M&A Litigation

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

Hogan Lovells

2018

GETTING THE DEAL THROUGH

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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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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.

Italy

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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.

The main claims that shareholders can bring in connection with M&A transactions are as follows:

- shareholders are entitled to challenge the resolutions of the shareholders' meeting and the board of directors resolving on the relevant transaction, provided that the resolution is in breach of the law or by-laws and the shareholders have not voted in favour (or, under certain limited conditions, independently from their consent). Under certain circumstances, shareholders are entitled to challenge resolutions only if they possess a certain amount of the corporate capital. In absence of such requirement, shareholders are entitled only to seek compensation;
- with regard to merger transactions, shareholders are entitled to challenge the merger, by no later than the filing of the deed of merger with the companies' register, if the merger causes them damages. After filing, pursuant to article 2504-bis and 2504-quater Italian Civil Code (ICC), the merger is effective, and shareholders, as well as other possibly injured third parties, can only seek compensation for losses deriving from the merger. In this latter case, the corporation is directly responsible for the losses suffered by the shareholders (or by third parties); and
- shareholders, individually or on behalf of the company, are entitled to claim liability of directors, statutory auditors, or both for violation of their duties arising from the law or by-laws.

In more general terms, shareholders can also activate control procedures over directors' acts or omissions that are possibly unlawful as follows: internally, by referring the same acts or omissions to the statutory auditors; or externally, by referring the same acts or omissions to the competent state court, which can, inter alia, appoint a judicial director also having the power to bring liability claims against directors (article 2409 ICC).

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

For each of the claims outlined in question 1, the shareholders shall demonstrate the following elements.

Challenge to resolutions

Shareholders shall demonstrate that the resolution is invalid (in violation of the law or by-laws) and that they have not voted in favour. As for joint-stock companies, shareholders shall also demonstrate pursuant to article 2378 ICC that they possess shares representing at least 1/1,000 of the corporate capital for publicly traded companies, or 5/100 for privately held companies.

Challenge to mergers

This requires the occurrence (and satisfactory evidence) of one of the following circumstances:

- violation of the ICC rules governing the merger (articles 2501 et seq ICC);
- invalidity of a shareholders' or board of directors' resolution of one of the companies involved in the merger (eg, violation of shareholders' voting rights; breach of the shareholders' right to be fully informed; or an unreasonable share exchange ratio); or
- invalidity of the deed of merger.

After filing the deed of merger with the companies' register, the merger can no longer be challenged, but, pursuant to 2504-quater (2) ICC, shareholders can still bring compensation claims against the company, which, according to some case law, is directly liable for all acts and omissions of its corporate bodies. In this case, shareholders shall essentially:

- allege the occurrence of one of the circumstances above (the company is indeed burdened to prove that no violation of the ICC rules, or invalidity of the shareholders' or board of directors' resolution or of the deed of merger, occurred); and
- prove the damage individually suffered in connection with the merger (ie, independently from the possible damage that the company that they are shareholders in has possibly suffered).

According to the same case law, since the the company is directly liable for its corporate bodies, the shareholders are not required to specifically demonstrate the negligence or wilful misconduct of its directors.

Directors' liability

Irrespective of, and independently from, any action against the company, the directors may still be held liable by shareholders for their wilful misconduct or negligence pursuant to article 2395 ICC. In this respect, to bring a successful claim, shareholders shall demonstrate: the negligence or wilful misconduct of the directors; the damage individually suffered (ie, not as a consequence of the loss suffered by the company); and causation between the directors' unlawful behaviour and the shareholders' loss.

The claim may be brought against directors who are still in office, as well as against those who are no longer in office. Third parties (for instance, former shareholders) can waive their right to start legal action against the directors of a company.

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?

In general terms, publicly traded corporations are subject to specific rules and disclosure obligations on price-sensitive information (material acquisition, capital increases, mergers and demergers, divestment of material assets, etc). The National Commission for Companies and the Stock Exchange (CONSOB) is the regulatory authority that supervises transactions (including tender offers and mergers) involving Italian publicly traded companies.

For instance, in the case of merger, the expert who is responsible for rendering its opinion on the fairness of the exchange ratio of shares and quotas has to be chosen and appointed among audit firms that are subject to the supervision of CONSOB. Violation of such specific rules may entail invalidity of the resolutions and deeds underlying the transaction and, to this extent, said rules may be relevant to claims that shareholders can bring.

As for tender offers, Italian law is detailed, and further types of claims may be raised under the relevant law provisions. For instance, Italian Financial Law (TUF) provides, inter alia, that an entity which

becomes the owner of certain thresholds of voting shares of an Italian listed company shall launch a mandatory tender offer; and shareholders have the right to sell their shares if a bidder, as a result of a mandatory or voluntary tender offer, ends up owning certain thresholds of voting shares.

Violation of such provisions may entitle relevant shareholders to raise further claims.

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

The types of claims that shareholders can bring may differ depending on the form of the transaction.

While certain claims may be relevant to any transaction (such as the challenge of resolutions or liability claims against directors and officers), others may be brought only in the context of specific transactions, such as the challenge of a merger or a liability claim against experts who rendered a fairness opinion in the context of a merger (see further question 11).

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

The types of claims that shareholders can bring may vary on the basis of the nature of the transaction (ie, a negotiated transaction versus a hostile or unsolicited offer).

While, in a negotiated transaction, the claims shareholders may raise are those already outlined in question 1, further types of claims may be brought in connection with hostile or unsolicited offers. The specific discipline concerning these additional claims is set out within the TUF and is mainly focused on the 'passivity rule', whereby directors of Italian companies that are target of an unsolicited offer shall refrain from undertaking strategies that would jeopardise the action of the bidder unless such defensive strategies are expressly authorised by the shareholders' meeting or provided by the company by-laws or articles of association.

The responsibility of directors towards the company is provided for in cases of non-compliance with such duty.

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

With regard to liability claims against directors, the nature of such liability – contractual or tortious – depends on whether the loss is suffered by the corporation or the shareholders. The different nature of the responsibility entails significant differences in the allocation of the burden of proof.

Indeed, when the corporation seeks directors' liability, the liability is contractual in nature, and this means that the plaintiff (the company or, for instance, shareholders acting on its behalf) is required to:

- allege that directors have breached the duties established by the law or by-laws, including the duties of loyalty, fairness and diligence (the directors have the burden to demonstrate that they fulfilled their duties);
- prove the damage suffered by the company; and
- demonstrate the causal nexus between such violation and the damage.

On the contrary, when the shareholders individually seek directors' liability, according to certain case law, the liability is tortious in nature and, as a consequence, the plaintiff is required to prove the directors' negligence or wilful misconduct; the damage individually suffered (not as a consequence of the loss suffered by the company); and causation between the directors' unlawful behaviour and the shareholders' loss.

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?

Pursuant to article 140-bis Legislative Decree No. 206/2005, class actions can be initiated only by consumers, and shareholders are not included in that definition. It follows that it is upon each individual shareholder to raise a claim for damage compensation.

Nevertheless, to some limited extent and under certain circumstances, shareholders may raise claims collectively. For instance, if corporate by-laws provide for the issuance of saving shares, the representative of the holders of such kind of shares may challenge resolutions of the shareholders' meeting and request the judge to ascertain and declare that shareholders have suffered a loss. In any case, even if it is ascertained and declared that damage occurred, the shareholders will have to then individually seek compensation.

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?

Shareholders are entitled to pursue compensation claims on behalf of the company in cases where the damage suffered by the company is attributable to the negligence or wilful misconduct of the directors in the management of the company and, therefore, also in the context of an M&A transaction.

Shareholders' right to bring liability claims against directors is provided for by the ICC both for joint-stock corporations (article 2393 ICC) and limited liability companies (article 2476 ICC), and has to be exercised within five years from the termination of the manager's contract.

More specifically, for limited liability companies, the action can also be brought by a single shareholder.

As for joint-stock corporations, the claim can be raised by:

(i) the shareholders' meeting;
(ii) the statutory auditors (resolving with a majority of two-thirds of all statutory auditors);
(iii) one-fifth of shareholders (but the minimum threshold can be differently set up to one-third by corporate by-laws) in the case of private companies; or
(iv) 1/40th of shareholders (but corporate by-laws can provide for a lower threshold) if the company is publicly held.

In cases (i) and (ii), board members, executives or directors involved are automatically removed from their role if the action is resolved by at least one-fifth of the shareholders.

In addition, the liability claim against directors can be initiated by the director appointed by the court pursuant to the procedure provided for by article 2409 ICC (see question 1).

If the claim is upheld by the judicial authority or is amicably settled, any damage compensation shall be paid to the company. Legal costs shall be reimbursed to the shareholders, up to the amount of legal costs awarded or agreed.

With reference to a situation where a claim is brought by one company against another company that is a party to an M&A transaction, such action may be initiated only by the company's representatives, and shareholders may only subsequently intervene in the proceedings should they wish to support or object to the company's claim.

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?

Article 2378 ICC establishes that shareholders may challenge resolutions (possibly resolving on a M&A transaction) in breach of the law or corporate by-laws. Resolutions can be challenged by shareholders who own shares with voting rights representing, on aggregate, at least 1 per 1,000 of the share capital for companies resorting to risk capital; and 5 per cent in other cases.

The by-laws may reduce or exclude such a requirement.

Together with the claim, plaintiffs can also request the judge to issue an interim order suspending the effectiveness of the resolution, which could also be sought (and granted) *ante causam*. In any case, the order of suspension may be revoked by the court during the merit proceedings relating to the validity of the resolution.

Under article 2504-quater ICC, a merger cannot be challenged once the deed of merger is filed with the companies' register. However, shareholders may in principle ask the judge to issue a temporary order preventing the shareholders' meeting or the board of directors from resolving upon the merger. Pursuant to article 700 Italian Code of Civil Procedure (ICCP), the shareholders shall demonstrate the risk that irreparable damage will occur in the case of a merger and the prima facie groundedness of the claim.

Regarding the possibility for third parties to prevent the closing of M&A transactions, see question 31.

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

No disclosure or discovery applies under Italian procedural law.

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

Pursuant to article 2501-sexies ICC, if the shareholders do not unanimously resolve to the contrary, each of the companies involved in a merger transaction is compelled to seek a third-party adviser (registered in a dedicated public roster) to provide a report on the fairness of the exchange ratio of shares and quotas and the criterion adopted for its calculation. Article 2501-sexies(6) ICC also establishes the liability of advisers in relation to companies, shareholders and third parties for damage caused in connection with the report. Shareholders will have to prove, inter alia, that in preparing the repor,t the advisers acted contrary to the duties of care and due diligence. The advisers, on the other hand, will have to provide evidence, inter alia, that any misstatement cannot be attributed to their work of audit. Under certain circumstances, misstatements may be qualified as criminal offences.

Any other consultancy provided to any of the parties that falls outwith the scope of article 2501-sexies is subject to the ordinary rules governing professional services contracts.

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

No specific provisions under Italian law confer upon shareholders the power to sue the counterparties to M&A transactions. Generally speaking, such an action would be probably dismissed for lack of shareholders' standing, given that the parties to the transaction are the only ones entitled to raise a claim for non-compliance.

In any case, under general rules for civil liability, it cannot be excluded that one party may be found liable for having contributed to the breach of a contractual obligation binding another party. To this limited extent, the possibility that shareholders bring claims against the counterparties to M&A transactions could in principle be envisaged.

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?

First, corporation documents (articles of association, by-laws, etc) are subject to the general rules applicable to contracts. Specifically, article 1229 ICC provides that any agreement aimed at limiting or excluding (in advance) liability for wilful misconduct and gross negligence, or in relation to acts amounting to violations of public policy, is null and void.

Second, the board of directors may confer upon one or more of its members, or upon a managing board, the power to perform certain functions. In this case, the other members of the board of directors are not liable for acts committed by the delegated members unless they are aware of the possible damage and fail to take any countermeasure. Furthermore, directors are not liable if, in the absence of any fault attributable to them, their dissent is recorded in the minutes of the board of directors and they have informed statutory auditors of the relevant facts.

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?

Italian law does not provide for any statutory or regulatory limit to shareholders' ability to bring claims against directors and officers in connection with M&A transactions.

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

Italian scholars and case law accept and uphold the 'business judgment rule' (recently, Supreme Court, 22 June 2017, No. 15470). Accordingly, courts can potentially only assess whether members of the board of directors complied with the applicable law, by-laws and obligations of due diligence and fair dealing, and that no conflict of interests occurred (see question 16); they cannot assess the economic opportunity and convenience of management's choices as discretional in nature, provided that they do not contravene the above-mentioned provisions and duties.

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 and executives must act in the best interest of the company, in compliance with all the obligations set out by the law and the company's by-laws, which shall be carried out 'with the diligence required by the nature of the office and their specific competences'. Such general duty of diligence and care applies to M&A transactions as well.

In the case of a failure to fulfil their duties, directors may be held liable for the damage resulting from their actions or omissions towards the company, the company's creditors, and shareholders or third parties.

The extent of directors' responsibilities and the standard of care required for each director may vary depending on the director's specific expertise. In general terms, however, to bring a successful claim, a damaged party shall demonstrate that the director did not perform his or her duties in good faith; undertake all the proper procedural steps before taking the business decision; and handle the situation with the care that an ordinarily prudent person in a similar position would have used under comparable circumstances.

The above-mentioned duties apply also when an insolvency procedure is opened: directors are open to criminal liability if they commit offences either during insolvency proceedings or in the period before a company is declared insolvent, under certain specific circumstances.

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

The nature of the relevant transaction does not affect the standard for determining whether a board member or executive may be held liable to shareholders.

The business judgment rule mentioned in questions 15 and 16 is a flexible standard that applies to any transaction (and, more generally, to any business decision) undertaken by directors, who will be held liable only in cases of failure to meet their duty of care and diligence.

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

The consideration being paid to the seller does not affect the standard for determining whether a board member or executive may be held liable to shareholders.

The business judgment rule applies to any transaction (and, more generally, to any business decision) undertaken by directors (see questions 15, 16 and 17).

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

In general terms, a director must inform other directors and statutory auditors of any interest he or she has on his or her own behalf (or on behalf of third parties) in a transaction, specifying its nature, terms, origin and relevance; in the case of a managing director, he or she shall abstain from such transaction, informing the board of the interest or reporting it to the shareholders' meeting (in the case of a sole director). A potential conflict of interest does not prevent the director with this interest from voting in favour of the transaction, but it requires the entire board of directors to adequately specify the reasons for the transaction and the advantages for the company deriving from the relevant transaction.

In the event of non-compliance with the above, the resolution – if adopted with the determining vote of the director in a conflict of interest situation, and if prejudicial to the company – can only be challenged by directors and the board of statutory auditors within 90 days of the date of its adoption.

Shareholders would in any event be entitled to pursue the liability of directors for violation of their duties on behalf of the company provided that the conditions outlined in question 2 are met.

In addition, directors will be liable for damage that may be caused to the company from any use for their own benefit (or that of third

parties) of data, information and business opportunities obtained in connection with their appointment.

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?

Italian law does not provide for any specific duty upon controlling shareholders in the case of M&A transactions.

More generally, however, specific rules and liabilities apply to legal entities exercising direction and coordination towards other companies. Those legal entities will be liable towards shareholders of the controlled companies (for damage caused to the value of their shares); and creditors of the controlled companies (for damage caused to the latter's assets) when acting in their own interest (or in the interest of third parties) in breach of the principles of fair management of the controlled company.

No liability shall arise where shareholders or creditors of the controlled companies suffered no damage, taking into account the overall outcome of the activity of direction and coordination; or where damage has been completely eliminated by a specific action carried out for this purpose.

To bring a successful claim against the directors of a controlling or controlled company, minority shareholders shall demonstrate the directing and coordinating power of the controlling entity; the existence of conducts against the principles of proper management; and the damage suffered.

As for listed companies, CONSOB sets out a specific discipline concerning related-party transactions.

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?

Companies are in principle allowed to indemnify or advance the legal fees of their officers and directors sued for alleged breach of their duties.

This is not, however, common practice since, as explained in question 24, companies usually opt instead to pay for insurance policies covering directors' and officers' liability.

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

This possibility is not provided for under Italian law.

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

Shareholders who expressed their favourable vote to a resolution approving a transaction cannot challenge it.

As regards joint-stock corporations, shareholders' resolutions that are not in compliance with the law or company by-laws may be challenged only by those shareholders who were not present at the relevant shareholders' meeting or that dissented or abstained from the vote (as well as by directors, supervisory board members or statutory auditors). As explained in question 9, resolutions can be challenged by shareholders who own shares with voting rights representing, on aggregate, at least 1 per 1,000 of the share capital, for companies recurring to risk capital and 5 per cent in other cases.

The by-laws may reduce or exclude such a requirement. Shareholders who do not represent the required share capital (and those who are not entitled to challenge the resolution) are entitled to seek damages suffered by the non-compliance of the resolution with the law or with the by-laws.

As to limited liability companies, quotaholders' resolutions that are not in compliance with the law or by-laws may be only challenged by those quotaholders who were not present at the relevant quotaholders' meeting or that dissented or abstained from the vote (as well as by directors, supervisory board members or auditors). The corporate capital quota needed to challenge the resolution is provided by the by-laws of the company.

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

Directors and officers are commonly insured (companies also often sign insurance policies covering directors and officers as part of their directors' and officers' insurance policy) against damage claims deriving from breaches of duties set out in the law or by-laws, as long as these do not derive from gross negligence or wilful misconduct.

It is therefore common that, when a director or officer is sued, he or she seeks indemnification from the insurance company. This is usually sought by filing a request for joinder upon the insurance company. Traditionally, insurance companies present pleadings that are two-fold and aimed at denying that an obligation to indemnify the director or officer exists, and dismissing claims raised against the director or officer.

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?

As a general rule, article 2697 ICC establishes that the burden of proof is upon the party making the relevant allegation.

However, in the context of liability claims against directors and officers, the burden of proof depends on whether the shareholders claim losses suffered by the company or individually.

In the first case, the claim is grounded on a contractual breach, and the claimant or injured party is exonerated from demonstrating that a breach occurred, while the defendant or injuring party has the burden to prove that it has complied with the relevant contractual obligation (Supreme Court 30 October 2001, No. 13533). The claimant or injured party shall, in any case, demonstrate the existence of the contract, the occurrence of a loss (as well as its quantification) and causation between the breach and the loss. Accordingly, when shareholders file a claim for damages on behalf of the company, ie, grounded on the failure of the board members or officers to comply with their duties, the shareholders (more correctly, the company) shall prove the existence of the contractual relationship between the parties and the damage, along with its quantification. On the other hand, the members of the board or officers shall prove that they complied with their duties or that the alleged damage cannot be attributed to their behaviour.

If the shareholders act personally and in their own interest against the board members or officers, the general rule under article 2043 ICC will apply, and the plaintiff or injured party shall provide evidence of the unlawful act or omission committed by the director or officer.

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

As for limited liability companies, pursuant to article 2476 ICC, quotaholders who are not directors or members of the board have the right to obtain from the directors updates regarding the status of operations; and to examine the corporate books and records, including with the assistance of a professional adviser.

As for joint-stock companies, shareholders' right to examine and make copies is restricted to certain corporate books (article 2422 ICC), as the control regarding correct management generally lies with the statutory auditors. Pursuant to article 2409 ICC, when there is a reasonable ground to deem that directors have committed a serious breach relating to management, possibly causing losses to the company or controlled companies, a certain number of shareholders (minimum thresholds can be modified by corporate laws) can refer the relevant facts to the competent court. The court may, inter alia, order an inspection or even appoint a judicial director.

In the framework of mergers, a copy of the following documents, inter alia, shall be shared with the shareholders (30 days before the meeting resolving upon the transaction): the merger plan; the financial reports of the last three years of the companies taking part to the transaction, along with the reports of the board of directors and auditing firm; and the up-to-date financial status of the companies taking part in the transaction (article 2501-septies ICC).

Each shareholder can inspect said documents and obtain a free copy of them.

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

Provided that the company is sued, the general rule under Italian law is that proceedings shall take place where the company has its headquarters or its registered offices (article 19 ICCP).

While by-laws can derogate from such provision and provide that claims shall be brought before a different court (articles 28 to 29 ICCP), that option is not applicable, inter alia, to claims raised by shareholders to challenge the validity of any resolution, including one that authorises the merger or acquisition, pursuant to article 2378 ICC (this rule was confirmed by the Supreme Court in judgment No. 19039 of 11 September 2007); and disputes between shareholders.

Further limitations are provided by law in relation to, inter alia, interim proceedings, enforcement proceedings and insolvency proceedings.

Furthermore, it is common that companies' by-laws provide that any dispute among the company, shareholders and directors shall be settled through arbitration. Under Italian law, arbitrators are generally prevented from ordering interim measures, with very limited exceptions relating to the order of suspension of the effectiveness of resolutions.

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

Discovery does not apply to Italian judicial proceedings, and each party to the proceedings is free to file (or not to file) with the court the documents and evidence that it deems necessary to support its allegations. However, each party is able to request the court to order the other party or a third party to exhibit a certain document if relevant requirements are met (eg, the exact identification of the relevant document, the indication of the reasons why exhibition is sought and the relevance of the – alleged – content of the document to the case). The party against which exhibition is sought may object, inter alia, that the exhibition of the document would be prejudicial to itself or a third party (eg, in the case of a confidential document).

The Italian civil procedural system provides for a simplified trial governed by articles 702-bis et seq. ICCP. Such simplified procedure can be used when collection of evidence is presumed to be easy. If the complexity of the matter requires a more articulated examination, the court can order that the case be decided through ordinary proceedings. This kind of proceeding cannot be used when the dispute, pursuant to article 50-bis ICCP, has to be decided by a panel of three judges. A panel of three judges is required, for instance, where specialised court divisions have jurisdiction over the matter (eg, court divisions having jurisdiction over a wide number of disputes possibly involving corporations, including without limitation liability claims against directors and officers, and disputes relating to any transfer of participation interests) or in the case of proceedings for challenges of resolutions of a shareholders' meeting or of the board.

In any case, given the complexity of post-M&A litigation, it is highly unlikely that even residual claims (ie, those not falling under the cases reported above) will be initiated or decided through summary proceedings.

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

The most common issues in M&A litigation concerning damages are related to the difference between the value attributed to the shares during and after the transaction, and the value that the same would have had if the alleged unlawful behaviour did not occur. It is upon the claimant to provide an estimate of the damages and to provide supporting evidence. Given the complexity of the calculation, courts generally appoint an expert to evaluate the correct value of the disputed amount. In such case, the parties will have the right to appoint their own experts.

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

In general terms, settlement agreements are regulated by articles 1965 et seq., ICC. Nonetheless, when the object of the settlement agreement is a liability claim against directors and officers brought, or possibly to be brought, by a shareholders' meeting on behalf of the company (pursuant to article 2393 ICC), the settlement can take place only upon approval by the majority of the shareholders' meeting, provided that no objection is raised by shareholders who represent (at least) one-fifth of the corporate capital or 1/40th for companies recoursing to risk capital (or any other majority the corporate by-laws provide for). According to article 2393-bis ICC, the liability claim can also be brought by shareholders who represent at least one-fifth of the shareholders on behalf of the company, and in this case the settlement must be approved by the same shareholders who initiated the claim. In this latter case, if the shareholders' claim proves successful, shareholders are reimbursed for any legal expenses. In both cases, any damages compensation awarded shall be paid to the company.

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

Pursuant to article 2503 ICC, a merger cannot be completed until 60 days after the filing of the resolution resolving the merger with the companies' register.

In this time frame, creditors and bondholders of either company have the right to object to the merger pursuant to articles 2503 and 2503-bis ICC should they consider that the operation may prejudice the company's compliance with outstanding obligations. Upon request of the company, the competent court may issue a temporary decision authorising the transaction, if it considers prima facie that the claim is ungrounded or that the company has provided sufficient guarantees.

Alternatively and in any case, the 60-day term does not apply if:

- all the creditors and bondholders have previously consented;
- the company fulfils its obligations towards the creditors objecting to the merger;
- the company deposits the claimed amounts in a dedicated bank account; or
- a single firm of auditors is in charge of drafting both companies' report regarding the share exchange ratio, pursuant to article 2501-sexies ICC, and it certifies under its own responsibility that the transaction will not damage the position of creditors and bondholders.

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

Anyone can start litigation to put pressure on the defendants. However, if the litigation is frivolous, plaintiffs can be ordered to pay damages in addition to legal costs.

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 general rules regarding the duties and responsibilities of directors apply.

In addition, further specific duties may arise, inter alia, from rules laid down in the TUF and CONSOB Regulation No. 11971 of 1999.

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 that may arise from an M&A transaction include:

- breach of contract;
- breach of representations and warranties;
- purchase price adjustments;
- earn-out claims; and
- breach of good faith obligations.

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

The rationale behind these two types of litigation is completely different, and the impact on the way litigation is conducted – which changes also based on the content of claims and the relief sought – is so wide, that it cannot be summarised in few lines. In general terms, however, it should be highlighted that in Italy:

- claims between parties to an M&A transaction are by far more common than litigation initiated by shareholders;
- disputes between parties to an M&A transaction are mainly focused on the transaction documents, while shareholders' litigation focuses on the actions taken by the corporate bodies and their consequences for the company; and
- disputes between the parties to an M&A transaction are usually contract-based and solved by arbitration (as most M&A contracts contain arbitration clauses), while litigation brought by shareholders can also be based on tort and is usually brought in public courts.

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