction was approved because of mismanagement by the board or misinformation provided by the shareholders.

Minority shareholders can always challenge the validity of a transaction approved by the general shareholders' meeting if it appears that the formal rules for calling the meeting have been violated or if the majority shareholders have abused their position (see question 2).

It should be noted that the fact that a shareholder voted in favour of a transaction does not preclude him or her from subsequently bringing a claim to challenge its validity.

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

Directors' and officers' insurance has significantly developed in recent years in France due to the influence of US practice. In the vast majority of cases, the insurance policy is negotiated and paid by the corporation itself and covers any director and officer. The company's de facto managers can also be covered.

The insurance policy covers a director's civil liability towards the shareholders for any loss they personally sustained and towards third parties. Some insurance policies may also cover the loss suffered by the company itself. The insurance policy covers both damages that may be awarded and the fees incurred by the directors and officers to defend themselves (see question 21).

Insurance policies also provide for exclusions, some of which cannot be negotiated as they derive from law. This is notably the case for intentional misconduct and criminal liability, which cannot be covered by the insurance policy.

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 rules applicable in M&A litigation are the same as those applicable in any litigation: the burden of proof lies with the claimant. Therefore, if a shareholder wishes to claim damages against board members or executives, he or she has to prove the fault, the loss and the causal link between the two. The burden of proof does not shift. Although the business judgment rule is not applicable as such in France, French courts tend to avoid interfering in the management of a company unless there is a clear violation of corporate interests (see question 15).

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

Shareholders have a general right to be informed of a corporation's commercial and financial situation. They are entitled to obtain at any time the disclosure of several documents, including:

- the annual accounts of the last three financial years;
- the auditor's report;
- the management reports made by directors and officers; and
- the reports and attendance sheets of the last shareholders' meeting.

Additionally, before general meetings, any shareholder can ask questions of the directors and officers in relation to the agenda of such meeting. Twice a year, any shareholder or group of shareholders holding more than 5 per cent of the share capital is entitled to put questions to the president of the board in relation to facts likely to jeopardise the company's activity.

Shareholders can also initiate summary proceedings to have an independent expert appointed, whose mission will consist of assessing the conduct of the board on a specific matter. They can also request seizure of any evidence (reports, emails, hard drives, deliberations) likely to be helpful to ground their claim in potential subsequent litigation (see question 9).

Update and trends

In France, the past couple of years have seen several M&A transactions involving publicly traded companies that were highly publicised, notably owing to the activism of some hedge funds. Using their prerogative as minority shareholders, some of them challenged deals quite virulently or, conversely, put pressure on directors and officers to trigger them.

For instance, in the context of the public exchange offer initiated by a French leader in the aerospace and defence industries on another company involved in the same industry sector, a hedge fund holding a minority shareholding in the company initiating the operation publicly expressed its view that the conditions of the deal were not in the company's best interests. The hedge fund repeatedly expressed its strong objection to the transaction and even threatened to initiate proceedings, on behalf of the company, against each individual board member who authorised the deal to get compensation for the loss suffered by the company. So far, to the best of our knowledge, no lawsuit has been filed.

This example is not isolated. Activism has grown tremendously in the past few years both in other European countries and in France, with foreign activist funds aiming at acquiring minority shareholdings in major French companies and often threatening to bring lawsuits when they consider that decisions are not made in the company's best interests. The recent strengthening of shareholder activism in France will necessarily imply an increase of M&A litigation in France.

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

In principle, disputes relating to the functioning of commercial companies, their shareholders, and their directors and officers must be brought before the commercial court having jurisdiction over the place where the registered office of the company is located. Shareholders who seek a board member's liability can also bring their claim before the commercial court having jurisdiction over the place where the board member resides.

The articles of incorporation can provide for a forum selection clause covering disputes arising from the conduct of board members or between shareholders. However, these clauses are only valid if every shareholder can be considered as a 'trader' under French commercial law, which will depend on the type of company at stake. Besides, such clause must be very clearly stated in the statutes.

A company's articles of incorporation can also provide that disputes between shareholders, the company, directors and officers will be submitted to arbitration.

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

Summary proceedings are widely developed in France. Regarding M&A transactions, they can be a very useful tool for shareholders (see questions 9 and 26).

There is no discovery mechanism in France.

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

Under French law, the general principle governing the calculation of damages is that the financial compensation awarded must compensate the full loss but nothing except the loss. Loss of chance can be compensated as well as damage to reputation, if applicable. This rule prevents punitive damages from being awarded in France.

Parties can decide to include penalty clauses whereby they determine in advance the amount of damages that will be payable if the obligations arising from the contract are violated. However, a judge can reduce or increase such amount if it is manifestly excessive or ridiculously low.

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

There is no special issue with respect to settlement agreements concluded between a shareholder and a board member for individual claims that a shareholder may have brought against him or her.

However, in the case of a derivative action, a shareholder cannot settle on behalf of a corporation for the loss suffered by the latter.

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

In the case of a merger, the creditors of any company participating in an operation are entitled to challenge the transaction if they prove that a risk exists that they may not recover their debt. In this situation, the court may order the company to reimburse the debt immediately before closing the deal or to provide financial guarantees.

Apart from this specific case, even if the contract concluded with a third party includes an exclusivity clause, a breach of this clause would only allow the third party to claim damages; it would not enable him or her to stop an otherwise-agreed transaction.

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

Although this would theoretically be possible, we doubt that this would be successful before the French courts because of the freedom to contract, which states that parties are free to decide whether they want to enter into an agreement.

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?

Since 2014, boards of publicly traded companies receiving a hostile offer can implement defensive measures aimed at frustrating the bid without the prior consent of the general shareholders' meeting, but only to the extent permitted by the company's by-laws and within the limits of corporate interests. Defensive measures can, for instance, consist of:

- looking for a better deal;
- making negative statements to encourage shareholders not to sell;
- selling strategic assets to a friendly third party (the 'crown jewels' defence);
- launching a counter takeover bid to acquire the would-be buyer (the 'Pac-Man' defence); or
- buying business or assets (the 'Fat Man' defence).

Preventive measures such as putting shareholding agreements in place (preemption agreements, double voting rights, consultation agreements, etc) can also be implemented.

As an exception to the general rule, shareholders can also decide to expressly remove this right from the board of directors and include in the by-laws what has been referred to as 'a passivity rule'. This way, any measures taken aimed at frustrating a hostile offer would first need to be approved by the general shareholders' meeting.

Should the directors not act in the company's best interests, shareholders may bring a claim to get the measure suspended through summary proceedings. Otherwise, shareholders would have the possibility of bringing an action against the directors to seek their liability.

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

Claims are frequently initiated by the buyer in a share deal arguing that the seller breached its representations and warranties because the annual accounts did not give a fair and accurate description of the company's financial situation. In this case, the buyer usually initiates proceedings before the commercial courts on the basis of the liabilities guarantee conceded by the seller. Claims are also frequent between counterparties in relation to the enforcement of earn-out provisions or purchase price adjustment provisions.

To assist them, parties usually resort to private experts (accounting or audit companies) who are in charge of performing an analysis of the company's financial situation and helping parties assess their claims. Parties can also ask the court to appoint an independent expert. This process is long and can be costly, especially if the company at stake uses specific accounting methods (for instance, the on-progress accounting method, which is sometimes used for long-term contracts). For this reason, settlements are not unusual in these types of litigation.

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

In France, claims between counterparties to an M&A transaction are by far more common than litigation initiated by shareholders. They tend to be claims on the merits of the case whereby one party claims monetary compensation from the other one. The judicial proceedings are usually lengthy and technical, and can eventually lead to negotiations and a settlement being concluded.

By comparison, litigation brought by shareholders is seen less frequently in France. Litigation can be launched in summary proceedings, and mostly aims at gaining information or having an independent expert or agent appointed to collect documents, review a board's behaviour or replace the board for specific acts such as general shareholders' meetings. Such proceedings rarely end in directors being found liable to pay monetary compensation.

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