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

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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

London
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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.

Brazil

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Levy & Salomão – Advogados

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 shareholders may assert are:
- claims related to any violation of the corporation by-laws or legal provisions that might have occurred in the context of an M&A transaction;
- indemnification claims against officers and directors for damage caused to the corporation in violation of the by-laws, or as a result of acts or omissions performed with:
  - negligence;
  - recklessness;
  - lack of professional skills; or
  - wilful misconduct; and
- indemnification claims against controlling shareholders for any damage caused by acts performed by an abuse of power.

Minority shareholders may also file a claim in the context of an M&A transaction if it involves a corporate reorganisation (such as a merger, amalgamation or spin-off) and the minority shareholder receives fewer shares in the surviving entity than expected. Minority shareholders may also exercise withdrawal rights (not applicable to publicly traded corporations) and challenge the value to be paid for their shares.

As a principle of law, any individual or entity that caused damage resulting from an action or omission of the corporation is entitled to indemnification for damages.

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

As a condition to filing a successful claim, a shareholder must show that he or she has standing to sue (ie, he or she was a shareholder prior to the transaction and was affected by it); and a legal interest to bring the claim based on a violation of his or her rights.

In relation to the substantive law and burden of proof, the shareholder must have strong elements to prove that a breach of the company's by-laws or the law has in fact occurred as a result of the transaction, thus causing direct damage to the shareholder.

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 corporations are subject to the supervision of the Brazilian Securities and Exchange Commission (CVM) according to the Brazilian Security Law. Therefore, CVM has power to impose penalties and fines in cases of violation of the applicable law or other rules arising from CVM's normative power. For this reason, publicly traded corporations can be party to punitive administrative proceedings before CVM as a result of a claim brought by shareholders.

Other procedures can be pursued whether the corporation is publicly trade or privately held. Note that shareholders of publicly traded corporations are not entitled to withdrawal rights and any lawsuits deriving therefrom.

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

As a general rule, shareholders can bring a claim for indemnification in the case of breaches of legal duties, legal provisions and governing documents by company directors, officers or controlling shareholders in the context of M&A transactions, regardless of the form of the transaction. Shareholders can also bring a lawsuit against their counterparties in the M&A transaction in relation to the transaction documents.

In transfers of publicly traded corporations, disputes about the exercise of tag-along rights by minority and preferred shareholders may also take place.

However, there are certain transaction structures that entail additional rights for shareholders, particularly those involving reorganisations such as mergers, amalgamations and spin-offs. In such case, claims may challenge the exchange rate of shares of the corporation being merged, amalgamated or spun-off for shares in the surviving entity. Another alternative for dissenting shareholders is to exercise the right of withdrawal of the corporation, in which case shareholders may challenge the amount to be paid to the withdrawing shareholders.

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

Although unsolicited offers are conceptually possible under Brazilian law, they are very rare in practice. Brazil adopts the mandatory bid rule, whereby the decisions on the offer remain with the shareholders. The board of directors must give an opinion on the success of the offer, but the shareholders have the final word (section 32-D of CVM rule 361).

Unsolicited offers can, in theory, be challenged based on the regularity of the offer under Brazilian law. Potential violations of the regulations preventing competing offers may also give rise to litigation.

Claims seeking indemnification for abuses of controlling shareholders are more likely in negotiated transactions due to the nature of unsolicited offers.

Regardless of the type of transaction, whenever the corporation or its shareholders suffer damage due to acts or omissions of the management, claims for indemnification may be sought against directors and officers.

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

Even though the claims for these follow the same proceeding, they are based on different legal grounds.

In the case of a loss suffered by the corporation, as general rule, the legal entity has the standing to file a lawsuit to recover its losses as set forth in article 159 of the Corporate Law. However, if the losses are caused by directors' or officers' acts or omissions, there is the possibility of a derivative suit brought by shareholders on behalf of the corporation according to the third and fourth paragraphs of article 159 of the Corporate Law.

On the other hand, if the loss is suffered directly by shareholders, they can seek an indemnification from the wrongdoer based on the general provisions regarding civil liability set forth in the Brazilian Civil Code. Furthermore, shareholders can bring a claim against directors or officers if they suffered a direct loss caused by the acts or omissions of such management members as provided in the seventh paragraph of article 159 of the Corporate Law.

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?

Brazilian civil procedure law does not provide for class actions in the same terms as those under US law. There are specific civil collective actions that may be filed by the Prosecutor's Office, agencies, associations and other entities to defend the interest of a group of individuals under the same conditions, but M&A transactions would not fall under such hypothesis if there have been no securities violations. The shareholder him or herself is not entitled to file such collective claim.

Nevertheless, a suit brought by several individuals is allowed under Brazilian law. In this case, all of the individuals are considered co-claimants, and have the same rights and responsibilities in the lawsuit. However, the number of claimants allowed to stand in a lawsuit may be limited by the judge if he or she deems that an excessive number of claimants undermines the expedited resolution of the dispute, or hampers the regular defence of the defendant or the execution of the award.

Recently, groups of Brazilian individuals have been forming associations of minority shareholders of certain large corporations. The underlying rationale is that such associations file for a class or collective action, in which case the indemnification shall revert to the association. This phenomenon is recent, and to date there is no relevant case law on this.

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?

Brazilian law does not recognise derivative actions brought by shareholders in the name of the corporation against third parties, although the Corporate Law allows shareholders to bring lawsuits in the name of the corporation against officers and directors.

Shareholders can bring derivative suits against directors and officers according to the third and fourth paragraphs of article 159 of the Corporate Law. Such provisions establish two possibilities regarding derivative suits against directors and officers:

- shareholders can bring a derivative suit if the corporation does not file the claim within three months counted from the date of the shareholders' meeting that authorised such lawsuit; or
- shareholders representing at least 5 per cent of the capital stock can file a derivative suit if the claim against members of the management has not been approved in the shareholders' meeting.

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?

In the Brazilian legal system, any individual has the possibility of filing injunctive relief with the intention of avoiding a loss or preserving the successful outcome of a lawsuit. For this purpose, there are two legal requirements that should be fulfilled. As set forth in article 300 of the Brazilian Code of Civil Procedure, the requirements are the probability of the alleged claim (*fumus boni iuris*), and the risk of loss or injury to the successful outcome of the lawsuit (*periculum in mora*).

Regardless of the subject in dispute, the general provision is applicable to any situation in which a measure is deemed necessary.

Moreover, Brazilian courts can be invoked to enjoin M&A transactions. If an M&A agreement consists of an enforceable instrument, the specific performance of the transaction can be required in the case of a default regarding its implementation as set forth in article 815 of the Code of Civil Procedure.

Notwithstanding, courts are not allowed to modify deal terms, but only to review their validity or their effectiveness. For this reason, the only feasible outcome of a judicial review of a deal's terms is to find them null, void or ineffective. Conceptually, indemnification may be sought if the provisions of the transaction documents entail an abuse of a right (article 187 of the Civil Code) or a breach of the principles of good faith.

Antitrust authorities, in the context of the pre-merger analysis, may request the modification of the deal terms, in which case disposal of assets of the parties may be required.

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

No. The summary proceeding set forth in article 275 of the previous Code of Civil Procedure no longer exists. Nevertheless, it was not a procedural measure similar to a motion to dismiss.

Currently, there are the possibilities of summary judgment (article 355 of the Code of Civil Procedure) and of dismissal of the claim (article 330 of the Code of Civil Procedure). Notwithstanding, in both situations, it is common to produce documentary evidence when the party files the claim.

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

Shareholders can bring claims against third-party advisers that assist in M&A transactions.

In the Brazilian legal system, third-party advisers, such as lawyers and other consultants, have a duty of care regarding the work that they are retained to perform. This means that such parties are bound to apply their technical skills with diligence in the performance of their work, although they are not required to reach any previously determined results.

Should an adviser in an M&A transaction fail to act with the required diligence in the performance of his or her attributed tasks, either as a result of negligence, recklessness or lack of the required technical skills, or as a result of malicious intent, an aggrieved shareholder can bring a claim against the applicable adviser. It shall be incumbent upon such plaintiff to prove that the adviser's performance fits into one of the hypotheses that justifies a claim against such party.

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

Yes. The parties must act in good faith and according to their fiduciary duties. Breach of such duties entitles the aggrieved party to present a claim against the other party.

Claims may be brought during the negotiation of an M&A transaction, such as those related to break-up fees, breaches of the exclusivity or confidentiality obligation, or bad faith behaviour in the negotiations.

Pending closing, claims may also be brought, such as those requesting specific performance of the obligation to close or the termination of the M&A documentation.

After closing, claims may be filed to discuss, among other things:

- the terms and conditions of the transaction;
- price adjustments;
- earn-outs;
- breaches of representation and warranties;
- indemnifications; and
- breaches of covenants.

Post-closing bad faith behaviour can also give rise to lawsuits grounded on the protection of the principle of good faith, leading to potential indemnifications.

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?

Under Brazilian law, company managers can be held liable for breaches of their legally established duties, or obligations and duties set forth in the company by-laws.

As the company by-laws can set forth obligations and duties for the managers that are additional to those set forth in law, the breach of which can imply their liability, such constituting documents may amplify the hypotheses under which company managers can be held liable.

On the other hand, provisions in by-laws seeking to limit the extent to which managers can be held liable in any matters, including in connection with M&A transactions, can be challenged in litigation. The regime of managers' liability for breach of legal duties or of provisions of the company by-laws is set forth by law.

In the context of M&A transactions, managers are exempted from liability pertaining thereto once the general shareholders' meeting approves the accounts of the management for the fiscal year in which the transaction took place without reservations. See question 14.

In M&A transactions in Brazil that involve a change of corporate control of an entity, it is also common that the selling parties demand that, among the documents formalising the transaction's completion, which frequently include provisions whereby the company's management is replaced, the replaced managers are exempted from liability by the acquiring parties.

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?

In Brazil, there are no statutory or regulatory provisions limiting the shareholders' ability to bring claims against directors and officers specifically in connection with M&A transactions.

There are, however, statutory provisions that limit shareholders' ability to bring claims against directors and officers in general, including in connection with M&A transactions, as follows:

(i) as a general rule, liability claims cannot be filed against managers for their acts or omissions that have taken place during a fiscal year regarding which the financial statements and the accounts of the management have been approved by company shareholders, provided that this general rule shall not apply where the shareholders have been induced to erroneous approval due to malicious intent, fraud or sham documentation;

(ii) the statute of limitations to file a liability claim against a company manager is three years counted as from the publication of the minutes of the shareholders' meeting that approved the financial statements of the fiscal year in which the breach by the manager of his or her duties or of the legal or governing law provisions has taken place; and

(iii) as a general rule, the initiation of a civil liability claim against a company manager for losses incurred by the company shall require prior approval by the majority of those present at a general shareholders' meeting of the company. If the matter is not approved, the claim may be filed by shareholders representing at least 5 per cent of the corporate capital.

In the case of item (i), there is a statute of limitations of two years to annul resolutions taken in shareholders' meetings where such resolutions were approved as a result of malicious intent, fraud or sham documentation.

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

As a civil law jurisdiction, Brazil does not have any common law rules impairing shareholders' ability to bring claims against board members or executives. Access to justice and judgments upon the merits are essential corollaries of the Brazilian procedural system.

In practice, Brazilian courts are reluctant to assess business decisions or to modify negotiations. Unless negligence, recklessness, lack of professional skills or wilful misconduct are present and duly characterised at court, courts will likely decline to second guess informed and reasonable decisions.

However, according to article 159, paragraph 6 of the Corporate Law, judges are authorised by law to acknowledge the exclusion of a board member or executive's liability under exceptional conditions when a business decision is made in good faith and in the corporation's best interest.

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?

Articles 153 to 157 of the Corporate Law establish diligence, fiduciary and information duties. The Civil Code also contains liability provisions to be followed by managers and executives of limited liability companies.

In corporations, executives must conduct business responsibly, such as every diligent and honest person would habitually employ in his or her own business (article 153). They are also prohibited by law to use business for their own benefit or that of a third party (article 155, subsection 1). Particularly in public corporations, it is their duty to report to shareholders any relevant fact related to the corporation in compliance with CVM rule 358/2002.

Brazilian courts are reluctant to second guess business decisions of officers and directors, and management does not have the burden of proof in claims involving their liability. Even in cases of a breach of law or of the governing documents of the corporation, the officers and directors will not be held liable if they have acted in good faith.

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

No.

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

Should an M&A transaction involve the exchange of shares of the corporation being merged, amalgamated or spun-off for shares in the surviving entity, officers and managers are expected to follow market standards for the valuation of the entities and the calculation of the exchange rate, which imposes upon them additional liabilities in connection with the M&A transaction.

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

Article 156 of the Corporate Law establishes that directors and officers shall not take part in any corporate transaction in which they have a conflict of interest. Likewise, they are not allowed to be part of any resolution of the board related to such matter. If the above provision is violated, directors and officers can be held liable according to article 158 of the Corporate Law. Therefore, a claim can be brought against officers and directors under these circumstances if the acts or omissions of the board cause damage to the corporation.

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

The standard may vary if the officer or director performs an act or omission aiming at benefiting the controlling shareholder, in which case the management will be jointly and severally liable with the controlling shareholder for a power abuse.

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?

There are no legal restrictions for indemnification, but the parties could establish a cap value in the agreement they enter into. There are also no legal restrictions on the advance of fees, which shall follow the provisions of the company's by-laws or of the articles of association, as the case may be.

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

On the one hand, in transactions involving the sale of company shares, shareholders will be parties to the applicable transaction documents, and in this case would be personally bound by its provisions, including, as the case may be, termination fees and exclusivity clauses. In this case, there would be no grounds for a shareholder, as a party to transaction documents, to challenge any of its provisions, unless there is any error or fraud in the negotiation of the documents.

There are, on the other hand, M&A transactions that are executed by company managers on behalf of the company to which company shareholders are not parties, including those involving sales of a company's going concerns. In this case, shareholders are entitled to challenge the acts or omissions of company managers, including as to whether, during the course of the transaction negotiations and formalisation, they acted in compliance with the company by-laws and with their legal duties as company managers, including the duty of pursuing company interests; or acted negligently, recklessly, with lack of professional skills or with wilful misconduct.

A manager in breach of a company's by-laws or his or her legal duties, or that furthermore fails to take due precautions or even wilfully causes damage to the company in the course of an M&A transaction, is subject to a civil liability claim.

Brazilian law does not provide for a derivative lawsuit brought by the shareholders against the counterparty in an M&A transaction.

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

Shareholders are personally liable for vote abuses, which are particularly prevalent in cases of conflicts of interest, according to article 115 of the Corporate Law. For companies under the control of a majority shareholder, which are very common in Brazil, votes of controlling shareholders have the power to control almost every corporate decision and strategy.

A shareholder vote plays a central role in M&A transactions involving corporate reorganisations. In such case, a vote of a controlling shareholder must be verified in relation to the limits of and impediments to voting in a situation of a conflict of interest.

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

In the past few years, directors' and officers' (D&O) insurance take up has increased in Brazil following a wave of corporate bankruptcies, corruption scandals, environmental disasters and the exposure of Brazilian companies to securities class actions in the US (eg, Petrobras, Embraer, Banco Bradesco, Vale, Braskem, Eletrobrás and Gerdau). In addition, litigation arising out of M&A transactions is also a significant factor in the demand for D&O insurance and in hikes in premiums.

In Brazil, D&O policies are regulated by Circular No. 553, as of 23 May 2017, issued by the Superintendence of Private Insurance. D&O insurance aims at protecting the personal assets of executives against damage caused to third parties due to potential errors or omissions in their functions.

In the context of an M&A transaction, the buyer or minority shareholders of a company that is about to be acquired, or has been acquired, may feel that previous directors mismanaged the business or find that they failed to fulfil their fiduciary duties (eg, the duties of loyalty, care, disclosure, good faith). In this case, directors can be held liable for the damage caused to the company (see question 5), and D&O insurance can protect them against such claims, provided that they did not act with gross negligence or wilful misconduct.

Note that D&O policies usually contain a 'change in control' clause that automatically ceases coverage for the directors of a company in the event of a business transaction that affects its ownership structure. To maintain coverage, it is advisable to include in a policy a run-off clause to ensure coverage for wrongful acts performed prior to the closing but that have not yet been brought as claims. The policy term should last longer than the statute of limitations for any potential claims.

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

As a rule, the burden of proof under Brazilian civil procedure law is upon claimants regarding the facts on which the claim is grounded, and on defendants as to the existence of facts contrary to the plaintiff's right.

The burden may be shifted by a judge in civil actions in specific cases where he or she concludes that having such burden would impede or make it extremely hard for a claimant to successfully bring the suit, or in cases where shifting the burden to the defendant would be better suited to the lawsuit as the defendant would have better conditions under which to easily prove facts that undermine the grounds of the claim (article 373, paragraphs 1 and 2, Brazilian Civil Procedure Code).

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

Brazilian corporate law sets forth that shareholders can oversee the management of the business of a company under the terms of the law (article 109, subsection III, of Law No. 6,404).

Shareholders of Brazilian entities have the following rights, which enable them to investigate potential claims against company managers:

- taking part in shareholders' meetings where the business of the company and actions of management are reviewed and discussed;
- receiving financial information and management reports of the company prior to any ordinary shareholders' meeting thereof;
- having access to the corporate books of the company: shareholders entitled to at least 5 per cent of the capital stock may request at court the presentation of the corporate books in cases of supported suspicions of irregularities performed by the company's management;
- financial statements of publicly held corporations and large-scale companies (those that had, in the preceding fiscal year, total assets exceeding 240 million reais or gross revenues exceeding 300 million reais, regardless of their corporate type) shall be subject to audits by independent auditors, which allows shareholders to oversee the financial situation of the company from an independent perspective.

  The independent auditors responsible for auditing the financial statements of the company are required to take part in the ordinary shareholders' meetings that discuss such financial statements and to answer requests for clarifications from shareholders; and
- shareholders may request the establishment of a functioning audit committee responsible for overseeing the performance of the management bodies of the company.

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

As a general rule, litigation in Brazil must be brought before the defendant's jurisdiction (ie, the place of the company's headquarters in the case of a lawsuit brought by any shareholder), but the company's by-laws may provide for forum selection or arbitration as a dispute resolution forum to settle any conflict between the company and its shareholders.

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

In Brazil, there are no expedited proceedings in M&A litigation or discovery proceedings such as in the US. Evidence in Brazilian civil procedures is, as a general rule, produced throughout the proceedings (documents must be presented at the initial pleading or at the defence, while experts' analyses or depositions occur at a later stage). There are also proceedings set forth in the Civil Procedure Code allowing for the production of evidence prior to the filing of a claim in specific cases (eg,

Update and trends

As a result of the development and consolidation of arbitration, most M&A agreements provide arbitration clauses in order to subject potential disputes to arbitration. Parties to such transactions generally consider arbitration to be an expedited and technical means of dispute resolution: by using arbitration, disputes arising from M&A transactions can be settled quickly through a technical decision. Moreover, foreign investors usually require that arbitration clauses be included in the agreements that they enter into.

Furthermore, it is worth highlighting a relevant transaction that is currently in progress: a bid to acquire all the shares issued by Eletropaulo. The main companies interested in the acquisition are Enel, Energisa, Neoenergia and Iberdrola. An auction will be carried out on 18 May 2018 to finish the bidding process. Even though there is no dispute underway regarding the transaction, such transaction and its terms could be challenged at court or before other public bodies by shareholders or third parties interested in the transaction. Any repercussions arising from such transaction shall be paradigmatic, since public offers following auctions are not common in Brazilian practice.

Finally, shareholder activism, although still relatively low in Brazil in comparison to other jurisdictions, continues to increase in various ways, such as:

- joint efforts to appoint members of boards of directors or requests for shareholders' meetings to discuss matters of interest to shareholders; and
- the monitoring of:
  - actions to preserve compliance with internal policies and the Brazilian Corporations Law;
  - derivative suits; and
  - administrative proceedings before CVM.

risks of the impossibility of production or difficulty to prove a fact at a later stage, or if the production of evidence could facilitate a settlement or prevent the filing of a claim). However, in both cases the evidence production bears no relation to discovery, as it is limited in scope and extent, and by the relevance of the evidence a party intends to produce.

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

Damages are calculated in accordance with the extent of the loss caused to the claimant, encompassing direct material damages, loss of profits, pain and damage suffered. Indirect damages (ie, for damage that bears no strict relation to the harm caused) are not allowed under Brazilian law. Indemnification values granted by courts must be adjusted taking into account inflation and accrued interests.

Remedies to grant specific performance of obligations are also possible under Brazilian law.

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

A settlement in shareholder M&A litigation may be reached both in court or out of court. In the first case, it must be approved (homologated) by the judge. In the latter, a public deed must be executed.

Attorneys' fees to the claimants' lawyers are another important matter, as Brazilian law provides 10 to 20 per cent of attorneys' fees to the winning party's lawyers, which is usually taken into consideration when settling a dispute. Shareholders bringing a suit against controlling shareholders for any damage caused by acts performed by a power abuse are also entitled to an additional 'premium fee' of 5 per cent upon the indemnification value awarded by the court, which might also affect the settlement negotiations.

As to breaches of the regulations of CVM, publicly traded corporations may settle disputes with such governmental authority by entering into a commitment term, which can be negotiated with the authority.

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

Although in some circumstances this is possible, it is not usual for third parties to bring litigation to break up or stop agreed M&A transactions prior to closing.

In Brazil, certain third parties may be entitled to contractual rights to prevent an M&A transaction from closing. Examples include the stakeholders of a company being entitled to rights of first offer or rights of first refusal in connection with the acquisition of corporate interests from other stakeholders. If any stakeholder of such entity seeks to sell corporate interests disregarding the rights of other stakeholders, the latter group could seek to stop the transaction prior to closing. However, these third-party rights would usually be verified in due diligence, and it is very unlikely that they would be overlooked by a potential buyer.

It is also common in M&A transactions in Brazil to have the closing subject to prior waivers from certain third-party lenders (or other third-party counterparties) of the target company, but it is unusual that such third parties seek to break up or stop the M&A transaction prior to closing via litigation.

In transactions subject to prior approval by Brazilian antitrust authorities – Brazilian law sets forth objective criteria to determine whether a transaction shall be subject to such prior approval – third parties, including competitors of the target company or of the parties to the transaction, may present oppositions to the sought transaction based on its potential damage to competition in a given sector. This opposition can be brought before the antitrust authorities, and subsequently before the courts.

Conceptually, in the context of M&A transactions resulting from unsolicited offers, third parties can bring a lawsuit to challenge the offer or potential violations of procedures preventing competing offers. In the latter case, an administrative procedure before CVM may be an alternative.

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

Under specific circumstances, third parties can use litigation to force or pressure M&A transactions. The transactions in such cases shall be the outcome of a decision of a regulatory body or a result of a specific performance required before a court.

Concerning regulatory matters, competition is the most relevant. The Brazilian antitrust authorities may condition the approval of a transaction upon the execution of measures such as the transfer of corporate control and the spin-off of the corporation as set forth in the second paragraph of article 61 of the Brazilian Competition Law.

Whether the transaction is part of a binding agreement, the specific performance of the obligations thereof can be required at court. In such case, courts are authorised to take any legal measure deemed necessary to oblige the party to execute the M&A transaction as agreed in the preliminary 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?

Regarding unsolicited and unwanted offers, section 32-D of CVM rule 361 establishes that the board of directors must give an opinion on the success of the offer. Such opinion must take into consideration elements such as the offer price and changes in the corporation's finances. However, the shareholders have the final word related to the acceptance of the offer.

Furthermore, the Corporate Law provides that management members must comply with the duties of care, loyalty and disclosure, and their ramifications, in the conduct of corporate matters, including in providing an opinion, as referred to above.

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

Brazilian M&A transaction documents usually contain indemnification provisions whereby:

- each of the parties will indemnify and hold the other blameless for any breach of representations and warranties provided thereunder; and
- sellers will indemnify buyers – and this may be subject to several carve-outs – for losses incurred by the target company or the buyer, or both, stemming from any acts, facts, activities, omissions or business of the target company prior to the date the shares or assets of the target entity are transferred to the buyer (the pre-closing liabilities).

Indemnifications under the above items shall be without duplication.

Shareholders aside, indemnification claims for breach of representations and warranties or for pre-closing liabilities are the most common types of claims asserted by and against counterparties to an M&A transaction.

Issues regarding purchase price adjustments and earn-outs are usually settled between the parties to Brazilian M&A transactions prior to litigation. Well-negotiated M&A deals will set forth detailed procedures for the parties to discuss and eventually agree on such amounts. Such procedures will usually commence without the interference of any third parties, but if disagreements persist, third-party specialists may be called in to settle certain aspects under discussion. Litigation is sought in the event that the parties fail to reach an agreement following such procedures.

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

Since the Brazilian jurisdiction does not provide for cases of derivative suits brought against third parties in M&A transactions, only the parties to the transaction can bring litigation to discuss the conflicts arising out of M&A documents. Brazilian law provides shareholders with the right to challenge decisions taken by the management or by the controlling shareholder. In this case, shareholders can bring derivative suits in the name of the company against management or the controlling shareholder, or both.

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

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

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

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

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

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

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

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

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

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

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

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

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

No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No.

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

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

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

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

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

No.

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

No.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No.

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

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

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

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

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

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

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

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

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

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

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

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

Update and trends

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The main types of claims shareholders may assert against companies, officers and directors in connection with M&A transactions include:

- statutory (section 725(1)(b) or (2) of the Companies Ordinance) and common law unfair prejudice claims;
- statutory claims for breach of fiduciary duty by a director (section 728(4)(b) of the Companies Ordinance); and
- common law claims against directors for acting in excess of their powers or acting unfairly to the members.

Shareholders may have claims in their own names (personal actions) or in the name of the company (derivative actions). Section 732 of the Companies Ordinance allows a member of a company, with leave of the court, to bring derivative proceedings on behalf of the company in respect of any 'misconduct' committed against the company.

Other common causes of action vary from common law claims for breach of contract (including in relation to rights set out in the company's articles of association, which may also be pursued under section 728(4)(c) of the Companies Ordinance); and claims against third parties for aiding and abetting a default of the Companies Ordinance, or breach of a fiduciary duty and breach of a fiduciary duty by a party other than a director of the company (section 728(4)(a) of the Companies Ordinance).

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

For unfair prejudice actions, a shareholder must satisfy the court that the company's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of one or more members (including the member); or an actual or proposed act or omission of the company (including one done or made on behalf of the company) is or would be so prejudicial.

For breach of fiduciary duty actions, a shareholder must show that a director has failed to act honestly, in good faith and in the best interests of the company as a whole; or a director has failed to exercise his or her powers for the proper purposes for which those powers have been conferred on him or her.

The directors of a company must exercise reasonable care, skill and diligence that would be exercised by a reasonably diligent person with the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions of the director, and in relation to the company (section 465(2)(a) of the Companies Ordinance); or the general knowledge, skill and experience that the director has (section 465(2)(b) of the Companies Ordinance).

A registered shareholder of the company or a shareholder of an associated company (ie, a subsidiary or holding company of the first company) may bring a derivative claim under section 732 of the Companies Ordinance if it can satisfy the court that:

- on the face of the application, it appears to be in the company's interests that leave should be granted;
- there is a serious question to be tried;
- the company has not itself brought the proceedings; and
- the shareholder has served a written notice on the company of his or her intention to apply for leave.

If leave of the court is obtained, the shareholders must prove on the balance of probability the company's entitlement to the relief sought at the full trial.

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?

The basic principles for a shareholder to bring a claim against directors, officers or third parties in M&A transactions between privately held companies and publicly traded companies are generally the same. However, there might be additional regulations on public companies (particularly publicly listed companies).

In Hong Kong, the Companies Ordinance defines a company as a 'private company' if its articles of association restrict the right to transfer shares, limit the number of its members to no more than 50, and prohibit any invitation to the public to subscribe for shares in, or debentures of, the company. The term 'public companies' is defined in the Companies Ordinance as companies other than private companies and companies limited by guarantee.

Public companies listed in Hong Kong are subject to:

- the Securities and Futures Ordinance (SFO);
- the Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Limited or the Rules Governing the Listing of Securities on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited (Listing Rules); and
- the Codes on Takeovers and Mergers and Share Buy-Backs (Takeovers Code).

Publicly listed companies have various disclosure and reporting obligations under part XV of the SFO, the Listing Rules and the Takeovers Code to ensure a fair market and to protect investors' interests.

The Securities and Futures Commission of Hong Kong can bring a civil action before the Market Misconduct Tribunal (MMT) for suspected market misconduct or other infringements of the SFO.

Shareholders also have separate statutory rights of action under the SFO through the civil courts (section 281 of the SFO) if the shareholders have suffered financial loss caused by any form of market misconduct. The MMT's findings in relation to market misconduct will be admissible in evidence in a private civil action (section 281 (7) of the SFO). For a shareholder's civil claim to be successful, the court has to be satisfied that it is 'fair, just and reasonable' that compensation should be paid in the circumstances of the case (section 281 (2) of the SFO).

For publicly traded companies, the grounds for shareholders' claims for unfairly prejudicial conduct in an M&A transaction are limited to conduct that is in breach of their legal or equitable rights, or universal expectations of shareholders. However, for privately held companies, in addition to the legal, equitable and universal expectations of shareholders, personal expectations arising from personal relationships or dealings between parties with mutual trust and confidence are generally protected under the Companies Ordinance.

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

No.

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

No. However, in the case of a hostile or unsolicited takeover offer, under the Companies Ordinance, minority shareholders who do not accept the offer may under certain circumstances have the right to be bought out by the purchaser.

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

Yes.

If the loss is suffered by a shareholder, the types of claims available would mostly be unfair prejudice claims or contractual claims for breach of the company's constitutional documents.

Claims for losses suffered by the company itself may be brought by a shareholder in the form of derivative actions, for example, against the directors for breach of their fiduciary duties.

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?

There is no class or collective action regime in Hong Kong. The only multiparty proceedings regime is the procedure for representative proceedings provided under order 15, rule 12 of the Rules of the High Court, which allows one or more persons to start or continue proceedings as representatives of other persons who have the 'same interest' in the proceedings. However, this mechanism has limited application due to the strict interpretation of the 'same interest' requirement in the Hong Kong Court of Appeal case, *Markt & Co Ltd v Knight Steamship Co Ltd* (*Markt & Knight*). In particular, the plaintiffs must prove the same contract between all plaintiff class members and the defendant; the same defence (if any) pleaded by the defendant against all the plaintiff class members; and the same relief claimed by the plaintiff class members.

Although some piecemeal judicial initiatives have been taken to relax such requirements, *Markt & Knight* has never been expressly overruled, and it is still the leading case in Hong Kong.

It is also worth noting that a shareholder, when making an unfair prejudice petition, can join other shareholders as respondents.

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?

Yes.

Shareholders of a company or of an associated company may bring derivative actions under section 732 of the Companies Ordinance if there has been 'misconduct' committed against the company. 'Misconduct' is widely defined under the Companies Ordinance as fraud, negligence, breach of duty or default in compliance with any ordinance or rule of law.

In addition, common law derivative actions can be brought by shareholders where a loss is suffered by the company under circumstances where the company has engaged in conduct that is ultra vires or illegal; or parties that are in control of the company commit a fraud on the company.

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

The court has a wide discretion under the Companies Ordinance and Companies (Winding Up and Miscellaneous Provisions) Ordinance to award injunctive or other interim relief on such terms as the court deems appropriate. This extends to M&A transactions.

For example, sections 728 to 729 permit certain persons, including shareholders of a company, to seek an injunction to restrain breaches of the Companies Ordinance, breaches of fiduciary duties by directors or breaches of the company's articles.

The court also has a general power under section 21L of the High Court Ordinance to grant an injunction in all cases where it is 'just and convenient' to do so.

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

Yes. There is no distinction between M&A litigation and the usual situations in which summary judgment or strike out may be awarded, albeit a personal shareholder claim could be struck out where the loss being claimed has been suffered by the company rather than the individual shareholder (where the proper procedure would be a derivative action), and vice versa.

Other common grounds for strike out of a shareholder's claim include that the pleading discloses no reasonable cause of action, is scandalous, frivolous or vexatious, or is an abuse of process.

In addition, under section 736 of the Companies Ordinance, in circumstances where statutory derivative proceedings are on foot and the same shareholder or shareholders initiate a common law derivative action in respect of the same cause or matter, the court has the power to strike out part or the whole of the pleading in relation to the common law claim or to award summary judgment dismissing it.

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

Yes, shareholders can bring derivative actions, on behalf of the company, against third-party advisers that assist in M&A transactions if the third-party advisers have committed a wrong against the company.

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

Yes. For example, section 728 of the Companies Ordinance permits claims against parties other than directors in circumstances where:

- a person has engaged in, is engaging in or is proposing to engage in conduct that constituted, constitutes or would constitute:
  - a contravention of the Companies Ordinance;
  - a default relating to a contravention of the Companies Ordinance;
  - a breach specified in subsection (4) of section 728 of the Companies Ordinance; or
- a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by the Companies Ordinance to do.

A default for the purposes of this section of the Companies Ordinance is defined as:

- an attempt to contravene the Companies Ordinance;
- aiding, abetting, counselling or procuring another person to contravene the Companies Ordinance;
- inducing or attempting to induce, whether by threats, promises or otherwise, another person to contravene the Companies Ordinance;
- being in any way, directly or indirectly, knowingly concerned in or a party to a contravention of the Companies Ordinance by another person; or
- conspiring with others to contravene the Companies Ordinance.

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?

It depends on the terms of the relevant constitutional documents. Various versions of model articles are set out in the Companies (Model Articles) Notice.

Under section 468 of the Companies Ordinance, any provision, whether contained in the articles of a company, or in any contract with a company or otherwise, for exempting a director of the company from any liability to the company or an associated company that by virtue of any rule of law would otherwise attach to him or her in respect of any negligence, default, breach of duty or breach of trust of which he or she may be guilty, is void.

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?

Not specifically, but under the Companies Ordinance, the court may refuse to grant a shareholder leave to bring a derivative claim or to intervene if it is satisfied that:

- in the case of an application for leave to bring proceedings under section 732(1) or (2), the member has, in the exercise of any common law right, brought proceedings on behalf of the company in respect of the same cause or matter; or
- in the case of an application for leave to intervene in proceedings under section 732(3), the member has, in the exercise of any common law right, intervened in the proceedings in question to which the company is a party.

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

Yes. The rules laid down in the English case of *Foss v Harbottle* apply in Hong Kong, which impose restrictions on the ability of shareholders to bring claims against board members or executives who committed a wrong to the company. The rules include the proper plaintiff principle and the irregularity principle.

Under the proper plaintiff principle, where directors have breached their duties owed to the company or any person has committed a wrong to the company, the proper plaintiff to bring an action against the wrongdoer is the company save in circumstances where the criteria to bring a derivative action are satisfied.

Under the irregularity principle, shareholders cannot sue to complain of a mere irregularity that can be cured by a vote of the company in a general meeting and where the intention of the majority shareholders is clear.

Apart from the above principles, if shareholders bring a common law derivative claim, the shareholders are also subject to certain restrictions as follows:

- the shareholders must show they have a claim for illegal conduct or acts that are ultra vires, or that there has been a fraud on the company or, less commonly, that it is in the interests of justice;
- only current registered shareholders can bring an action;
- the shareholders must not have engaged in inequitable or unjust conduct; and
- where the majority shareholders acting independently of the wrongdoers and without collateral purpose ratify the wrongdoers' actions, such ratification can effectively prevent a derivative action being brought.

There is, at present, no statutory equivalent in Hong Kong to the US-style 'business judgment rule'.

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?

For a director or executive to be held liable to shareholders in connection with an M&A transaction, the shareholders must prove that on the balance of probabilities, the director's or executive's conduct infringes the shareholders' personal rights. Shareholders' personal rights can arise pursuant to the company's constitution, common law, a contract or statute. In cases where the conduct of the director or the executive infringes both the company's rights and the shareholders' personal rights, the shareholders' loss should be separate and distinct and not properly regarded as being reflective of the company's loss. In determining whether the shareholders' loss is reflective of the company's loss, the test is whether the loss would be made good if the company was able to recover for its own loss.

If a shareholder wishes to seek remedies under an unfair prejudice action (section 724 of the Companies Ordinance), it must prove that the company's affairs are managed by the wrongdoer in a way that is unfairly prejudicial to the shareholders. The concept of the 'company's affairs' is given wide interpretation, and includes contracts, assets, goodwill, profits and loss, business or trade matters, capital structure, dividend policy, voting rights, and other external activities and internal management.

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

No. However, infringements of the shareholders' personal rights that can be caused by a director or executive differ based on the specific circumstances of the transaction.

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

No.

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

No. A director has a duty in common law to avoid conflicts between his or her personal interests and those of the company. Section 536 of the Companies Ordinance states that if a director of a company has a material interest in a transaction, arrangement or contract, or a proposed transaction, arrangement or contract, with the company, that is significant in relation to the company's business, the director must declare the nature and extent of his or her interest to the other directors.

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?

No. There is no equivalent in Hong Kong to the US-style 'entire fairness rule'.

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?

Yes. Under section 468 of the Companies Ordinance, if a provision in a company's constitutional documents purports to exempt a director of the company from any liability that would otherwise attach to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company, the provision is void.

In addition, if, by a provision of a company's constitutional documents the company directly or indirectly provides an indemnity for a director of the company, or a director of an associated company, against any liability attaching to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company or associated company (as the case may be), the provision is void.

Section 469 of the Companies Ordinance permits a company to indemnify a director against liability incurred by the director to a third party if specified conditions are met. Certain liabilities and costs must not be covered by the indemnity, such as:

- criminal fines;
- penalties imposed by regulatory bodies;
- the defence costs of criminal proceedings where the director is found guilty; and
- the defence costs of civil proceedings brought against the director by or on behalf of the company or an associated company in which judgment is given against the director.

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

Assuming the M&A transaction documents are governed by Hong Kong law and subject to the exclusive jurisdiction of the Hong Kong court, shareholders can challenge particular clauses in the signed transaction documents if the shareholders believe that the execution of the particular clauses is, for example, unfairly prejudicial to the shareholders.

In privately negotiated M&A transactions in Hong Kong, it is not common to see a shareholder challenge particular clauses that, for example, preclude third-party bidders.

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

Under the Companies Ordinance, a special resolution (a resolution that is passed by a majority of at least 75 per cent of the shareholders who attend and vote, in person or by proxy, (section 564(1)) is required for important matters such as, but not limited to:

- alteration of the articles of association (section 88(2)(3));
- change of the company's name (section 107(1));
- reduction of a company's share capital (section 215(1));
- an unlisted company buying back its shares (section 244(1)(2)); and

- pay out of a company's capital in respect of the redemption or buy-back of shares (section 258(1)).

Furthermore, under section 473 of the Companies Ordinance, shareholders may vote to ratify conduct by a director involving negligence, default, breach of duty or breach of trust in relation to the company. However, pursuant to section 734 of the Companies Ordinance, this does not prevent a shareholder bringing a derivative action in relation to the ratified conduct, and when considering the derivative action, the court will take into account:

- whether the members were acting for proper purposes, having regard to the company's interests, when they approved or ratified the conduct;
- to what extent those members were connected with the conduct when they approved or ratified the conduct; and
- how well-informed about the conduct those members were when they decided whether to approve or ratify the conduct.

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

Under section 468(4) of the Companies Ordinance, a company is permitted to take out insurance for its directors for:

- any liability to any person attaching to the director in connection with any negligence, default, breach of duty or breach of trust (except for fraud) in relation to the company or associated company (as the case may be); or
- any liability incurred by the director in defending any proceedings (whether civil or criminal) taken against the director for any negligence, default, breach of duty or breach of trust (including fraud) in relation to the company or associated company (as the case may be).

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?

It depends on who brings the litigation and what remedy is sought. If directors commence the litigation on behalf of the company, the directors have the burden to prove the company's claim. If the shareholders bring a derivative action on behalf of the company or bring a claim for infringement of their personal rights, the shareholders have the burden of proof.

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

Yes. For example, under section 740 of the Companies Ordinance, upon application to the court by members representing at least 2.5 per cent of the voting rights of all the members who are entitled to vote at the company's general meeting or at least five members of the company, the court may make an order to authorise a person to inspect any record or document of the company if the court satisfies that the application is made in good faith and the inspection is for a proper purpose.

However, according to section 741 of the Companies Ordinance, the authorised person is not allowed to disclose the information obtained to anyone that is not the applicant, without the company's prior written consent, unless stated otherwise by section 741 (3) of the Companies Ordinance (eg, for the purpose of criminal proceedings or for any other requirement under the law).

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

No.

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

A court may expedite proceedings to resolve certain issues quickly, and particularly in the context where an injunction is granted to delay closing, in the same way as it would with any type of civil claim.

Common discovery issues arise in relation to access to the transactional documents and due diligence as to the parties to the transactions and relevant third parties.

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

There are no special rules in Hong Kong regarding calculation of damages in M&A litigation. The normal rules as to the calculation of damages apply, including the principles of remoteness.

However, there are various mechanisms, in relation to post-closing claims, for quantifying adjustments to the purchase price based on value, such as discounted cash flow or net asset value.

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

There are no special issues in Hong Kong with respect to settling shareholder M&A litigation.

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

Third parties may seek injunctive relief to break up or stop agreed M&A transactions prior to closing if they have an underlying cause of action either in tort or contract, or pursuant to statute.

However, litigation without a cause of action issued for the sole purpose of creating pressure would be at risk of strike out for abuse of process.

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

Specific performance is an available remedy in Hong Kong and can be used to compel parties to perform their obligations, including proceeding with a transaction.

However, as above, litigation without a cause of action issued for the sole purpose of creating pressure would be at risk of strike out for abuse of process.

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

In Hong Kong, directors' fiduciary duties mainly arise from common law, which include the following duties:

- to act in good faith in the interests of the company;
- to exercise powers for proper purposes;
- to avoid conflicts of interests;
- not to make secret profits; and
- not to misappropriate company assets.

In addition, the directors also have a statutory duty to exercise due care, skill and diligence under section 465 of the Companies Ordinance.

Therefore, when directors consider an unsolicited or unwanted proposal, the directors must comply with their fiduciary duties.

There are situations where directors attempt to defeat takeover offers by entering into agreements that are triggered upon a takeover offer and that might make it prohibitively expensive or otherwise unattractive for an offeror to proceed (the 'poison pill' arrangement), or an agreement involving the disposal of the company's major assets (the 'sale of the crown jewels'). In such case, whether the directors have breached their fiduciary duties depends on the specific circumstances. If, for example, it is clear that the directors' purpose of refusing an unsolicited M&A proposal is simply to preserve their positions in the company, then it may amount to a breach of duty.

For public companies, the directors must also comply with the Takeovers Code. Under general principle 9, directors of a target company cannot, without general meeting approval, take action in relation to the affairs of the company that could effectively result in any bona fide offer being frustrated or shareholders being denied a chance to decide its merit. However, for private companies, as the articles must impose restrictions on the right of shareholders to transfer shares, the directors are justified to ensure that the identities of shareholders are consistent with the company's interests. As such, the directors of private companies may be given more latitude in determining whether an M&A proposal should be carried forward or defeated.

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

The claims differ depending on the stage of the M&A transaction.

Before the M&A agreement has been signed, disputes that concern the behaviour of contractual parties could include breaches of pre-signing confidentiality or exclusivity provisions; or breaches of letters of intention (LOIs) (these often involve the issue of whether and to what extent the LOI is binding, and if the LOI is not binding, whether there are any pre-contractual obligations deriving from the LOI).

After signing the M&A agreement, most of the claims are based on the terms and conditions of the agreement, which include:

- conditions precedent not being met before closing;
- breaches of covenants;
- breaches of representations and warranties;
- disputes regarding due diligence and the disclosure letter;
- disputes regarding post-closing price adjustments; or
- disagreements regarding the earn-out adjustments.

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

Litigation between parties to M&A transactions most commonly occurs post-closing. This includes claims for breach of the transactional documents and misrepresentation claims.

Litigation brought by shareholders is usually pre-closing, and aimed at protecting shareholder interests either through direct claims or claims in the name of the company.

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Economic Laws Practice

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

Shareholders can make the following claims and seek remedies in the following situations.

Oppression, mismanagement and prejudicial conduct

Shareholders may proceed against other shareholders (usually majority shareholders or promoters), directors and officers in default to seek to establish that the affairs of the company are being conducted in a manner prejudicial or oppressive to the aggrieved shareholders, or prejudicial to the company or public interest, or to both.

Class or derivative actions

A prescribed number of members can initiate an action on behalf of the members if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members.

Breaches of contract

Contractual relationships between the shareholders arise either out of separate agreements or through the articles of association, which in themselves are considered to be a contract between the company and the shareholders. In the case of unlisted companies, a company may enter into contracts under which certain special rights are given to the shareholders (usually private equity investors):

- affirmative voting rights;
- shareholder lock-in rights;
- preemptive rights;
- rights of first offer or refusal; or
- any similar or other rights.

In the alternative, rights can be enshrined in the articles of association (which can be in addition to any separate contractual arrangement that such companies have). Violation of these rights gives rise to breach of contract, and the aggrieved party may claim damages. Additionally, if the contractual arrangement specifically records indemnity provisions, the aggrieved party can also claim the said indemnity.

Acts of misconduct

Where an M&A transaction involves misconduct on the part of directors or officers – for example, where directors have not complied with their fiduciary duties, or such M&A transaction is the result of a director's conflict of interest or fraudulent act – the Companies Act, 2013 (Companies Act) has specifically provided for various statutory duties upon the directors, the breach of which could lead to action being initiated against them under the relevant provisions of the Companies Act.

Breaches of statutory duties and obligations

Where an M&A transaction results in breach of statutory duties and obligations by corporations, officers and directors, it could take the form of non-compliance with the statutory prerequisites, resulting in action being initiated against them under the relevant provisions of the Companies Act. For example:

- mergers and amalgamations require the approval of the shareholders (including creditors, debenture holders and statutory authorities, as may be applicable) under the Companies Act: that is, 75 per cent of the shareholders in value involved in a company are required to approve actions such as a merger of a company. The Companies Act has statutorily recognised that any objection to a compromise or arrangement shall be made only by persons holding not less than 10 per cent of the shareholding; and
- for the sale of substantial assets of a public company, whether listed or unlisted, the board of directors cannot exercise such power unless it has the approval of the shareholders of the company by passing a special resolution, that is, by a 75 per cent majority.

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

Applicable thresholds

An application for relief of oppression and mismanagement can be made in the case of a company having a share capital, not less than 100 members of the company or not less than 1/10th of the total number of its members, whichever is less, or any member or members holding not less than 1/10th of the issued share capital of the company. In the case of a company not having a share capital, then not less than one-fifth of the total number of its members are required to maintain such an action. An action for relief of oppression and mismanagement is required to be filed before the relevant national company law tribunal (NCLT). An NCLT, in its discretion as per the facts and circumstances of a case, is also empowered to waive such threshold if an application is made to it in this behalf, so as to enable the members to apply.

For the initiation of a class action, in the case of a company having a share capital, there should be at least 100 members of the company or not less than such percentage of the total number of its members as may be prescribed (as on date there is no such number prescribed), whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed (as on date there is no such number prescribed). In the case of a company not having a share capital, not less than one-fifth of the total number of its members is entitled to initiate class action.

Grounds

Depending on the nature of the claim, the grounds of the claim would need to be established in the following manner:

- for making a case of oppression and mismanagement, it is essential to show that the affairs of the company have been or are being conducted in a manner:
  - prejudicial to the public interest;
  - prejudicial or oppressive to the aggrieved shareholders or any other member or members; or
  - prejudicial to the interests of the company;
- that there has occurred a material change in the management or control of the company that is not a change brought about by or in the interests of any creditors, including debenture holders or any class of shareholders of the company; and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests, or to its members or any class of members; and

- in a class action claim, it is essential to show that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members.

Non-compliance with statutory duties and obligations
Facts establishing the non-compliance would be required. Where the shareholders are proceeding against directors or officers, depending on statutes, and where an act or omission was caused by the consent or connivance of the relevant directors or officers, this would entitle the shareholders to proceed against specific directors or officers. The Companies Act recognises that the officers in default (which includes various categories of persons, such as key managerial personnel and the de facto controller of the company) could be held liable for acts or omissions committed therein.

Remedies in contractual disputes
The shareholders would have to establish the breach complained of, and the damages or losses they may suffer by reason of such breach of contract. For injunctions as an interim remedy, the shareholders would have to establish that they have a prima facie case against the company or other shareholders, that their rights would be irrevocably prejudiced if the action complained of is allowed to take place and that the balance of convenience lies in their favour. In the case of a claim for indemnity, the terms of the indemnity provision will govern such claim.

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

Yes. In addition to claims (as mentioned in question 1) with respect to publicly traded corporations, the Securities and Exchange Board of India (SEBI), the Indian securities regulator, has issued several regulations for listed companies the breach of which could result in statutory actions being initiated by the regulator itself or by the aggrieved party. These regulations include:

- the SEBI (Prohibition of Insider Trading) Regulations, 2015, which, inter alia, prohibit the sharing of unpublished price-sensitive information (whether or not in conjunction with the trading of shares) and are geared towards levelling information asymmetry in the market;
- the SEBI (Substantial Acquisitions and Takeovers) Regulations, 2011, which require shareholders acquiring a certain percentage of shares or control in a listed company to make an open offer to acquire the shares of other shareholders who are not party to such arrangement due to which the open offer was triggered;
- where the acquisition would result in delisting, the dissenting shareholders have the right to seek an exit from the promoters of the company in accordance with the provisions of the SEBI (Delisting of Equity Shares) Regulations, 2009; and
- additionally, the SEBI has also mandated that listed companies making disclosures in relation to their material transactions follow certain corporate governance norms and obtain relevant approvals under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. These norms include the formation of a stakeholders' grievance committee that is required to address shareholders' grievances in a time-bound manner, failing which the shareholders may approach the SEBI of the stock exchange where the shares of such companies are listed.

In view of the above, shareholders (or any other stakeholders) may approach or file complaints with the SEBI or a stock exchange in the event that the company, or promoters, directors or other officers, have not complied with the aforementioned legislation.

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

See questions 1 to 3. Remedies before the NCLT or the civil courts may arise depending upon the nature of a transaction, as per the provisions explained above.

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

In a negotiated transaction, counterparties to the M&A transaction can bring claims for breach of contract and for breach of covenants or representations and warranties, and can seek indemnities (if provided for).

In the case of a hostile or unsolicited offer, in the event of non-compliance with the various regulations mentioned in question 3, an aggrieved shareholder of a listed company can seek remedy as mentioned therein.

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

Yes, different claims will lie depending upon who has suffered the loss. For further details, see questions 1 and 2.

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?

Yes, a class or derivate action claim can be pursued. The requirements with respect to these are explained in question 1.

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

No. There is no provision under the Companies Act that entitles a shareholder to bring derivative actions on behalf of or in the name of the company. The Companies Act permits a shareholder to initiate class action proceedings only on behalf of the members or depositors of the company.

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?

Courts in India have the discretion to award injunctive relief to prevent the closing of an M&A transaction if the company or its shareholders are able to establish that the proposed M&A transaction affects the rights of the company or its shareholders. For an interim injunction, the shareholders would need to establish that there is a prima facie case in their favour, that they would suffer irreparable harm if the transaction went through without deciding their rights and that the balance of convenience lies in their favour. While courts can prevent an M&A transaction from closing if it affects the rights of the company or its shareholders, a court cannot rewrite a contract, and therefore cannot interfere with or modify deal terms.

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

Yes. The grounds on which an early dismissal may be sought are non-compliance with the minimum applicable threshold for filing the proceedings; the applicability of a period of limitations to initiate the action; and the existence and availability of an alternative remedy.

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

Claims in a class or derivative action
Shareholders can bring a class action seeking damages or compensation or another other suitable action from or against:

- the auditor, including the audit firm of the company, for any improper or misleading statement of particulars made in its audit report, or for any fraudulent, unlawful or wrongful act or conduct; or
- any expert, adviser, consultant or any other person for any incorrect or misleading statement made to the company, or for any fraudulent, unlawful or wrongful act or conduct, or any likely act or conduct on his or her part.

Claims before governing bodies
Shareholders may also make complaints to the bodies that govern such advisers (such as the Bar Council in the case of legal advisers or the Institute of Chartered Accountants India).

Claims in the case of listed companies
Shareholders may complain to the SEBI or a stock exchange that merchant bankers and other intermediaries have not followed the requisite code of conduct.

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

Unless there is a privity of contract between such parties, no proceedings can be initiated in relation to an M&A transaction.

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

The Companies Act imposes various duties on directors and key managerial personnel breach of which could result in an action being initiated against an officer in default under the relevant provisions of the Companies Act.

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?

As per the provisions of the Companies Act, any objection to a compromise or arrangement shall be made only by persons holding not less than 10 per cent of the shareholding. In addition to this, a shareholder can initiate proceedings for oppression or mismanagement subject to the condition that the applicant has paid all calls and other sums due on his or her shares.

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

There is no such common law rule impairing the rights of shareholders to bring such claims.

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?

Depending upon the remedy being sought, a board member or executive could be held liable if his or her involvement in the said wrong is demonstrated. For example, in a case of oppression and mismanagement, an NCLT is empowered to terminate, set aside or modify any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, if in the opinion of the NCLT it is just and equitable in the circumstances of the case. Similarly, in the case of a class action, regarding the role and involvement of a director, a claim could be made for damages or compensation, or any other suitable action from or against the company or its directors, for any fraudulent, unlawful or wrongful act or omission or conduct, or any likely act or omission or conduct on their part.

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

No, the standard does not vary depending on the type of transaction.

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

No, the standard does not vary depending on the type of consideration being paid to the seller's shareholders.

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

Statutory duty
The Companies Act sets out the duties of directors, under which a director of a company is prohibited from involving him or herself in a situation in which he or she may have a direct or indirect interest that conflicts with the interest of the company.

Director's interest
If a director who holds more than a 2 per cent shareholding in another company with which the company seeks to enter into a transaction fails to so disclose his or her interest, the transaction is voidable at the option of the company, and such director is liable to pay a fine as well as imprisonment.

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

The standard does not vary if 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.

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?

Under the Companies Act, there is no restriction on the company's ability to indemnify its officers and directors. A company may procure directors' and officers' insurance cover to indemnify them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company.

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

If a shareholder had a right pursuant to which his or her prior consent or approval had to be sought for any agreement that a company may enter into, and if such consent or approval has not been obtained, the aggrieved shareholder may challenge the terms of an M&A document.

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

Under the Companies Act, there is no provision enabling a shareholder to vote on M&A litigation. Any such power of a shareholder to cast a vote would have to be contained in the constitution documents of the company pursuant to a shareholders' agreement (the breach of which would entitle the shareholders to sue or initiate arbitration for breach of contract). Decisions with respect to the initiation and defence of an M&A litigation would typically be made by the directors of the company.

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

As discussed above, such insurance is common, and usually covers the liability of the directors and officers in question, including in relation to M&A transactions.

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

The burden of proof lies on the party asserting a claim. Therefore, initially such burden of proof would lie with the person initiating proceedings or making a claim, and if there are any counterclaims or defences specifically taken up by the counterparty, then such counterparty would be required to establish the same.

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

There is a statutory right to inspect:
- annual returns;
- registers of members;
- the minutes of shareholders' meetings;
- financial statements;
- the register of directors and key managerial personnel;
- the register of loans and guarantees;

- the register of contracts and arrangements in which directors are interested; and
- the contracts of employment of the managing director and full-time directors.

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

Under the Companies Act, the following, inter alia, are required to be heard by the NCLT in whose jurisdiction the registered office of the company is located:
- legal proceedings concerning mergers;
- demergers;
- amalgamations;
- windings up;
- reductions of capital;
- oppression and mismanagement; and
- class actions.

For example, NCLT Mumbai will have jurisdiction to hear proceedings against a company that is registered within the state of Maharashtra and NCLT Ahmedabad will have jurisdiction over a company that is registered within the state of Gujarat.

With respect to legal proceedings arising out of a breach of contract, the jurisdiction of the civil court may be determined, inter alia, on the basis of where the cause of action has arisen. If the contract in respect of which a breach is alleged contains an arbitration clause, then the same will have to be heard by an arbitral tribunal, with the seat of the arbitral tribunal being determined by the terms of the contract.

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

There is no such provision for expedited proceedings and discovery in M&A litigation.

The Companies Act requires NCLTs to endeavour to dispose of matters within three months from the date of their being filed. In the event that an NCLT is unable to conclude the hearings within the aforesaid time frame, the president or chairperson of the NCLT is empowered to grant an extension of a further period not exceeding 90 days.

With respect to shareholder disputes, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, requires the high courts to endeavour to dispose of the proceedings in a far more efficient manner by providing strict timelines to ensure expeditious disposal of the proceedings. For example, defendants are now required to file their statement of defence or written statement within 120 days, after which the said right is forfeited.

When dealing with the stage of discovery of documents, the Code of Civil Procedure, 1908, requires the parties to ensure that a list of all documents and photocopies thereof are filed at the stage of the filing of the plaint or the written statement itself. In this regard, one of the most common issues faced by parties in discovery is the requirement to obtain the leave of the court to produce a document that was not originally filed at the time of instituting the suit. Grant of such leave is entirely discretionary in nature and is subject to costs.

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

The term 'damages', although not defined under the Indian Contract Act, 1872 (Contract Act), has been judicially interpreted by courts in a manner to provide for the grant of 'compensation' by a defaulting party in the event of a breach of contract. The Contract Act divides damage into two categories: general damage and special damage. General damage arises in the usual course of things from the breach itself, and special damage occurs on account of unusual circumstances. When the terms of a contract are broken, if a sum is named in the contract as the amount to be paid in the case of a breach, the party complaining of the breach is entitled, whether actual damage or loss is proved to have been caused thereby, to receive compensation not exceeding the amount so named. If a stipulation to pay a certain amount by way of penalty has been provided in the contract, then reasonable compensation not exceeding that amount should be paid.

While interpreting the law on the grant of damages, the courts have held that where the terms of the contract that stipulate the payment of liquidated damages (in cases of a breach of the contract) are clear and unambiguous, the same would have to be paid by the party who has committed the breach, unless the court concludes that such estimate of damages or compensation is unreasonable or is by way of penalty. Furthermore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him or her. The court is competent to award reasonable compensation in cases of a breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract. In cases where it is impossible for the court to assess the compensation arising from a breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is a genuine pre-estimate by the parties as the measure of reasonable compensation.

Update and trends

Insolvency

Since the enactment of the Insolvency and Bankruptcy Code, 2016, several large M&A transactions are taking place through resolution plans. These plans are being challenged by shareholders on various grounds, primarily lack of transparency and fairness, lack of the independence of the resolution professional and the protection of stakeholder rights.

Increasing scrutiny of independent directors

Proceedings against independent directors are becoming more common, with stringent interim reliefs such as attachment of personal property being granted against them.

Competition Commission of India

The Competition Commission of India is playing a more stringent role in governing combinations, and has made orders requiring the hive off of parts of combined businesses to third parties to prevent monopolistic tendencies.

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

The settlement of disputes arising out of a contract is a matter of private negotiation between the parties. On reaching a settlement, the parties are required to record the terms of their settlement and produce the same before the civil court. While doing so, the parties provide undertakings to the court with respect to their compliance with their respective obligations under the consent terms. These undertakings are recorded by the court and the proceedings are accordingly disposed of in terms of a settlement arrived at between the parties.

With respect to any proceedings filed before the NCLT, if the parties amicably settle the same before the first hearing of the matter, then the NCLT Rules, 2016, require the applicant to seek permission from the NCLT for withdrawal of the case. Such withdrawal may be granted, subject to the payment of costs, at the discretion of the NCLT.

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

Interest in property

Third parties can bring litigation to break up or stop an agreed M&A transaction if such third party's interest is adversely affected.

Contractual breach

If there is any contract with such third party that is being breached by such M&A transaction, the third party can intervene.

Regulatory proceedings

If the acquisition involves regulatory proceedings, for example at the NCLT for a merger (which requires public notice) or the Competition Commission of India for combinations, third parties can intervene by objecting to the transfer.

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

Unless there is a specific contract, third parties cannot pressure a company to enter into an M&A transaction. Where there is a contract, a suit for specific performance could arise from this.

Further, where the government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the government may, by order, provide for the amalgamation of those companies into a single company with such constitution, such property, powers, rights, interests, authorities and privileges, and such liabilities, duties and obligations as may be specified in the order.

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 Companies Act imposes various duties on directors. For example, they should exercise their duties with due and reasonable care, and skill and diligence, and they shall exercise independent judgment. Similarly, they should not be involved in a situation in which they may have a direct or indirect interest that conflicts, or that possibly may conflict, with the interests of the company. Such duties may require them to proactively disclose any unsolicited or unwanted proposals to the board of directors.

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

Commonly, counterparties to an M&A transaction assert claims for breach of statutory provisions, breach of representations and warranties, indemnities and purchase price adjustments, depending on the criteria set out in the contract.

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

Litigation between parties to an M&A transaction usually arises from the contract entered into between the parties (ie, breach of contract, breach of representations and warranties). Parties to an M&A transaction would have to institute a suit or an arbitration for damages or specific performance.

On the other hand, litigation brought by shareholders would be in the nature of oppression and mismanagement or a class action on the ground that the affairs of the company are being conducted in a manner prejudicial to the company, its shareholders, or both. Remedies may also be sought against the management.

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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 twofold 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.

Japan

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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.

There has been an increased number of appraisal cases in which shareholders who were not satisfied with the consideration offered in a transaction have requested the court to determine the fair value of the shares. In some cases, shareholders also claimed a breach of fiduciary duty of directors of the seller (for selling shares at a discounted price), the buyer (for buying shares at a price higher than the fair value) or the target company (for accepting, and recommending its shareholders to accept, a tender offer despite the tender offer price being lower than the fair value of its shares). However, as proving a breach of fiduciary duty is challenging for shareholders without comprehensive discovery, appraisal claims are currently the most common claims. When shareholders claim a breach of directors' fiduciary duty, they tend to claim against directors in tort at the same time.

While, in theory, the Companies Act of Japan (Companies Act) permits claims for injunctive relief to suspend a transaction, shareholders generally do not attempt this because the grounds for injunctive relief are limited. Shareholders may also bring a claim to nullify a transaction, but as doing so would affect a large number of interested parties and the courts tend not to nullify transactions in the absence of extraordinary circumstances, such successful claims are quite rare.

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

Appraisal cases are treated as non-contentious cases in which the court has reasonable discretion to determine the fair value of shares without regard to the burden of proof of the parties. However, in recent cases the court has presumed the consideration offered in a transaction is fair if it was determined through fair procedures and without any coercion. Therefore, as in many cases the company can show the fairness of the procedures to a certain extent, shareholders are normally required to rebut this presumption, for example by showing there were factors preventing the shareholders from approving the transaction fairly (eg, the company's false disclosure of material facts, or shareholders being threatened with a squeeze-out at a lower price in the future) or that the independence of the target's board was jeopardised.

For a derivative claim in which shareholders pursue damages sustained by the company for breach of fiduciary duty, shareholders must prove the existence of the fiduciary relationship, the contents of the directors' duties, their breach and the quantum of damages arising. Directors could then refute the claimed negligence, as it is not a strict liability. On the other hand, to pursue directors for damage directly sustained by shareholders, the Companies Act requires shareholders to prove, in addition to the foregoing, malicious intent or gross negligence on the part of the directors.

In both cases, as mentioned in question 15, except in the case of directors of the target company breaching their fiduciary duty in management buyouts (or transactions involving conflicts of interests), the business judgment rule would apply to the decision of directors with respect to M&A transactions. Therefore, shareholders would be required to show that the directors were prevented from making an informed decision, or that their decision or decision-making process was extremely unreasonable (see question 15 for further explanation).

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?

The actual claims that shareholders tend to bring differ depending on whether the companies involved in the M&A transactions are publicly traded or privately held, but under the Companies Act, there is no major difference in the types of claims they can bring.

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

Shareholders can bring a derivative suit or direct claim in all types of M&A transactions if losses are sustained by the company or the shareholders (see question 6).

A claim for injunction under the Companies Act is only available (and in a limited manner) for mergers and other statutory reorganisations, and not in the case of tender offers, share purchases or asset sales, although the Companies Act generally allows injunctions by shareholders if directors conducted or are likely to conduct actions that are outside the scope of the company's purpose or that otherwise are in violation of the law or the company's articles of incorporation, and the company will likely sustain substantial damages.

In addition, appraisal rights are available in mergers and other statutory reorganisations and business transfers, except for simplified mergers or other reorganisations or for shareholders of the acquiring company in short-form mergers or other reorganisations. Shareholders do not have appraisal rights in the case of tender offer, share purchase and asset purchase transactions.

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

No.

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

Yes, shareholders can bring a derivative suit if the company itself sustains losses. Subject to directors' malicious intent or gross negligence, if shareholders themselves directly sustain damages arising out of a breach of directors' fiduciary duty, they may bring a direct claim against directors. The question arises as to whether shareholders can claim diminution of value of their shares due to directors' failure to exercise their fiduciary duty with respect to M&A transactions, which resulted in losses to the company as damages in a direct claim. The majority view is that diminution of value of their shares is an indirect damage, and that the remedy should be through bringing a derivative action if the loss is sustained by the company and is recoverable through the derivative action. For instance, in a cash-out merger, the surviving company would sustain losses if the merger ratio was improper and the surviving company paid excessive consideration to the shareholders of the absorbed company, in which case shareholders of the surviving company should bring a derivative action.

If the consideration in the merger was shares of the surviving company, all the assets and liabilities of the absorbed company are succeeded to the surviving entity without any cash-out and, therefore, the surviving company arguably does not sustain any losses. In this case, while a derivative action would likely be dismissed due to the lack of losses sustained by the surviving company, shareholders of the surviving company may bring a direct claim as their shares were diluted in a manner disproportionate to a fair merger ratio. In this case, one would argue that issuing new shares based on an improper merger ratio itself should be considered damage to the issuer (ie, the surviving company), but whether the courts will accept such argument or not remains to be seen.

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?

Japanese law does not permit class or collective actions (except for collective actions that may be brought by certified consumer protection agencies under special laws for protection of consumers' interests, which are not relevant here). This said, there have been cases in which a lead shareholder made a campaign through a website or other means to solicit other shareholders or similarly situated parties to be co-plaintiffs in a claim.

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?

Yes, shareholders can bring derivative litigation on behalf of or in the name of the company.

Any shareholder holding one or more shares in a company (for at least six months or such shorter period as prescribed in the articles of incorporation in the case of a public company) may demand that the company bring a claim against its directors and other officers. After receipt of the demand, the company will have 60 days to determine whether it will bring a claim against the named directors and other officers. If the company does not file such claim within the 60-day period, the demanding shareholder may bring derivative litigation on behalf of the company. When the company decides not to bring the claim, upon request of the demanding shareholder it must notify the demanding shareholder, and provide a description of any investigation it conducted, the conclusion and justifying reasons for such decision.

The 60-day period does not apply, and shareholders can immediately bring derivative litigation if the waiting period would result in the company sustaining irrecoverable damages.

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?

Under the Companies Act, for mergers or other M&A transactions involving corporate reorganisations such as spin-off, the court may enjoin the transaction if there is a violation of the law or the articles of incorporation, and the shareholders are likely to be prejudiced by the transaction. In the case of short-form mergers or other short-form reorganisations that do not require approval of the shareholders, if the consideration of the transaction is extremely unfair that would also form the basis of an injunction. A breach of fiduciary duty or the insufficiency of consideration in the transaction (except for short-form mergers or other short reorganisation) is not generally considered a violation of law. As mentioned in question 1, injunctive or other interim relief to prevent the closing of an M&A transaction is extremely rare in Japan.

The court does not have any authority to modify deal terms.

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

This is not relevant in Japan as there is no comprehensive discovery.

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

In theory, shareholders can bring such claims if, for example, advisers had been involved in some wrongdoing or there were other extraordinary circumstances that would constitute a tort, but in practice such claims are extremely rare.

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

In theory, shareholders of a party can bring claims against the counterparty to the M&A transactions for aiding and abetting a breach of fiduciary duty based on the joint-tort theory, but we are not aware of any such cases. As the directors and officers of the counterparty do not owe any fiduciary duty to the shareholders of the first party, bringing a successful claim would be extremely difficult. Note that a controlling shareholder is not construed as owing fiduciary duties to other minority shareholders, so the foregoing is also true for M&A transactions between a company and its controlling shareholder.

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

A company may include provisions in its articles of incorporation that allow the board to discharge directors' or officers' liabilities or permit non-executive directors or officers to enter into contracts limiting their liabilities, in both cases in excess of certain statutory minimum liabilities. For details, see question 21.

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?

To deter abusive derivative litigation, shareholders are not entitled to demand the company to bring a claim against its directors, or to bring a derivative claim if the claim is for the personal benefit of the shareholders or other third parties or causes damage to the company. Otherwise, there are no statutory or regulatory provisions that limit 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?

Japan is not a common law jurisdiction. However, the Japanese courts generally apply a 'business judgment rule' when questions arise with respect to a managerial decision. While there is no concrete specification of the business judgment rule and the effect thereof, where the business judgment rule applies, the court normally respects the decision of the director unless the director made a mistake in gathering or analysing the information necessary to recognise the underlying facts that formed the basis of his or her decision; or the director's decision or the decision-making process was extremely unreasonable.

How and to what extent the business judgment rule applies to a decision of board members in connection with M&A transactions is not entirely clear. However, except for a decision of board members of a publicly traded target company with respect to management buy-outs or other transactions that involve conflicts of interests (see refer question 17), the business judgment rule would be widely applied.

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?

As mentioned above, the court would normally apply the business judgment rule in some form in determining the liability of directors with respect to M&A transactions; therefore, unless exceptional circumstances are found, it is not easy for shareholders to prove a breach of a board member's or executive's fiduciary duty. For instance, with respect to an integration of two publicly traded non-life insurance companies by way of a joint share swap, a shareholder filed a claim for breach of fiduciary duty and asserted that the representative director of the company failed to exercise the duty to determine a fair consideration (ie, the stock swap ratio). However, the Tokyo District Court applied the business judgment rule and dismissed the claim.

In doing so, the Tokyo District Court reasoned that:

- the company engaged an independent third party to conduct financial due diligence;
- the parties agreed on the stock swap ratio in reference to the result of multiple third-party valuation reports;
- the agreed stock swap ratio was within a range of the valuation reports; and

- the multiple independent third parties expressed a fairness opinion.

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

It is not entirely clear whether the court applies a different standard of review depending on the type of transaction, consideration being paid, potential conflict or involvement of a controlling shareholder.

In 2013, the Tokyo High Court held in a breach of fiduciary duty claim with respect to a management buyout of Rex Holdings that the decision to conduct the management buyout itself should be respected under the business judgment rule unless there were circumstances that rendered such decision or the decision-making process extremely unreasonable. Nonetheless, the court stated that, even if the decision for conducting the management buy-out itself is respected under the business judgment rule, the directors must perform their fiduciary duties to ensure that the fair value is transferred among shareholders; and to disclose the information necessary for the shareholders to determine whether to tender their shares in a tender offer.

There are divided views as to whether this decision imposes a stricter standard of review or merely clarifies duties of directors in management buy-outs. It is also not clear whether this decision applies only to management buy-outs, or whether it could extend to transactions involving conflicts of interests or further to transactions in which a transfer of value among shareholders would be disputed.

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

See question 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?

See question 17.

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?

See question 17.

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?

With respect to indemnification of directors' or officers' liabilities against the company itself, the Companies Act provides specific rules for the company to discharge such liabilities. As a general rule, discharging directors' or officers' liabilities against the company requires unanimous approval of the shareholders. However, if the director or officer acted in good faith and without gross negligence, the liability in excess of the statutory minimum (ie, six years' salary for representative directors and four years' salary for other directors) could be discharged by approval of the shareholders or, if the articles of incorporation of the company have a provision expressly allowing it, by the board. Non-executive directors or officers, if there is a provision in the articles of incorporation expressly allowing it, may enter into contracts with the company limiting their liabilities to the statutory minimum or any amount determined by the company within the range stipulated in the articles of incorporation, whichever is the higher.

Apart from those statutory provisions, officers and directors are generally considered as fiduciaries of the company and, in accordance with the Civil Code of Japan, may request that the company reimburse or advance expenses required to perform their duties as fiduciaries. In addition, they may request that the company indemnify them for any liability incurred in performing their duties as fiduciaries not attributable to their fault. While the Civil Code of Japan requires officers and directors not to be at fault, in practice, companies from time to time voluntarily indemnify officers and directors in the absence of gross negligence. Therefore, it is generally understood that companies may indemnify, or advance the legal fees of, its officers and directors named as defendants in M&A-related litigation so long as such indemnification or advancement is necessary for them to perform their duties as officers or directors.

The Companies Act does not clearly set out rules concerning companies' ability to indemnify, or advance the legal fees of, their officers and directors named as defendants. Depending on the circumstances, it is possible that the indemnification or advancement of legal fees could be considered compensation, in which case other requirements would apply (eg, obtaining shareholder approval). Hence, there was ambiguity about whether companies could take such actions.

In recognition of this, a study group organised by the Ministry of Economy, Trade and Industry published a report in July 2015 on the practice of corporate governance, and clarified the requirements and procedures for indemnification, or advancement of legal fees or other damages, to enable directors to take necessary risks when managing companies without fear of personal liability. According to the report, if an indemnity agreement is entered into with an officer or director with the approval of the board as well as the unanimous consent of outside directors or the approval of a committee, the majority of which consist of outside directors, companies may indemnify directors and officers for their liabilities against third parties that arose in discharging their duties without malicious intent or gross negligence, and reimburse or advance the resulting legal fees. In February 2018, the Legislative Council Companies Act Subcommittee published an Interim Proposal for the Companies Act Revision, which addresses these issues, and relevant amendments are expected to come into force soon.

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

It is not clear whether shareholders can challenge particular clauses or terms in M&A transaction documents such as termination fees, standstills, 'no shop' or 'no talk' clauses, or other terms that tend to preclude third-party bidders. Agreeing on deal protection clauses without proper fiduciary-out exceptions might deprive shareholders of opportunities to receive more favourable offers from other bidders and would constitute a breach of directors' fiduciary duty. If this is the case and shareholders sustain losses as a result, shareholders can bring a claim for breach of fiduciary duty. However, proving damage arising out of such breach would normally be difficult, unless a favourable competing offer was actually made but prevented due to the deal protection clauses. Injunctions based on improper deal protection clauses are even more difficult, as the grounds for injunctions are limited (see question 9).

As such, it is not practicable for shareholders to challenge particular deal protection clauses.

Having said this, in subsequent appraisal proceedings shareholders may use the improper deal protection clauses in support of the claim that the entire transaction process was unfair (and thus, the court should not presume the agreed consideration to be fair).

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

While the shareholder vote itself is not the decisive factor, the court normally respects the informed decision of shareholders. In an appraisal proceeding concerning an M&A transaction between independent listed companies, the Supreme Court judged that, if the transaction was implemented through procedures generally considered fair (such as the approval of the shareholders based on proper disclosure of relevant information) then, unless there were special circumstances that prevented shareholders from making a reasonable decision, the consideration of the transaction will be considered fair.

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

Directors' and officers' (D&O) insurance plays a substantial role in shareholder litigation.

Standard D&O insurance in Japan would normally cover a wide range of liabilities that directors or officers could incur in performing their duties, except for matters arising from receipt of unlawful private benefits, criminal acts or wilful breaches of the law. Whether a company can pay the insurance premium corresponding to special coverage for cases where a director loses in a shareholders' derivative suit had long been subject to discussion, as it would have been construed as payment of compensation without obtaining shareholder approval or a discharge of directors' liabilities without taking proper procedures. In practice, to be conservative, directors themselves have paid the insurance premium corresponding to such special coverage. However, as

Update and trends

Since the enactment of the Companies Act in 2005, there has been a significant increase in the number of appraisal cases in which minority shareholders have demanded that the courts determine the fair value of their shares in M&A transactions, mainly because the Companies Act entitles dissenting shareholders to the fair value of the shares taking into consideration the synergies arising out of the transaction or the value the shares would have had in the absence of the M&A transaction. In some of these appraisal cases, the courts looked in detail at the appropriate value of the shares and determined the fair value on its own without specifically relying on any third-party expert's opinion. Such cases encouraged arbitrary actions by shareholders to a certain extent, creating uncertainty in M&A transactions involving publicly listed companies, and have been criticised by practitioners. The Supreme Court removed such uncertainty in its decision involving the appraisal of shares of Jupiter Telecommunication, the largest Japanese cable TV operator, in its going-private transaction by its major shareholders, KDDI and Sumitomo Corporation, who collectively held more than 70 per cent of the shares in Jupiter Telecommunication prior to the transaction. The Supreme Court stated that, even in the case of a two-step going-private transaction consisting of a tender offer and a subsequent squeeze-out procedure that involves conflicts of interest, the court should respect the price determined by the parties to the transaction if:

- measures to ensure the decision-making process was not arbitrary due to conflicts of interests such as obtaining an opinion from an independent committee or third-party experts were taken; and
- the tender offer was conducted through procedures generally considered fair, such as disclosing the offeror's intent to acquire the remaining shares in the subsequent squeeze-out process at the same price as the tender offer price (to reduce coerciveness).

To put it simply, the Supreme Court stressed that courts should focus on procedural fairness before looking deeply into the substance (ie, valuation of the shares) because judges are not valuation experts. How and to what extent the courts should review procedural fairness are remaining issues about which further clarification is awaited.

In any event, we expect to see fewer arbitral appraisal cases going forward, but at the same time the courts will review procedural fairness more carefully, so practitioners should continue to pay attention to how they ensure procedural fairness.

Apart from the appraisal proceedings, we have seen an increased number of disputes regarding breach of representations and warranties between private sellers and buyers. As mentioned earlier, the courts' position on a number of issues relating to M&A litigation are far from settled, but judicial precedent that can guide M&A practitioners has gradually accumulated through a series of court decisions, including Supreme Court decisions, in recent years.

this differed from other developed countries, in a recent report of the study group organised by the Ministry of Economy, Trade and Industry, it was clarified that the company can pay such insurance premiums for directors by taking the same procedures required for the execution of the indemnity agreement (see question 21), and the Interim Proposal for the Companies Act also contains relevant proposals.

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?

For appraisal cases there is no precise burden of proof, while for a breach of a fiduciary duty claim shareholders have the burden of proof. For further details, see question 2.

There are no clear rules as to when and to what extent the burden shifts.

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

Any shareholder may, during the normal business hours of the company, review or obtain copies of minutes of shareholders' meetings.

Similarly, if it is necessary to exercise this right as a shareholder, a shareholder may request the company to make available for review, or provide copies of, minutes of board meetings. However, for the board minutes, if the company is a company with statutory auditors or a company with an audit or nominating committee, the request requires court approval.

Class actions are not possible under Japanese law; however, shareholders are entitled to review or copy the shareholders' register, and sometimes a plaintiff shareholder exercises this right to solicit other shareholders who would be potential plaintiffs. The company may refuse such a request only if it was made:

(i) for purposes other than securing or exercising rights as a shareholder;
(ii) for disturbing the business of the company or otherwise impairing the common interests of shareholders;
(iii) for providing to third parties the facts ascertainable from the shareholders' register for consideration; or
(iv) by an applicant who has provided to third parties the facts ascertainable from the shareholders' register for consideration in the past two years.

Shareholders holding at least 3 per cent of the total voting rights of a company (or such lower threshold as prescribed in the articles of incorporation) may request the company to make available for review, or provide copies of, the accounting books and records at any time during normal business hours. However, the company may refuse to do so based on the grounds equivalent to items (i) to (iv) above and also if the requesting shareholder engages in a competing business.

In addition, when a shareholder anticipates a dispute with respect to an M&A transaction that requires shareholders' approval, any shareholder holding at least 1 per cent of the total voting rights (or such lower threshold as prescribed in the articles of incorporation) (in the case of a public company, for a consecutive period of six months) may request the court to appoint an inspector to investigate the convocation procedures and the manner of the resolution of the shareholders' meeting.

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

Under the Companies Act, with some minor exceptions, the court located in the area of the headquarters of the defendant company or the company for which the defendant directors or officers serve has exclusive jurisdiction over any litigation concerning the validity of an M&A transaction or a breach of fiduciary duty claim. Forum selection clauses in corporate by-laws are not permitted.

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

There are no expedited proceedings or comprehensive discovery under Japanese law. However, under the Code of Civil Procedure, a party may request the court to order the other party or any third party to produce a document to the court. The party requesting such order must specify a description, the purpose and the holder of the document, the facts to be proven by the document and why it is necessary. Documents typically requested by plaintiff shareholders would include negotiation materials, internal evaluation documents, third-party valuation reports and minutes of material internal meetings, including those in draft form.

The statute imposes a general obligation on relevant parties for submission of documents with some exceptions. In M&A litigation, defendants could contest a plaintiff shareholders' request in reliance on:

- the lack of necessity of producing a document;
- the specification of the documents requested to be disclosed; or
- the exceptions for document production related to professional secrecy or to documents prepared solely for the use of the party holding the documents.

The court once ordered a company to produce various documents with respect to an attempted management buy-out that was not successful due to improper involvement of the management who participated in the buyer; it was an extraordinary case that came about mainly because of a series of reports from whistleblowers. The lack of comprehensive discovery in M&A litigation is probably a major factor in M&A litigation being less common in Japan than in some other jurisdictions such as the US.

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

There are no clear guidelines as to how damages should be calculated in M&A litigation in Japan.

As a general rule, Japanese courts do not award punitive damages. While the position of the courts is far from settled, shareholders tend to assert that the difference between the actual price paid in the transaction and the fair value of the shares is the damage they sustained from the transaction. Calculation of damages based on a multiple would not likely be accepted by the court.

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

In a derivative M&A litigation brought by a shareholder, if the company is not a party to the litigation, the settlement does not have an immediate final and binding effect on the company unless the company affirms the settlement. In such cases, the court must notify the company of the description of the settlement and request the company to make any objection within two weeks. If the company does not object to the settlement in writing within two weeks, the company is deemed to have affirmed the settlement, and the settlement will be final and binding on the company.

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

Under the Companies Act, only shareholders of the company are entitled to bring claims for injunctions in M&A transactions. Therefore, in the absence of contractual or other specific grounds that would form the basis of an injunction under the Civil Preservation Act, third parties cannot bring litigation to break up or stop agreed M&A transactions prior to closing.

One such exceptional case was the merger between the Mitsubishi Tokyo Financial Group (MTFG) and the UFJ Holdings Group (UFJHD) together with some of their affiliates. In this case, UFJHD had entered into a memorandum of understanding (MOU) with Sumitomo Trust Bank (STB) regarding the disposal of its shares in UFJ Trust Bank that included exclusivity provisions, but UFJHD had later decided to unilaterally terminate the MOU to enter into discussions with MTFG regarding the integration of the entire UFJHD group with the MTFG group. STB brought an injunction based on the exclusivity provision. While the Tokyo District Court granted injunctive relief to prohibit negotiations between UFJHD and MTFG, the Tokyo High Court and the Supreme Court denied the injunction. In doing so, the Supreme Court stated that, as the MOU itself did not oblige either party to enter into definitive agreements for a transaction, the damage the claimant would sustain from the breach of the MOU should not include the profit they would have received if the transaction was completed. If that were the case, such damage could be recovered by a subsequent damages claim, and thus there is no significant damage or imminent danger that forms the basis of injunctive relief.

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

It is not common in Japan for third parties to use litigation to force or pressure companies to enter into M&A transactions. As mentioned in question 31, in the absence of contractual or other specific grounds that would form the basis of an injunction under the Civil Preservation Act, third parties cannot bring claims for injunction.

It is of course possible for third parties to acquire substantial shares in companies and pressure them to enter into M&A transactions, but here again, initiating litigation to force or pressure companies to enter into M&A transactions is not practicable.

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?

Unsolicited or unwanted offers are quite rare in Japan, and there is no judicial precedent in which directors' duties in the face of an unsolicited or unwanted offer were directly at issue.

When the validity of defensive measures has been disputed, courts have normally upheld the defensive measures adopted by boards if the purpose is to obtain information and the time required to ensure the informed decision of shareholders. On the other hand, if the board takes a more aggressive measure such as the issuance of stock options to a friendly third party with the aim to diluting the shareholding of the hostile offeror, as determined in the Tokyo High Court's decision in the *Livedoor v Nippon Broadcasting* case, unless exceptional circumstances justify the taking of such a measure to protect the common interest of shareholders (eg, there is a greenmailer or other abusive offeror), taking such measures is presumed to be for the purpose of maintaining the control of the incumbent management and would not be permissible.

With regard to defensive measures approved by the shareholders, however, the Supreme Court held in the *Steel Partners Japan Strategic Fund v Bull-Dog Sauce* case in 2007 that it was permissible under the principle of equal treatment of shareholders for a company to allot stock options to all shareholders that are only exercisable by shareholders other than the hostile offeror as long as such allotment is necessary and appropriate to protect the common interests of shareholders from the probable damage to be caused by the hostile offeror.

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

In private M&A transactions, we have seen an increased number of disputes regarding breach of representations and warranties. From time to time, parties to M&A transactions dispute purchase price adjustments or earn-out payments, but these are less common. This

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said, while there have been some cases in which the court determined whether a breach of representations and warranties occurred and, if so, the amount of damage arising, owing to the limited number of such precedents there remains a number of issues with respect to which the court's position is unclear.

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

In litigation brought by shareholders, shareholders would have difficulties obtaining the evidence necessary to prove their case. In litigation between the parties to an M&A transaction, asymmetry of information would not normally be a critical issue.

Netherlands

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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.

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

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

This type of proceedings entails three steps:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

No.

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

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

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

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

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

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

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

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

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

No. Derivative actions do not exist under Dutch law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The standard does not vary if one or more directors or officers have potential conflicts of interest in relation to the receipt of any consideration in connection with an M&A transaction. It should be noted that the directors shall be guided in the performance of their duties by the best interests of the company and the undertaking connected with it (articles 2:129(5) and 2:239(5) DCC).

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

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

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

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

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

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

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

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

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

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

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

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

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

Update and trends

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By determining the strategy of the company, the board of directors shall be guided in the performance of their duties by the best interests of the company and the undertaking connected with it (articles 2:129(5) and 2:239(5) DCC). The interest of the company lies most often in the advancing of the success of the company. Based on the standards of reasonableness and fairness that apply to all the parties involved with the company (article 2:8 DCC), the directors have to prevent the interests of other interested parties from being disproportionally harmed due to pursuing the best interests of the company (Dutch Supreme Court, *Cancun*).

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

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

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

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

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

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Russia

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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.

Shareholders in Russia may file various direct and derivative claims in connection with M&A transactions.

If a shareholder is a party to a particular transaction, it can file various direct claims thereunder. In particular, after the recent reform of the Civil Code of Russia, Russian legislation has adopted the typical English contractual mechanisms that are used in M&A transactions: warranties and indemnities. Warranties and indemnities are usually included in M&A documentation under Russian law. Therefore, the parties to an M&A transaction may claim damages for the breach of warranties or claim for compensation in accordance with indemnities set out, for example, in the sale-purchase agreement. In addition to damages claims, claims for specific performance are available in Russia. The parties may claim for transferring shares under M&A documentation or even for the obligation to redeem shares according to M&A documentation (there are certain cases where such claims are made under put options).

Derivative claims for damages against directors (including de facto directors) and controlling shareholders or claims for invalidation of transactions are also available to shareholders in the corporation entering into the M&A transaction.

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

To bring a warranty claim (for instance, in the case of mergers or share purchases), a shareholder needs to show that the warranty is breached and that the other party did not disclose the real status of certain assets of the company. To bring an indemnity claim, a shareholder must prove that losses have already been incurred or will inevitably be incurred in the future. Moreover, the shareholder must prove the existence of a causal link between the occurrence of the relevant circumstance and its losses.

To support a claim for invalidation of a company's transaction (for instance, an asset sale) the shareholder must prove that:

- the transaction was made in breach of the company's interest (for instance, not on arms-length terms);
- no necessary corporate approvals were obtained in relation to the transaction or that the approvals were obtained with serious breaches of corporate procedure (eg, a resolution adopted without quorum in the general shareholders' meeting); and
- the other party to the transaction knew or should have known of the absence of proper corporate approval.

As part of the claim for damages against directors, a shareholder needs to establish that damage has been caused to the company by culpable actions or inactions of the relevant director. In particular, a director is considered liable for damage that occurred as a result of his or her failure to act reasonably and in good faith (including if his or her actions (or omissions) were not consistent with the normal business practices or the normal entrepreneurial risk).

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, there are two types of corporations: public (joint-stock companies with publicly traded securities) and non-public (other joint-stock companies and limited liability companies). The most typical claims that shareholders of these corporations can bring are practically the same. At the same time, certain claims in M&A disputes can be brought only in respect of non-public corporations, for example claims for exclusions of shareholders or (subject to certain exceptions) to transfer shares due to the breach preemptive rights. On the other hand, certain claims could be brought only in M&A disputes involving publicly traded companies, for example certain claims under tender (voluntary or mandatory) offer procedures.

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

There are specific types of claims that can be brought only in particular types of M&A transactions. For instance, in cases of mergers or other types of reorganisations, a shareholder may (if he or she voted against a reorganisation or did not participate in the voting) claim:

- a buy out of its shares by the company;
- the invalidation of the decision on reorganisation (article 60.1 of the Civil Code); or
- for a declaration that the reorganisation did not take place (article 60.2 of the Civil Code).

The most common contractual claims in merger or share purchase transactions are claims for breaches of warranties and indemnities claims. In the case of put-option transactions, the seller could claim for specific performance (eg, to transfer shares). Some other types of claims, such as claims for invalidation of the M&A transaction and claims for damages against directors or controlling shareholders, are available for all types of transactions, although they would mainly be expected in the case of asset sales and other transactions conducted at the level of the company (as opposed to the shareholders' level).

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 do not differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer.

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

In Russia, as in many countries, there are two types of claims depending on whether the loss is suffered by the corporation or by the shareholder. If the loss is suffered by a shareholder, the shareholder may bring a direct claim in connection with M&A transactions in its own name. If the loss is suffered by the corporation, either the corporation itself can file a claim or a shareholder can file a derivative claim in the name of the corporation.

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?

An individual shareholder may pursue claims in connection with M&A transactions on behalf of other shareholders, but only if they are parties to the same (as opposed to similar) legal relationships.

The shareholder who is going to bring the relevant claim is required to notify all other shareholders of his or her intention to bring the action, and the other shareholders may agree to join the claim. If more than five shareholders join the claim by the time it is filed with the court, it is considered a collective claim with the filing shareholder having the right to act on behalf of the group. If a shareholder does not join the collective claim, he or she cannot file his or her own separate claim that will be equal to the collective action.

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?

Where a loss is suffered by the corporation in connection with an M&A transaction, shareholders can bring a derivative claim in the name of the corporation claiming invalidation of the transaction made by the corporation or damage caused by culpable actions or inactions of its directors (or de facto directors) or controlling shareholder (see question 2).

In line with the clarifications of the Supreme Court of the Russian Federation, a shareholder who brings a derivative claim is regarded as the representative of the corporation, while the corporation itself is regarded as the claimant in a court proceeding. This means that damages will be granted to the corporation, and the shareholder will enjoy only an indirect benefit from the award.

In terms of the procedure before bringing the relevant derivative claim to court, a shareholder of a joint-stock company is required to notify other shareholders of such intention at least five days before applying to the court by sending the relevant written notification to the company. Derivative actions may also be filed as collective actions (see question 7).

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?

There are two general bases for granting injunctive relief: if the non-adoption of the injunctive relief would make it difficult or impossible to enforce a court ruling, or to prevent significant harm to a claimant. At the same time, the adoption of injunctive relief should not lead to an actual impossibility for a company to carry out its activity or significantly impede its activity, or to violations of Russian legislation by this company.

There is an open list of injunctive relief, which includes interim prohibition from entering into a transaction or from transferring shares. As for injunctive relief in the form of an obligation to enter into a transaction or modification of the deal terms, we have not come across cases where this has been ordered.

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

Russian procedural legislation does not recognise the concept of disclosure or discovery. Each party is obliged to present evidence that supports the arguments on which it bases its claim.

However, an interested party may file a motion in court to force another party to disclose relevant information. Furthermore, a court at its own discretion can request parties to disclose particular information. If a court grants a motion and requests parties to disclose documents, then the parties are obliged to do so.

Consideration of any motions to dismiss a shareholder complaint may take place both before and after any issues of the above type of disclosure occur in the procedure.

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

In general, such claims will derive from a contract with a third-party adviser. Shareholders cannot bring claims against third-party advisers since advisers provide assistance on a contractual basis to the parties of M&A transactions – a seller, a purchaser, or both – but not to shareholders directly.

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

Shareholders in one of the parties may bring derivative claims for invalidation of an M&A transaction against counterparties thereto. See the elements of such claim in question 2.

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?

Under Russian corporate law, the liability of the board members or executives for bad faith behaviour cannot be limited or excluded at all by any agreement. In addition, for public companies, the liability of the above-mentioned persons for unreasonable behaviour may not be limited or excluded by an agreement. Any agreements to the contrary are deemed to be void.

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?

Under Russian law, there are some provisions limiting the shareholders' ability to bring claims against the corporation's management and executive bodies.

For instance, a court will dismiss a shareholder claim against the directors or officers if a similar claim has been brought to a court before by another corporation's shareholder seeking the same remedy on the same grounds and if the relevant shareholder has failed to join this previously filed claim (see question 7).

In addition, there are also specific rules on the limitation period for bringing claims against the directors and officers. The limitation period is calculated from the moment the corporation's shareholders have become or should have become aware of the directors' or officers' breach. Even if a new shareholder acquired shares of the company upon the breach and became aware of such breach far later than its preceding shareholder should have become aware of it, the limitation period is still to be calculated as for such preceding shareholder.

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

The Russian legal system does not recognise any such common law concepts and does not contain any statutory rules imparing shareholders' ability to bring actions against directors. See the elements of such claim in question 2.

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 have no obligations to shareholders of a company they are appointed to, but they have an obligation to the company to act in its interests reasonably and in good faith. If a board member or general director is in breach of this obligation, he or she may be held liable for the damage incurred by the company and, as a result, be obliged to compensate such damage to the company. The relevant claim can be brought by either the company itself or its shareholders (see question 6).

It is assumed that the board member or general director acted in bad faith when one of the following conditions is met:

- he or she has taken actions notwithstanding the existence of a conflict between his or her (or his or her affiliates') personal interests and the company's interests, except where information about the conflict of interest has been disclosed in advance and the director's actions have been duly approved;
- the board member or general director does not disclose information about an M&A transaction to shareholders;
- an M&A transaction was entered into (executed by the general director) without being duly approved; or

- while executing the M&A transaction documents, the board member or general director knew or should have known that his or her actions as at the time of their performance (or omissions to act) were not in the company's interests: for example, if he or she has voted for a transaction that was apparently of a loss-making nature or made with an entity that was clearly incapable of performing its obligations. At the same time, if an M&A transaction is deemed to be to the detriment of the corporation's interests, the directors or officers are entitled to provide evidence that this M&A transaction has been one of a few interrelated transactions that had a single business purpose and that together were supposed to be profitable for the company, or that the transaction has been approved to avoid even greater loss for the company.

Furthermore, there is a standard of reasonable behaviour for the board member or general director. It is considered to be proved that the board member or general director acted unreasonably in the following situations:
- he or she made a decision without taking into account important information for this M&A transaction that was available to him or her;
- before making a decision to enter into an M&A transaction, the board member or general director failed to take actions aimed at obtaining necessary and sufficient information, provided taking such actions is standard market practice in comparable circumstances: for example, if it can be proved that in the same circumstances, a reasonable director would postpone his or her decision until additional information was obtained; and
- the board member or general director entered on the company's behalf into an M&A transaction without abiding by internal corporate procedures.

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

No. However, the peculiarities of the relevant types of transactions should be taken into account while deciding on whether the standard is met.

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

No. However, the type of consideration paid should be taken into account while deciding on whether the standard is met.

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

No; however, as mentioned in question 16, a director's liability is assumed if the director acted under a conflict of interest that he or she did not disclose. In this situation, a plaintiff does not need to prove unfaithful actions of a director and the burden of proof shifts to the latter. However, if a director discloses the existence of a conflict of interest prior to the conclusion of an M&A transaction and this has not been approved according to a special procedure by the company's competent governing body, then no presumption is applicable and the burden of proof is on the plaintiff's side.

It should be noted that not only de jure (as for interested party transactions) but also de facto interests are to be taken into account by courts when ruling such cases. For this reason, a wide range of self-dealing transactions potentially may fall within the scope of interests of directors.

Finally, in Russia only members of the governing bodies of the company (such as the board of directors and chief executive officers, as the main decision makers, may be held liable for losses under the rules of Russian civil law (including in the case of M&A transactions), whereas other officers (eg, chief accountants) generally bear no liabilities in this respect.

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?

No. Such situation, however, will likely trigger the necessity to approve the transaction as an interested party transaction. If it has not been approved as such, but has been executed by the director, his or her her liability will be assumed (see question 16).

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?

Russian law does not contain any provision restricting a company's ability to indemnify its officers and directors against their liability. There is also no relevant court practice on this matter. However, Russian law prohibits agreements on the limitation of directors' liability for bad faith actions (in all companies) and unreasonable actions (in public companies). As such, indemnification by a company against a director's liability to the company may be considered inconsistent with these provisions.

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

It is generally allowed under Russian law to challenge particular parts or terms of the transaction documents (including in M&A transactions) as opposed to challenging the documents as a whole (regarding the latter, see question 2). The law does not generally limit this right by the type of the terms challenged. Importantly, however, a court may declare only part of the transaction invalid subject to such invalidation not leading to the creation of a contract that the parties do not intend to enter into.

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

In Russian M&A litigation, the shareholders' vote should be taken into consideration in the following cases. First, the core right to bring a suit before a court (eg, to challenge an M&A transaction) is given only to the shareholders that hold no less than 1 per cent of the company's share capital. If a shareholder holding less than this threshold intends to bring a suit before a company, it may cooperate with other shareholders so that the amount of their shares is more than 1 per cent of share capital.

Second, some forms of disposal of rights to litigation (eg, concluding a settlement agreement or withdrawing an action) are viewed by judicial practice as transactions. Consequently, such actions may require approval as major or interested-party transactions, or both, by the competent bodies of the company (which in most cases is the general shareholders' meeting). As a result, the amount of votes a particular shareholder holds in a company has an express impact on his or her ability to influence the results of such voting, and thus the litigation process itself.

At the same time, Russian courts may grant approval to a settlement agreement or a withdrawal of a suit despite lacking the shareholders' consent. However, disagreeing shareholders and other third parties whose rights are influenced by such decision have the right to further challenge such transaction as concluded without necessary approvals.

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

Directors' and officers' (D&O) insurance is not commonly used in Russian corporate practice. There is an expert view that explains this phenomenon with the fact that insurance companies in many cases refrain from providing D&O policies because of the lack of legal regulations in relation to this type of insurance on the one hand, and of coherent court practice regarding directors' liability and claiming related losses on the other.

Note that the Code on Corporate Governance, which although not mandatory was recommended by the Bank of Russia for the compliance of publicly trading companies, prescribes such companies to purchase insurance policies so as to cover possible damage caused by their directors. However, the market of insurance services in relation to directors' liabilities is quite moderate (the average insurance policy does not exceed 1 million roubles), and we are not aware of any cases where its existence was somehow taken into account.

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?

In M&A litigation, the approach to determine which party has the burden of proof is similar to all other types of directors' liability litigation.

As a general rule, it is the plaintiff who must prove that a director's actions in terms of an M&A transaction caused damage to the company and that this director is actually guilty (ie, by breaching his or her duties as a director). Moreover, Russian civil law contains a presumption of good faith in relation to participants in civil law relationships. For this reason, a plaintiff's failure to provide the court with enough evidence will result in the court rejecting holding a director liable for losses.

The burden of proof may shift depending on whether any assumptions are in place (see question 16). In addition, if a director refuses to cooperate with the court and to provide any explanations of his or her actions (or if such explanations are obviously insufficient), the court may consider such director's behaviour to be in bad faith and rule that it is the director who must prove that there are no grounds for liability.

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

Yes, if shareholders intend to carry out pre-litigation investigation, they have certain tools at their disposal.

Russian law provides shareholders with the right to request information and documents from a company. The scope of such right depends on the number of shares held by the requesting shareholder as well as the type of the company. In joint-stock companies, shareholders generally have access to all constitutional documents of the company, its internal regulations and annual reports. If a shareholder holds more than 1 per cent of the shares, he or she may also request contracts concluded by the company, reports of appraisers and minutes of meetings of the board of directors. However, if a shareholder needs to investigate the company's records and books, he or she may do so only when holding more than 25 per cent of the shares. A different approach applies to the information rights of limited liability company participants: they may investigate all these documents notwithstanding the amount of their participatory interest in the limited liability company.

Another right that may be used as a pre-litigation investigatory tool is a right to initiate an auditing review of the company. Participants of a limited liability company are entitled to address the company with a request for an auditing review to be carried out by a particular auditor chosen by such requesting participant. Shareholders of a joint-stock company, however, do not have such right.

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

As a matter of Russian law, if M&A litigation falls within a notion of a 'corporate dispute' it is to be initiated in a state court that is located at the registered address of the company that is the subject of the dispute. These jurisdictional rules are obligatory and cannot be changed by the parties' agreement.

At the same time, some categories of M&A disputes falling into a 'corporate dispute' notion may also be brought to an arbitration. The relevant arbitration clause could be incorporated into the agreement or could be included in the by-laws of the company. An arbitration clause may be implemented into companies' by-laws at the time of its adoption or later as an amendment to the relevant by-laws on the basis of a decision of general shareholders' meeting. In any case, such decisions require the unanimous approval of all shareholders.

Note that the possibility to include an arbitration clause in companies' by-laws is available only for non-public companies with fewer than 1,000 shareholders.

Russian procedural law limits the choice of arbitral institutions for the consideration of corporate disputes only to those ones that have obtained a special permit from the government. Compliance with this requirement is necessary both for Russian and foreign arbitral institutions.

Update and trends

In the past, the practical application of Russian legislation created difficulties in identifying those categories of disputes that may be subject to arbitration (ie, the arbitrability issue). For many years, it was not entirely clear whether disputes connected with the incorporation of a legal entity, its management or participation in a legal entity (corporate disputes) could be subject to arbitration. Corporate disputes also include M&A disputes. These difficulties led to demands for the reform of the arbitration legislation in Russia.

As a result, new legislation was adopted in 2016 and implemented in 2017. This new legislation, in particular, expresses a statutory recognition of the arbitrability of a majority of corporate disputes (which previously was not directly stipulated, leading to the risk of non-enforcement of arbitral disputes in such cases).

At the same time, the new legislation specifies that corporate disputes may only be considered by arbitration administered by a special arbitral institution that has obtained a permit from the government. These requirements are applicable to foreign arbitral institutions as well.

To date, only a few Russian arbitral institutions have obtained this permit (such as the International Commercial Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation). It is not clear whether major international institutions will use this opportunity to apply for the permit in Russia.

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

In general, litigation in Russia is relatively quick (the law establishes a three-month standard period for consideration of cases in the first instance, although in practice this can be up to nine months or a year). Russian procedural legislation does not permit the application of expedited proceedings for corporate disputes. The term 'corporate disputes' covers most M&A litigation cases. In relation to other cases, it should be noted that expedited proceedings concerning monetary claims can be applied only if the cost of a claim for legal entities does not exceed 500,000 roubles and for sole entrepreneurs 250,000 roubles. This makes expedited proceedings irrelevant for most M&A litigation cases.

The Russian jurisdiction does not establish any rules for pretrial disclosure of evidence (discovery). Parties to court proceedings may only file a motion to a judge demanding specific evidence from another party (see question 10).

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

As a matter of Russian law, damages consist of actual damage and loss of profit. Actual damage can be regarded as expenses that the person whose right has been violated has made or will have to make to restore its violated right, the loss or the damage caused to his or her property. Loss of profit means unreceived profits that this person would have derived under ordinary market conditions if his or her right had not been violated.

Calculation of damages in relation to new contractual instruments (indemnity, warranties and representation) is complicated, as current court practice is still poor in this area.

In the case of a mandatory tender offer or squeeze-out offer, the damages comprise the difference between the price of shares provided in the mandatory tender offer or squeeze-out offer of the bidder and the real market price of these shares.

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

Shareholders may address their claims through an indirect lawsuit on behalf of the company. Russian legislation establishes that shareholders may file this lawsuit against directors of the company, or demand recognition of the company's interested party and major transactions as void. As far as joint-stock companies are concerned, in both cases these lawsuits may be filed by shareholders holding at least of 1 per cent of the voting shares of the company. Similarly, participants in limited liability companies may file lawsuits if they hold at least 1 per cent of the share capital of the company. The Law on Limited Liability Companies does not provide any minimal threshold for filing lawsuits against directors of the company.

It should be mentioned that Russian legislation and court practice are vague in relation to the opportunity of shareholders to file lawsuits based on a breach of warranties, indemnity and other contractual obligation provided in favour of their company.

The Civil Code establishes obligations on shareholders to inform the company and other shareholders regarding their intention to file a lawsuit. Any shareholder that has not joined the lawsuit is not entitled to subsequently file the same claim.

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

Russian legislation does not directly provide such rights to third parties. However, according to the latest court practice, some third parties (eg, an ultimate beneficial owner) may file lawsuits demanding recognition of M&A transactions as void after their conclusion.

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

Russian law provides a minority shareholder with a right to demand from the person who, as a result of a voluntary or mandatory tender offer, has become the owner of over 95 per cent of the total number of the shares of a public company, counting the shares owned by this person and affiliated persons thereof, to purchase remaining shares held by him or her and other persons, as well as the issuable securities convertible into such shares of the public company, upon the request of their holders.

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?

Under Russian law, after receiving a voluntary or mandatory tender offer, the board of directors of a public company shall adopt recommendations in relation to this offer, including an assessment of the price of the shares provided in a bid and the probable change of their market price after acquisition thereof, an assessment of plans of the person that has sent the voluntary or mandatory tender offer concerning the public company, and also those in respect of employees thereof.

These acts shall be undertaken by the directors even if the corporation receives an unsolicited or unwanted offer to enter into an M&A transaction.

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 asserted by counterparties to an M&A transaction intend to recognise interested party transactions or major transactions as void in the absence of the required approval by the board of directors or a general shareholders' meeting under the proper procedure established by the law.

There is also extensive court practice in relation to a breach of contract and the application of corresponding sanctions. Before the implementation of the rules that directly provide parties to M&A transactions with an opportunity to apply warranties and representations concerning contractual obligations, there was a widespread approach of demanding damages for damage incurred by the improper 'quality' of transferred shares.

To date, issues related to purchase price adjustments and earn outs have only be subject to weak testing in Russian court practice.

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

As previously noted, Russian law contains several peculiarities in relation to indirect suits brought by shareholders (see question 30).

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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.

There are four claims that shareholders can file in connection with M&A transactions (claims 2 and 3 relate to directors' responsibility).

Action 1

The most common claims in shareholder-initiated litigation deriving from M&A transactions are claims between the parties to the M&A transaction, generally based on breach of contract.

The action is usually a damage compensation claim deriving from (mainly) a breach of the representation and warranties of a sale and purchase agreement, or from discussions regarding price-adjustment clauses, although it could relate to other contractual breaches.

There are two types of claims: in a share deal, shareholders (as sellers) are the parties to a contract, and therefore they can claim against the buyer generally based on a breach of contract; and in an asset deal, the company itself is the party to the contract, and it can claim against the buyer generally based on a breach of contract.

Action 2

Social liability action: the company (through an agreement of the general shareholders' meeting), shareholders (holding a minimum capital percentage) and creditors are entitled to claim directors' liability. The purpose of the social liability action is having the liable directors compensate the company for any damage caused.

Action 3

Individual liability action: shareholders and creditors individually damaged by directors' actions or omissions (ie, when the damage is not caused to the company itself) can request compensation from the liable directors. The purpose of the individual liability action is having the liable directors directly compensate the shareholders or creditors (as the case may be) for any damage caused.

Action 4

The fourth action related to M&A transactions arises mainly in the context of tenders and initial public offerings. Should there be a misrepresentation or inaccurate information in the prospectus (or in the periodic information that should be disclosed by issuing companies), shareholders may assert claims against the corporation, or against the directors or other personnel legally liable for the accuracy of the prospectus, further to sections 38 and 124 of the Capital Markets Act. Section 38 establishes the liability for information (ie, false information or omissions) disclosed in the prospectus, whereas section 124 sets forth the liability regarding periodic information disclosed by issuing companies. Further to these sections, shareholders are entitled to claim damage suffered.

These four actions are referred to by their corresponding numberings throughout this chapter.

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

Action 1

In the case of a breach of contract claim, claimants need to prove the breach, the damages suffered and a cause-and-effect relationship between the breach and the damages.

Actions 2 and 3

Regarding directors' liability claims (both for social and individual liability actions), claimants must prove that directors acted wilfully or negligently contrary to the law, the company's by-laws or the legal duties deriving from their position. Shareholders must also prove that the corporation (in the case of a social liability action) or the shareholder or creditor (in the case of an individual liability action) suffered actual damage. Finally, it must be proven by the claimant that there is a cause-and-effect relationship between the wilful or negligent behaviour of the director and the damage suffered.

Action 4

In the event of claims further to the Capital Markets Act (Action 4), shareholders need to prove the existence of false information or omissions, the damage suffered and a cause-and-effect relationship.

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?

They apply to both publicly traded and privately held corporations, except in the case of claims further to the Capital Markets Act (Action 4). Actions further to the Capital Markets Act can only be brought against issuing companies (ie, companies subject to the capital market regulations).

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

Yes.

In the case of tender offers, Actions 2 and 3 (directors' liability), and Action 4 (claim further to the capital markets regulation), would be available.

In a share deal, Action 1 will be available to the contracting shareholders.

In an asset deal, the contracting company will have legal standing for a breach of contract claim (Action 1) and shareholders could bring Actions 2 and 3.

In the case of a merger, Actions 2 and 3 would be available for shareholders.

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

No.

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

Regarding Action 1, the loss is suffered by the contractual party (a shareholder or the company, as the case may be). The damaged party will be the one with legal standing.

In Actions 2 and 3, if the loss is suffered by the corporation, the appropriate way to seek compensation would be a social liability action, whereas if the loss is suffered by a shareholder, compensation would have to be requested through an individual liability action.

In Action 4, shareholders are the individually damaged parties.

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?

In the case of a social liability action, shareholders (if the general shareholders' meeting does not pass a resolution favourable to suing corporate directors) can file the claim against them to the benefit of the company (and, indirectly, of the remaining shareholders).

In an individual liability action, shareholders cannot pursue claims on behalf of other similarly situated shareholders.

In claims further to the capital markets regulation, shareholders cannot pursue claims on behalf of other similarly situated shareholders. However, consumer associations can bring collective claims on behalf of consumers that have accepted being part of such claim.

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?

Only regarding social liability actions, shareholders holding minimum capital stakes can file actions requesting a director's liability deriving from M&A transactions on behalf of the corporation when the corporation itself (through an agreement of the shareholders meeting) has refused to initiate said actions.

As a way of exception, if a social liability action is based on a breach of the duty of loyalty, shareholders are entitled to directly file a claim against corporate directors, without a previous refusal of the general shareholders' meeting.

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?

There are three requirements under Spanish law to get interim relief:

(i) *fumus boni iuris*: the claim must be justifiable on the merits, that is, the requesting party shall be likely to receive a favourable ruling on the merits;
(ii) *periculum in mora*: there is a real risk that the enforcement of the claim would be frustrated if the petition is not guaranteed during the proceedings; and
(iii) posting a bond or security to cover potential damage caused to the counterparty.

Even if a claimant could evidence the fulfilment of requirement (i) and offer a bond (requirement (iii)), the periculum in mora is hardly ever met in interim relief aimed at preventing the closing of M&A transactions, as the potential damage caused to the shareholders could, in the vast majority of cases, be compensated through a monetary reward.

Spanish courts cannot generally enjoin M&A transactions or modify deal terms.

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

This is not applicable. Early dismissal and discovery do not exist under Spanish law (ie, discovery is only available in antitrust damage action claims).

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

Technically speaking, shareholders could arguably bring tort claims against third-party advisers that assisted the company in M&A transactions. However, it would be much more natural that these claims against third-party advisers are brought by the corporation itself rather than by the shareholders. Otherwise, directors' liability may arise, and shareholders could file Actions 2 and 3.

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

Shareholders bringing claims against the counterparties to M&A transactions is far from being usual. There may be very particular circumstances in which shareholders may bring tort liability claims against the counterparties to M&A transactions, but this is not at all common. Claims deriving from M&A transactions are almost always brought by the affected corporation.

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 corporation's constituting documents are a key element regarding Actions 2 and 3. Shareholders may bring claims against directors if it is proven that they failed, wilfully or negligently, to comply, inter alia, with the provisions included in the corporate by-laws, in the regulation of the general shareholders' meeting or in the regulation of the board of directors.

Regarding liability limitation provisions that may be included in the corporation's constituting documents, any limitation provision would be considered null and void.

Directors' and officers' (D&O) insurance, for instance, would be a way to limit the personal exposure of company directors.

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?

Shareholders' ability to bring claims against directors cannot be limited by statutory or regulatory provisions.

Indeed, if the company by-laws include any kind of clause limiting shareholders' ability to bring claims against directors and officers, such stipulations would not be accepted by the commercial registry and therefore would not apply. In the very unlikely scenario that a clause like that is accepted (due to the inattention of the registry) it would be null and void.

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

Section 226 of the Spanish Corporations Act provides for the protection of directors through the business judgment rule.

Regarding strategic and business decisions subject to the business judgment rule, the standard of diligence of an orderly business person is understood to have been fulfilled when the director acted in good faith, without personal interest in the matter being decided, with sufficient information and further to a proper decision-making process.

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?

A general standard is the above-mentioned standard of diligence of an orderly business person.

Additionally, there are differences for determining whether directors may be held liable to shareholders:

- in actions of company directors contrary to the law or the corporate by-laws, there is a presumption of guilty behaviour by the directors. That provision means that the burden of proving the non-existence of guilt lies on the directors; and
- in actions of company directors breaching their legal duties (eg, the duty of diligence, duty of loyalty), there is no presumption of directors' liability. The burden of proof lies on the claimant, who must prove that the director acted wilfully or negligently and that such actions caused damage.

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

Generally not, although regarding Action 4 the standard would be reasonable care and diligence.

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

No.

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

The duty to avoid conflicts of interest is included within the broad concept of the loyalty duty of corporate directors. The Corporations Act provides for the regulation regarding conflicts of interests, and sets forth the circumstances in which a director has the obligation to avoid conflict of interests situations.

A violation of such provisions would be considered a breach of the loyalty duty.

Therefore, further to our answer in question 16, the applicable standard in cases of conflicts of interest, as it is technically a breach of a legal duty, is that there is no presumption of directors' liability. Therefore, the claimant will need to prove a breach of the loyalty duty, a damage arising thereof and a cause-and-effect relationship.

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?

Yes, it does.

If a shareholder is part of the M&A transaction, it could file Action 1 (eg, a damage claim for breach of contract).

To the contrary, if the shareholder is a person legally responsible for the accuracy of a prospectus (eg, a corporate director), such shareholder could not arguably bring Action 4 (a claim based on the capital markets regulation).

Regarding Actions 2 and 3 (directors' liability), the ability of shareholders to bring actions would depend on their degree of knowledge and participation on the relevant transaction.

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?

This question should not apply to Action 1, as the party to the M&A transaction is generally the company itself.

In Actions 2, 3 and 4, a company cannot indemnify corporate directors (it would arguably be a kind of invalid limitation of liability), and the approving director could face liability.

Regarding advancing legal fees, in Actions 2 and 3, the claiming party is always the company itself (either through an agreement of the general shareholders' meeting, or an agreement by shareholders or creditors on behalf of the company). It would not make sense for the claimant (ie, the company) to advance the legal costs to the defendant (ie, the defendant directors).

In Action 4, any decision to indemnify corporate directors or to advance legal costs could represent a decision under a conflict of interest, because the directors (eg, the board) would be the ones approving such decisions to their own benefit.

Generally, legal costs in this type of claim are initially covered by D&O insurance.

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

No, they cannot, if they are not directly part of the transactional documents.

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

In an asset deal (Action 1), the decision would be on the board except if the transaction involves assets exceeding 25 per cent of the company's value. In that case, the transaction must be approved by the general shareholders' meeting. Shareholders approving the transaction could have limited possibilities of filing actions against corporate directors, except in cases of concealment of information, or when inaccurate or incomplete information was provided.

Regarding Action 2, the general shareholders' meeting has to approve the filing of a social liability action. However, if the resolution is not favourable, shareholders holding a determined percentage of shares can file a social liability action in the name and on behalf of the company.

Regarding Actions 1 (share deal), 3 and 4, whether to file an action is a personal decision of each shareholder. Therefore, voting is unnecessary.

Update and trends

It is worth mentioning two trends:

- actions further to sections 38 and 124 of the Capital Markets Act (Action 4) are becoming increasingly common. Many consumers (ie, minority shareholders) are filing actions requesting compensation for damage against an issuing company and its directors (or other persons liable for the accuracy of the publicly disclosed prospectus and information); and
- representations and warranties insurance is becoming increasingly common in the Spanish market, especially when sellers need to provide a quick return to investors. The use of this type of insurance could decrease M&A litigation for breach of contract in share and asset deals (Action 1). However, it is still unknown whether subscribing to these insurance policies could lead to litigation between the insurance company and the company that is insured.

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

D&O insurance plays an essential role within shareholder litigation arising from M&A transactions. It covers damage caused by directors and officers, normally except in cases of wilful behaviour. It also generally provides for an advance of legal costs to the defendant director.

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?

Regarding actions or omissions of company directors contrary to the law or the corporate by-laws, there is a presumption of guilty behaviour by the directors. That provision means that the burden of proving the inexistence of guilt lies on the directors.

Regarding actions or omissions of company directors breaching their legal duties, there is no presumption of directors' liability. The burden of proof lies on the claimant, who must prove that the director acted wilfully or negligently and that such actions caused damages.

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

Yes, but they are very limited. To prepare a statement of claim, shareholders can request the company to provide very limited types of documents and accounts.

Additionally, shareholders have a limited right to information regarding the matters to be discussed with a general shareholders' meeting.

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

Regarding Action 1 (share deals and asset deals), the parties are generally allowed to include forum clauses in the relevant contracts, including arbitration clauses.

Regarding Actions 2 and 3, companies can submit their internal disputes to arbitration. Including an arbitration clause in the corporate by-laws requires the favourable vote by two-thirds of the shares. The challenge of corporate decisions by shareholders or directors can also be submitted to arbitration, provided that the proceedings are administered by an institution and that such institution also appoints all the arbitrators.

If no arbitration clause is included in the corporate by-laws, Actions 2 and 3 must be filed in the court of the domicile of the defendant directors. If several directors with different domiciles are sued, the claimant can choose the court that will handle the case.

In connection with Action 4, the claim must normally be filed in the court of the domicile of the defendant. If there is more than one defendant, the claimant can choose the court that will handle the case. However, if the claim derives from a public offering or the claimant is a consumer (eg, a minority shareholder legally qualifying as a consumer), it could file the claim in the courts of his or her domicile.

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

No.

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

Claimants are only entitled to claim actual damage caused to the company by directors' actions or omissions that are duly proven.

The methodology to calculate damages depend on the action filed and the type of damage caused. The usual ways in which experts calculate damages are normally also used in M&A litigation.

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

There are no special issues regarding settlements.

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

This is not common, but it could happen in very special circumstances (eg, if there is a priority right or a previous transaction by a third party regarding the same assets or shares).

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

No.

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?

Directors must issue a report regarding the proposal stating whether they support the tender offer. They also need to disclose whether there is any agreement between the company or its directors or shareholders and the offeror. Any conflict of interest situation also needs to be disclosed.

Likewise, corporate directors are obliged to request the authorisation of the general shareholders' meeting before executing any action that could jeopardise an unsolicited proposal (eg, selling the company's assets, paying dividends), including approval for the issuance of securities in order to avoid the offeror from gaining control of the company. By way of exception, directors are entitled to look for competing offers.

If an action that could jeopardise the proposal was already approved before the offer was known, directors are also obliged to request confirmation at the general shareholders' meeting.

Directors are further obliged to notify the Capital Markets Commission of any defensive measure approved by the general shareholders' meeting. Before defensive measures are approved, corporate directors must issue a report justifying the proposed measures.

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

In share deals and asset deals (Action 1), the most common claims are based on a breach of contract. Such claims normally relate to, inter alia:
- a breach of representations and warranties;
- purchase price adjustments;
- contract interpretation;
- material adverse change provisions;
- specific indemnities;
- limitations of liability clauses; and
- a breach of non-compete obligations.

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

Actions 1 (in cases of a share deal where shareholders are sellers), 2, 3 and 4 are litigation types brought by shareholders.

Action 1 (asset deals) would be the usual claim deriving from M&A transactions, but shareholders do not normally have legal standing (ie, the asset deal has to be filed by the contracting party, which is normally the company).

That said, whereas litigation involving M&A transactions (asset deals) and shareholder litigation in a share deal are contractual claims based (normally) on a breach of contract, shareholder litigation (Actions 2, 3 and 4) are damage claims against corporate directors or the company (in the case of Action 4).

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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 may assert against corporations, officers and directors under Swiss law in connection with M&A transactions are the following:

- challenges of shareholder resolutions and of certain board resolutions;
- liability claims against officers, directors, founders, auditors or any person involved in a merger, demerger, capital increase, conversion of legal form or transfer of assets, or the review thereof; and
- claims for the review and determination of adequate compensation by a court.

These claims are available under the Swiss Merger Act (MA) and/or Swiss corporate law as set forth in the Swiss Code of Obligations (CO).

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

Challenge actions against shareholder or certain board resolutions require the plaintiff shareholders to show that the resolutions violate the corporation's articles of association, provisions or principles of Swiss corporate law, and/or provisions of the MA (board resolutions can be challenged only in the latter case). It is further required that the challenged resolutions affect the plaintiff shareholder's legal position and that he or she did not approve the resolutions. Challenge actions must be directed against the corporation and filed within two months of the adoption of the resolution (in the case of a challenge under Swiss corporate law) or of the publication of the resolution (in the case of a challenge under the MA), respectively, after which the respective claims will be forfeit.

Liability claims against officers, directors, founders or auditors or any person involved in a merger, demerger, capital increase, conversion or transfer of assets, or the review thereof, require the plaintiff shareholder to show that the defendant intentionally or negligently breached a legal duty under Swiss corporate law or the MA; that such breach caused loss or damage to the corporation(s) involved or to the plaintiff shareholder; and that there is an adequate causal nexus between the breach of duty and such loss or damage. Whether the plaintiff shareholder must also establish fault of the defendant or whether fault is presumed (and the defendant must prove he or she was not at fault to escape liability) depends on the specific claims in question and is controversial.

Claims for review and determination of adequate compensation by the court in the context of a merger, demerger or conversion of legal form require the plaintiff shareholder to show that his or her shares or membership rights are not adequately safeguarded, or that the compensation offered is not adequate. Such claims must be filed within two months of the publication of the merger, demerger or conversion resolution, after which the respective claims will be forfeit.

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

No. Under Swiss law, the types of claims shareholders can assert do not depend upon whether the corporations involved in the M&A transaction are publicly traded or privately held. Note, however, that in the case of public tender offers, the stock exchange law and regulations apply, and shareholders may resort to the competent authorities in the case of violations of these provisions.

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

Yes. Challenges against shareholder or board resolutions under the MA may only be brought in the case of mergers, demergers or conversions of legal form. In the case of other transaction forms, shareholder resolutions may only be challenged under general Swiss corporate law. Liability claims under the MA are only available in the case of mergers, demergers, conversions of legal form or transfers of assets. In the context of other transactions, liability claims against officers and directors, founders or auditors must be brought under general Swiss corporate law. Claims for review and determination of adequate compensation by the court are only available in the case of mergers, demergers or conversions of legal form.

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

No. Under Swiss law, the types of claims do not differ depending on whether the transaction involves a negotiated transaction versus a hostile or unsolicited offer.

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

No, but this has an impact on who has standing to bring a liability claim: if a loss is suffered by the corporation, liability claims may be brought both by the corporation itself or by individual shareholders. Shareholders can sue either on behalf of the corporation (derivative suit) or in their own right. However, a shareholder who decides to bring an action in his or her own right will be limited to claiming damages directly suffered by that shareholder (see also question 8).

As regards challenges to shareholder resolutions under the MA or requests for review and determination of adequate compensation by the court, only shareholders have standing to bring such claims.

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?

For the time being, Swiss procedural law does not provide for class actions. Therefore, a shareholder may only pursue claims on his or her own behalf. The limited options for collective proceedings before Swiss courts are through a joinder of parties. Pursuant to the Swiss Code of Civil Procedure (CCP), parties may join their claims and appear jointly in a trial when their case is based on similar factual circumstances or legal grounds. While the concept of joinder may have some advantages for plaintiffs who wish to coordinate their actions (eg, only one evidentiary proceeding, reduced costs and avoidance of conflicting judgments), it is not particularly suited for litigation involving large groups of plaintiffs, as it lacks many of the features and advantages of (common law types of) class actions. For example, the rules relating to the joinder of parties do not provide for mandatory joint representation. Furthermore, while the CCP does provide for the possibility to bring all the joined claims in the jurisdiction of one single court, this rule does not establish mandatory and exclusive jurisdiction for all claims that are based on the same facts.

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?

Yes, loss suffered by the corporation in connection with an M&A transaction may be claimed by individual shareholders in a derivative action. Such action is not brought in the name of the company but in the name of the individual shareholder. However, the plaintiff shareholder may only request payment of damages on account of the corporation (not the plaintiff shareholder's) to compensate for the loss suffered by 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?

In the case of urgency, Swiss courts may order injunctive or interim relief in summary proceedings upon a prima facie showing that a right of the plaintiff has been violated or is about to be violated (eg, by a shareholder resolution that violates principles or provisions of corporate law or the corporation's articles of association, or both), and that such violation will cause the plaintiff irreparable harm. In such proceedings, the court further assesses whether the relief requested by the plaintiff is reasonable and the harm caused to the defendant if such relief was granted is proportionate (balance of the equities). On this basis, a Swiss court may prevent the closing or enjoin an M&A transaction. In the case of utmost urgency (which is not caused by the plaintiff's delay in applying for injunctive or interim relief), the court may also grant such relief ex parte, subject to confirmation in inter partes proceedings. Note that any interim or injunctive relief granted by a court must be pursued by the plaintiff in ordinary proceedings in order to have a court confirm the right of the plaintiff and the violation thereof.

As mentioned in questions 1 and 2, under the MA, upon application by a plaintiff shareholder, a Swiss court may review if the shareholders' membership rights are adequately safeguarded in the context of a merger, demerger or conversion of legal form, and may determine adequate compensation. In that sense, a Swiss court may modify deal terms. However, such action does not enjoin the M&A transaction or prevent its closing. Moreover, adequate compensation is not determined on an injunctive or interim relief basis but in ordinary inter partes proceedings.

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

No. First of all, Swiss procedural law does not provide for discovery, and it allows only limited disclosure in the context of the court's taking of evidence. There are no specific procedural remedies for parties to seek an early or summary dismissal of claims. However, the court may decide to dismiss claims without the taking of evidence (or ruling on requests for document production) if it finds that the plaintiff failed to state its case or to sufficiently substantiate a claim, or if the court is persuaded based on the available documentary evidence that it may dismiss (or grant) the claims without a need to take further evidence.

In any event, a Swiss court would not proceed with a case if the basic procedural requirements of an action (legitimate interest in the action, jurisdiction, no lis pendens of the same action, no res judicata, capacity to sue, payment of advance on court costs, etc) are not met by the plaintiff at the outset of the litigation. In that case, the court would not even enter the merits of the case, but would rather dismiss the claims on procedural grounds.

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

In principle, claims against third-party advisers that assist in M&A transactions may only be brought by the parties contracting the services of such third-party advisers: that is, typically the corporation(s) that are assisted by such advisers. However, to the extent third-party advisers are involved in the review of a merger, demerger or conversion of legal form as specifically required under the MA, they may become liable both to the involved corporation(s) and to the shareholders for damage or loss caused by the intentional or negligent breach of their duties. A corporation's auditors who are involved in auditing the annual and consolidated financial statements, the formation of the corporation, and a capital increase or reduction of capital, are subject to a similar liability.

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

In principle, no. Shareholders may bring claims only against officers, directors, founders or auditors of the corporation in which they hold shares. However, to the extent persons involved in a merger, demerger, conversion or transfer of assets, or the review thereof, breaches duties under the MA that aim at protecting the shareholders of all corporations involved in such transaction, they may be held liable by the shareholders of each of the involved corporations. Moreover, if a counterparty's involvement in the breach of a fiduciary duty by an officer or director of a corporation was of such significance that the counterparty de facto assumed and exercised the role of such officer or director, it could be held liable by the corporation's shareholders as a de facto officer or director.

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 articles of association determine a corporation's purpose and may specify the scope of a board member's or executive's duties. Therefore, the articles of association may have an impact on the extent board members or executives can be held liable. However, the articles of association may not validly limit the extent of liability of board members or executives.

A limitation of liability can rather result from a release or waiver of liability claims that may be granted by shareholder resolution. Moreover, under Swiss law, a corporation may agree on a contractual basis to indemnify its board members or executives against liability claims brought by third parties, provided these claims do not stem from a grossly negligent or intentional breach of duties.

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?

For Swiss corporations, it is a standard agenda item of the annual general shareholders' meeting to resolve whether to release directors and officers from liability. Pursuant to general Swiss corporate law, a release resolution adopted by the general shareholders' meeting provides directors and officers with a legal defence against a liability action brought by the corporation or by shareholders who consented to the release resolution, to the extent the liability action is based on facts that were known to the shareholders when adopting the release resolution. Such release resolution further limits the non-consenting shareholders' ability to bring liability claims, since the right to bring action of these shareholders is forfeited six months after the resolution of release has been adopted.

In the context of M&A transactions, if the general shareholders' meeting approves a merger or demerger contract or a conversion plan, respectively, such shareholder resolution is generally deemed to have the same effect with respect to such transaction as a release resolution. Therefore, shareholder resolutions approving certain M&A transactions provide the directors and officers with a legal defence against liability claims brought by the corporation or consenting shareholders in the context of such transaction, provided the facts on which such liability claims are based were properly disclosed and, thus, known (or at least easily recognisable) to the shareholders when adopting the resolution.

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

Switzerland's legal system is based on civil law, not common law. That being said, during the past decade the Swiss Federal Supreme Court has recognised a business judgment rule concept pursuant to which Swiss courts should exercise restraint in reviewing business decisions from an ex post perspective, provided these decisions are the result of a proper decision-making process on the basis of sufficient information and free from conflicts of interest. If these requirements are met, Swiss courts may only review whether such business decision was reasonable and must not review whether the decision was correct in substance.

Moreover, pursuant to general principles of Swiss law, a corporation is estopped from raising liability claims to the extent the corporation or its shareholders consented to the behaviour that allegedly caused damage or loss to the company.

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

Whether a board member or executive is in breach of his or her duties is determined pursuant to the specific duties in the context of an M&A transaction as set forth in the MA and pursuant to the general duty of care and loyalty under Swiss corporate law: that is, the duty to apply due diligence and to safeguard the interests of the company in good faith. The standard of care is objective: a Swiss court will assess whether the board member or executive applied the level of care a reasonable person in the position of such board member or executive would be expected to apply in a similar situation. Any failure to meet this standard triggers liability. Even minimal negligence is, in principle, sufficient; in practice, however, the level of negligence (along with other factors, including the application of the business judgment rule) will typically have an impact on the court's determination as to whether a board member or executive is liable.

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

No. In principle, the standard does not vary depending on the type of transaction at issue. However, a Swiss court would assess the specific transaction situation at hand when determining the level of care expected from a board member or executive in such situation.

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

No. The standard does not vary depending on the type of consideration being paid to the seller's shareholders.

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

While the standard does not vary, in the case of conflicts of interest, the Swiss law concept of the business judgment rule (see question 15) does not apply, and Swiss courts may in principle fully review whether a business decision taken under the influence of a conflict of interest was correct in substance. While a conflict of interest may be a breach of duty in and by itself, this is not necessarily the case and does not trigger liability automatically. However, according to a recent precedent by the Swiss Federal Supreme Court, where a conflict of interest is established, there is a factual presumption that such board member or executive acted in breach of his or her duties by taking a business decision under the influence of such conflict. This presumption may be rebutted by showing that the corporation's interests were safeguarded despite the conflict of interest.

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?

While the standard does not vary, a Swiss court would assess the specific transaction at hand when determining the level of care expected from board members or executives in such situation. Note that in the case of public tender offers, Swiss stock exchange law generally prevents a controlling shareholder from receiving consideration that is not shared proportionally with all shareholders.

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

It is the majority view in legal doctrine that under Swiss law, a company may advance the legal fees of its officers and directors named as defendants, at least in the case where a liability action is brought by third parties (shareholders). Provided the defendants did not act intentionally or grossly negligently, it is further accepted that the company bears the legal fees of or indemnifies the defendants, respectively. Moreover, it is undisputed and general practice for public and large non-public Swiss companies to contract and pay for directors' and officers' (D&O) insurance for the benefit of its directors and officers.

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

In public transactions, the extent to which corporations may agree on certain clauses or terms (offer conditions, break-fees, etc) are limited, and the competent authorities under Swiss stock exchange law review whether a tender offer respects these limits. A shareholder who wishes to challenge such clause may thus apply to these authorities and argue that such clause was in violation of the stock exchange law and regulations.

Outside of the scope of the stock exchange law and regulations, shareholders may only challenge the resolutions of the general shareholders' meeting, and in certain instances also resolutions of the board of directors, which approve a merger, demerger or conversion of legal form, but not individual clauses in M&A transaction documents.

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

The vote of shareholders in an M&A transaction, or the approval thereof, respectively, generally strengthens the board's position in M&A litigation. As mentioned above, a shareholder resolution approving a merger, demerger or conversion of legal form is in principle deemed to have the same effect as a release of liability with respect to such transaction, and provides the board members and officers with a legal defence against liability claims (see question 14). At the same time, the challenge of shareholder resolutions in the context of M&A transactions is often the primary means for individual shareholders to challenge the M&A transaction as such and to prevent it from closing.

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

At least in the case of public or larger private Swiss corporations that regularly contract and pay for D&O insurance (see question 21), such insurance plays an important role in liability actions brought by shareholders against directors or officers (including those arising from M&A transactions).

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?

In the case of liability actions against board members or officers, the plaintiff shareholder bears the burden of proof to establish that the defendant intentionally or negligently breached a legal duty under Swiss corporate law or the MA; that such breach caused loss or damage to the corporation(s) involved and/or to the plaintiff shareholder; and that there is an adequate causal nexus between the breach of duty and such loss or damage. As mentioned in question 2, it depends on the specific claim, and it is controversial whether the plaintiff shareholder must also establish fault of the defendant or whether fault is presumed (and the defendant must prove that he or she was not at fault to escape liability).

In the case of challenge actions against resolutions adopted by the shareholders or (under the MA) against resolutions adopted by the board, it is generally the plaintiff shareholder who bears the burden of proof that the challenged resolution was in breach of provisions or principles of Swiss corporate law, the MA and/or the corporation's articles of association.

Update and trends

Litigation between parties to an M&A transaction agreement over breaches of representations and warranties or price adjustments claims is fairly common in Switzerland. It is often resolved through arbitration, in particular in international M&A transactions. While the number of litigations between the parties of these transactions (in particular after closing) has slightly increased during the past decade, there is no clear trend as regards the frequency or the type of disputes arising out of M&A transactions. In contrast, in recent years Switzerland has seen an increasing number of high-profile litigations in the context of unfriendly takeovers and proxy fights. These litigations often involve multiple proceedings, such as requests for injunctive or interim relief in advance of general shareholders' meetings, challenge actions against shareholder resolutions, and liability actions against directors and officers of the corporations involved. Unlike M&A disputes between the transacting parties, these cases are almost exclusively litigated in state courts and often trigger significant public attention. Among the most prominent cases of such M&A litigation during the past few years are the attempted takeover of Sika AG by Compagnie de Saint-Gobain and the proxy fight regarding Schmolz + Bickenbach AG.

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

Shareholders in a Swiss corporation have the statutory right to ask the board of directors at the general shareholders' meeting for information on company matters. The board is obliged to provide this information to the extent required for the proper exercise of shareholders' rights, but may refuse to provide information where doing so would jeopardise the corporation's business secrets or other interests worth protecting. Furthermore, a shareholder may only inspect the company's accounts or business correspondence upon express authorisation by a shareholder or board resolution, and if the appropriate measures are taken to protect the corporation's business secrets. If the board refuses to provide the requested information without just cause, the shareholder may apply to a court, which may order the corporation to provide the requested information.

Moreover, any shareholder may request the general shareholders' meeting to have specific company matters investigated by means of a special audit where this is necessary for the proper exercise of shareholders' rights. The main purpose of such special audit is in fact to investigate potential liability claims against board members or executives and to enable shareholders to decide on whether to bring such claims. The right to request a special audit presupposes that the shareholder has exercised his or her statutory right to information and inspection (see above). If the general shareholders' meeting approves the special audit, the corporation or any shareholder may apply to a court within 30 days to appoint an independent special auditor. In the event that the general meeting does not approve the special audit, shareholders who together represent at least 10 per cent of the share capital or hold shares with a nominal value of 2 million Swiss francs may apply to a court within three months to appoint an independent special auditor. They are entitled to such audit despite the general meeting's refusal if they can establish prima facie that directors or officers of the corporation have violated their duties and caused damage or loss to the corporation and/or the shareholders.

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

Under Swiss law, both in a domestic and an international context, challenges against shareholder resolutions must be brought at the seat of the corporation. Subject to certain limitations or additional requirements in cases where the defendant resides in a member state of the Lugano Convention, liability actions against directors or officers may either be brought at the seat of the corporation or at the individual defendant's domicile.

Whether forum selection or arbitration clauses in a corporation's articles of association are binding upon shareholders or directors and officers of the corporation is currently subject to debate. To date, forum selection or arbitration clauses are of limited practical relevance for challenges to shareholder resolutions or liability actions. However, the Swiss legislature is currently considering the introduction of a new provision in corporate law pursuant to which the articles of association may provide that corporate law disputes are subject to the jurisdiction of an arbitral tribunal sitting in Switzerland, and that such arbitration clause is binding upon the corporation, its governing bodies, the directors and officers, and the shareholders. Such a rule, if enacted and eventually implemented by a company, would also limit where the shareholders may bring litigation in an M&A context.

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

As mentioned in question 10, discovery is not available under Swiss procedural law.

In M&A litigation, expedited (summary) proceedings are applicable in the case of requests for interim or injunctive relief (see question 9). If an M&A dispute is subject to arbitration, expedited arbitration proceedings may be available depending on the arbitration clause or the procedural rules agreed upon by the parties (eg, by reference to the rules of an arbitration institution such as the ICC or the Swiss Chambers' Arbitration Institution).

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

As for any damage calculation under Swiss law, including in M&A litigation, damage is defined as the difference between the injured party's actual assets and the injured party's hypothetical assets absent the breach of duty that caused damage or loss to the injured party. The injured party bears the burden to substantiate and prove the damage or loss with a high level of detail. If it is not reasonably possible to quantify the damage or loss, a Swiss court may estimate the quantum in its discretion in light of the normal course of events. However, in general Swiss courts are reluctant to exercise this discretion to estimate the damage or loss, and would do so only upon the plaintiff showing that he or she has exhausted all available means to substantiate and prove the damage or loss. While states courts apply very strict, sometimes exaggerated standards regarding the burden of substantiation and proof (and are more inclined to dismiss claims if these standards are not met), arbitral tribunals are often more generous (and also more flexible when it comes to the application of certain valuation methods, eg, for the calculating of future loss of profits).

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

In the case of a challenge against shareholder resolutions, the defendant corporation (which is represented by its board of directors unless the challenge is brought by the board) may not enter into a settlement agreement with the plaintiff shareholder since the board lacks the power to modify shareholder resolutions. Therefore, such settlement would require shareholder approval. However, settlement agreements under which the plaintiff shareholder withdraws the challenge are permissible.

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

Unless such third party has specific contractual arrangements with the sellers or the target company (such as an exclusivity agreement), there is in principle no legal basis under Swiss law for litigation to break up or stop agreed M&A transactions prior to closing. However, to the extent a third party is a shareholder to a corporation involved in an M&A transaction, it may challenge shareholder resolutions that are required in this context, and may cause a transaction to fail through such litigation.

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

Unless such third party has a specific contractual arrangement with the corporation or shareholders under which they are obliged to enter into a certain M&A transaction (and specific performance of such undertaking is practically feasible), litigation is generally not available for this purpose. Shareholders who are dissatisfied with a board's reluctance to enter into M&A transactions may, however, raise pressure, for example by exercising their statutory information and inspection rights (see question 26), by challenging shareholder resolutions or by threatening to bring liability claims in the case of continued inaction. However, it would be difficult for shareholders to hold directors or officers liable for not having entered into M&A transactions except in extraordinary circumstances.

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

In the case of an unsolicited or unwanted proposal to enter into an M&A transaction, the board of directors must perform its duties with due diligence and must safeguard the interests of the corporation in good faith. The board is further required to afford equal treatment to all shareholders in similar circumstances.

In the case of a public tender offer, pursuant to the stock exchange law and regulations, the board is obliged to publish a complete and accurate report in which the board comments on the tender offer. Moreover, from the moment in time the tender offer becomes public, the board may not enter into transactions that would have a significant impact on the corporation's assets or liabilities.

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 asserted by parties to M&A transactions under Swiss law are claims for breaches of representations and warranties as well as claims for price adjustments or earn-out payments. All of these claims are typically brought post-closing. To a lesser extent, parties to M&A transactions under Swiss law bring:

- claims to enforce exclusivity or confidentiality agreements;
- damages or break-fee claims in relation to aborted negotiations;
- claims to compel the signing or the closing of an M&A transaction; and
- claims arising from a breach of covenants on the target company's conduct of business between the signing and closing.

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

Disputes arising between the parties to an M&A transaction are often resolved through arbitration, which has in fact become the method of choice for dispute resolution in international M&A transactions. Most parties and M&A practitioners perceive arbitration as a commercially effective means to resolve M&A disputes and prefer it over state court proceedings. The main advantages of arbitration over state court litigation are:

- the possibility to select a neutral forum and to prevent home bias;
- to appoint arbitrators who are experienced in M&A disputes;
- confidentiality of the dispute resolution process; and
- the flexibility to tailor arbitration proceedings to the specific disputes that may arise in an M&A transaction.

In contrast, a challenge of a shareholders' resolution or liability claims brought by plaintiff shareholders in the context of M&A transactions under Swiss law are almost exclusively litigated in front of state courts, and are often a matter of public interest.

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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.

Directors owe duties under the Companies Act 2006 (CA 2006) and also owe fiduciary duties to the company they serve. In respect of an M&A transaction, the most important duties owed by a director are:

- to act in a way that he or she considers, in good faith, would promote the success of the company for the benefit of the shareholders as a whole;
- not to exercise his or her powers for an improper purpose, such as issuing new shares in the company for the purpose of reducing the influence of dissenting shareholders;
- to avoid conflicts between his or her own interests and those of the company, and to declare any interest he or she may have in the proposed transaction;
- to exercise independent judgement; and
- to exercise reasonable care, skill and diligence.

The most likely claim against a director or officer is that, in pursuing a transaction, he or she acted in breach of one or more of these duties.

As a general proposition, such duties are owed to the company, and the cause of action therefore vests in the company and not in any individual shareholder. Furthermore, individual shareholders are, on the whole, prevented from disputing any course of conduct by the company that has been approved by a majority of shareholders.

However, there are certain specific remedies available to individual shareholders, which are principally a derivative claim by a shareholder on behalf of a company; an unfair prejudice petition by a shareholder; and a petition for the company to be wound up on just and equitable grounds.

These remedies require court action, and there are high hurdles to overcome to get proceedings for these started in the courts (explained further in question 2) . For these reasons, claims for these remedies are not particularly prevalent in the English courts.

In rare cases, a shareholder may also have a direct cause of action against the directors or officers, or against third parties, on the basis that a duty that was owed personally to him or her has been breached. For example, a shareholder who voted on a transaction on the basis of a company circular that he or she subsequently alleges to have been misleading may seek a remedy directly from the directors in his or her own name. A director may also owe a fiduciary duty to a shareholder depending on the existence of a special factual relationship, for example in relation to the disclosure of material facts or an obligation to use commercial or confidential information to benefit the shareholders. However, a court will not permit a shareholder to make such a claim where the loss he or she is seeking to remedy is merely a reflection of a loss suffered by the company (eg, a diminution in the value of the shareholder's shares) – which in practice can be a real stumbling block for shareholders seeking to bring claims.

Finally, a shareholder in a public company may have a claim against a director responsible for listing particulars and prospectuses if the shareholder acquired or contracted to acquire securities to which they applied, and he or she has suffered loss as a result of any untrue or misleading statements in the particulars or prospectus, or through any omission of information otherwise required to be included (section 90, Financial Services and Markets Act 2000).

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

First, a derivative claim against a director or third party can be pursued by a shareholder on behalf of a company, if a court gives permission, where there has been any actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company. A claimant must obtain permission from the court to continue a derivative claim, which the court may give at its discretion. The claimant shareholder must be able to demonstrate that he or she has a prima facie case. The court must refuse permission if it considers that a person acting in accordance with the statutory duty to promote the company's success would not seek to continue the claim, or if the act or omission complained of has been authorised or ratified by the company (and the court may in fact adjourn the proceedings to allow such ratification to be obtained).

Secondly, a petition alleging unfair prejudice can be brought by a shareholder where the company's affairs are being conducted in a manner that is unfairly prejudicial to the interests of some or all of its shareholders as shareholders; or a current or proposed act or omission would be unfairly prejudicial to the interests of some or all of its shareholders as shareholders.

The complaining shareholder must be able to show that unfair prejudice has in fact been suffered. Unfair prejudice petitions may be appropriate in many different circumstances, for example where a shareholder has an expectation to be included in the management of a company but has been excluded; in the case of excessive remuneration of the directors, inadequate payment of dividends or loss of confidence in the management of the company; or, in respect of an M&A transaction, if the directors take action to thwart a prospective transaction that is in the company's interests. A court will decide on a case-by-case basis whether a petitioning shareholder has adduced sufficient evidence to establish the relevant unfair prejudice.

On a successful derivative action or unfair prejudice claim, the court has a wide discretion to impose such remedy as it sees fit. In particular, it can order a company to refrain from or carry out particular acts – although it is unlikely that a court would order an M&A transaction to be stopped or to force one to go ahead.

Thirdly, a petition for the company to be wound up on just and equitable grounds can be brought by a shareholder. The just and equitable grounds are not exhaustively defined, but an order will not be made where another remedy is available to the petitioner: this is a remedy of last resort and therefore rarely granted.

All breaches of duty (statutory or fiduciary) are capable of ratification by an ordinary resolution of the shareholders (over 50 per cent of votes cast) at a general meeting if there is full disclosure of all material circumstances, which in practice can nullify any claim centred on that breach of duty by a minority shareholder who did not support the ratification (however, see question 14).

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?

Shareholders in publicly traded and private companies are equally eligible to bring the claims explained in questions 1 and 2. In addition, further claims or grounds for claims may arise:

- in respect of public companies, by virtue of their regulation by the Takeover Code and, where their shares are publicly traded, the UK Listing Rules or the AIM Company Rules and related legislation that applies to quoted companies such as the Market Abuse Regulation. For example, Class 1 and related party transactions by publicly traded companies require shareholder approval; and
- in respect of private companies, by virtue of any additional obligations or restrictions imposed under the company's articles of association or any shareholders' agreement.

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

The basis of any claim is likely to be as explained in questions 1 and 2. However, the formulation of the claim may differ depending on the form of the transaction complained about. For example, in the case of a tender offer, the bidder makes an offer to the target's shareholders and the shareholders are the selling parties who approve the transaction, whereas, in the case of an acquisition or disposal by a company of a business or the share capital of a subsidiary, it is the company that is the party to the relevant transaction and its board of directors makes the decision to buy or sell.

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

In principle, the types of claims available would not differ. However, similar to question 4, the nature of the transaction may affect the formulation of a claim because acceptance of a hostile offer for a public company would not, at least when made, be recommended by the directors of the target company and the offer would be successful only if a sufficient number of shareholders accepted the offer (however, see question 1 in relation to a potential claim for misleading statements). A negotiated transaction would normally require only the approval of the board of directors of the selling company (in the case of an asset or subsidiary sale or purchase, if shareholder approval is not required by the UK Listing Rules, or any shareholders' agreement or the company's articles of association).

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

This is a critical issue in English law where a shareholder tries to commence a personal claim against a director or a third party. As explained in question 1, he or she will be precluded from making such a claim if the loss he or she is looking to recover is merely reflective of loss suffered by the company that it can claim for in its own name (eg, a diminution in the value of his or her shareholding). Such circumstances, however, are not prima facie a bar to a shareholder commencing a derivative claim, unfair prejudice petition or petition for winding up.

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?

Collective action by shareholders is possible under English law. First, a shareholder is able to bring or continue a claim as a representative for one or more other persons with the same interest in that claim. Secondly, a court may consolidate claims by multiple claimants together, using its case management powers, or claims can be brought jointly. Thirdly, a court may make a group litigation order whereby multiple claims giving rise to the same issues are grouped together and managed according to specialist procedural rules.

Any new claimant must actively 'opt-in' to benefit from the collective action being brought.

On a successful collective action according to any of the three methods above, judgment will be binding on all claimants involved.

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?

As explained in questions 1 and 2, a shareholder can bring a derivative action on behalf of a company in limited circumstances.

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?

It would be open to a shareholder to seek (final) injunctive or interim relief to prevent a transaction closing, and the courts have a wide discretion to make appropriate orders if:

- in the case of an interim injunction:
  - there is a serious issue to be tried; and
  - the balance of convenience requires that an order be made, namely that damages would not be an adequate remedy if the claimant were to succeed at trial, a cross-undertaking in damages would adequately protect the respondent from any relief subsequently judged to have been wrongly granted and any other factors relevant to the balance of convenience justify the making of the order sought; and
- in the case of a final injunction at the conclusion of a trial:
  - where a claimant has established a legal or equitable right and the court considers it just to exercise its discretion to make such an order.

The same tests apply whether the injunction sought is prohibitory or mandatory, although historically the courts are more reluctant to grant the latter.

As explained in questions 1 and 2, a court also has a wide discretion to grant an appropriate remedy on a successful derivative claim or unfair prejudice petition. However, a court is unlikely to make an order preventing a transaction from closing, and is further unlikely to modify or redraft the terms of a proposed transaction.

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

If a shareholder complains by making a derivative claim, he or she must seek the permission of the court to continue that claim (explained further in question 2).

Furthermore, a defendant or respondent to a derivative claim, unfair prejudice petition or petition for winding up could apply for its early dismissal by:

- applying for summary judgment on the claim where, on the basis of either a relevant point of law or the evidence adduced, the claimant has no real prospect of succeeding in his or her claim, and there is no other compelling reason why the claim should wait to be disposed of at trial; or
- applying for a strike out of the claimant's statement of case where:
  - it discloses no reasonable ground for being brought;
  - it is an abuse of the court's process;
  - it is otherwise likely to obstruct the just disposal of proceedings; or
  - there has been a failure to comply with a procedural rule.

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

A shareholder may be able to bring a claim against a third-party deal adviser if he or she can establish that he or she was owed:

- a duty of care by that third party not to be negligent because the damage he or she has suffered was foreseeable, there was sufficient proximity between him or her and the adviser, and it is fair, just and reasonable in the circumstances for a duty of care to be imposed; or
- a duty of care by that third party not to make negligent misstatements where the adviser assumed a responsibility towards the shareholder.

In practice, it may be difficult to establish that a third-party deal adviser did owe a shareholder a relevant duty of care: the tests to be satisfied are restrictive. In addition, such an adviser usually contracts directly with the company, and in such circumstances the courts have rarely found that a collateral duty is owed in favour of a shareholder. Furthermore, if the company has a readily available remedy against the adviser for all of the loss suffered as a result of the wrongdoing, then the shareholder's personal claim will be barred under the principle of reflective loss.

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

In principle, a shareholder could bring a derivative claim or an unfair prejudice petition against a director and a third party (eg, a counterparty to an M&A transaction) who participated in the director's wrongdoing where the claim arises out of the director's breach or the shareholder obtains the court's permission. On either cause of action, the court could order relief against a third party.

If the shareholder was seeking recovery of loss from a third party unconnected with any wrongdoing by a director, he or she may have a personal claim against the party concerned if he or she could establish that he or she was owed an independent duty by that party, and the loss he or she is seeking to recover is not merely reflective of the company's loss (as explained further in questions 1, 6 and 11).

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?

Directors have a duty to comply with a company's constitutional documents, which may impose more rigorous standards than those in the CA 2006.

English law does not allow a director's duties or liabilities to be diluted or limited by the company's articles of association.

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?

A derivative claim may not be brought where the act or omission has been authorised or ratified by the company. In respect of such authorisation or ratification, the vote of the director whose actions are being challenged or of any connected person must be disregarded.

An act or omission complained of cannot be authorised or ratified if it can be regarded as a 'fraud upon the minority', for example where the complaining shareholder has no other remedy and the directors have used their power to benefit themselves at the expense of the company, or where the relevant action involves an attempt by majority shareholders to expropriate shares held by the minority.

Authorisation or ratification does not preclude an unfair prejudice petition.

A court also has the power to relieve a director of liability entirely or in part in any proceedings for negligence, default, breach of trust or duty if it appears that he or she acted honestly and reasonably and, having regard to all of the circumstances, he or she ought fairly to be excused under section 1157(1) CA 2006. If a director suspects that a claim may be made against him or her, he or she can apply for preemptive relief. Relief is likely to be granted only in limited circumstances, such as where a director has acted honestly and on legal advice and had no alternative course of action.

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

The CA 2006 requires that a director, in carrying out and complying with his or her duties, exercises the care, skill and diligence of a reasonably diligent person. The director must satisfy an objective test: that he or she has acted with the general knowledge, skill and experience that can reasonably be expected of a person carrying out the functions carried out by that director. He or she must also satisfy a subjective test: that he or she has acted with the general knowledge, skill and experience that he or she actually has.

The duties imposed on directors allow, prima facie, for the scrutiny of directors' conduct by the courts. For example, an allegation that a director has acted in breach of his or her duty to promote the success of the company for the benefit of its shareholders as a whole ostensibly requires the courts to examine the reasoning of the director, and the factors that he or she took into account in managing the company, and in taking decisions and acting in the way he or she did.

The intention behind the legislation is to impose a high standard on directors. However, a court is likely to be slow to second guess a director's good faith discretionary decision.

Note also our comments in question 14 regarding the court's ability to relieve a director of liability.

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?

See question 15.

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

No.

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

No.

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

The standard of care owed by a director does not vary depending on whether he or she has a potential conflict of interest in connection with an M&A transaction.

However, a director has a duty to notify the other directors of any interest he or she may have in a proposed transaction or arrangement with the company, and (save to the extent authorised by shareholders or, where permitted, the other directors) to avoid an actual or potential conflict as regards matters other than a proposed transaction where in either case the situation can reasonably be regarded as likely to give rise to a conflict of interest. In addition, the company's articles of association will often contain provisions regulating the situation and, in most cases where a director has any material conflict in relation to a proposed transaction, he or she will either as a matter of law or best practice recuse him or herself from any board decisions regarding the matter.

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?

As explained in question 19, the applicable standard of care does not vary.

Where the company is involved in the transaction, its directors will have a duty to ensure that the transaction is in the interests of the company as a whole and not just that of the controlling shareholder.

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?

The CA 2006 prohibits a company from indemnifying or exempting a director of the company, or of an associated company, from any liability in connection with any negligence, default, breach of duty or breach of trust by him or her in relation to the company.

However, there is a specific exception that, subject to certain requirements, allows a company to indemnify directors in respect of liabilities arising from proceedings brought by third parties (eg, class actions or actions brought by shareholders following M&A or share issues). In addition, companies may purchase directors' and officers' insurance to protect directors from loss resulting from claims made against them in relation to the discharge of their duties as directors, and the constitution of a UK company will often expressly permit the purchase of such insurance (on which, see question 24).

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

A shareholder has no personal right to challenge the terms of an M&A transaction.

However, as explained in question 1, a director has a duty, inter alia, to act in the best interests of the company. If the particular M&A term is damaging to a company's interests, a shareholder may be able to raise an argument that in agreeing to it the director has breached this duty. However, the CA 2006 makes it clear that the decision as to what will promote the success of the company, and what constitutes such success, is one for a director's good faith judgment. As such, unless a director's good faith can be impugned, a court is unlikely to determine that a decision has not been properly made.

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

See question 14.

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

Directors' and officers' (D&O) insurance policies typically cover the directors and officers of the company for claims made directly against them that are not subject to an indemnity from the company (known as 'Side A' cover); and the company itself in respect of any reimbursement or indemnity paid to the directors and officers arising from a claim against them (known as 'Side B' cover).

Whether directors and officers are able to rely on an indemnity from their company in particular circumstances will depend on the nature of the claim. As a result, Side A claims will typically be claims made against directors by the company itself or by shareholders, whereas Side B claims will typically be claims made by third parties.

In addition, D&O insurance policies usually provide cover in respect of directors' defence costs, so that the costs of defending a Side A or Side B claim that are reasonably incurred will typically be covered, subject to approval by insurers. If there is an open question as to cover under the policy, insurers may approve defence costs incurred subject to a reservation of rights.

Therefore, D&O insurance provides an important protection in respect of shareholder and derivative claims both for individual directors and officers (in cases where their company cannot indemnify them) or for the company itself (if it is in a position to provide an indemnity to the relevant directors or officers). Whether a particular shareholder claim will attract cover under any given D&O policy will of course depend on the nature of the claim and the specific terms of the relevant D&O 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 shareholder bringing the claim has the burden of proof, and the burden does not shift in the course of proceedings.

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

A shareholder has limited rights to access company records or obtain company information. In particular, a shareholder has no general right to inspect documentation such as board minutes or general financial records.

Shareholders have a statutory right to receive copies of various reports and records that directors have statutory obligations to prepare or maintain, such as annual accounts and statutory registers. However, these documents may postdate any act or omission complained of, and may provide only limited information to assist a shareholder with his or her complaint.

A shareholder may apply for pre-action disclosure of company records before commencing a claim if:

- he or she and the respondent are likely to be parties to subsequent proceedings;
- the respondent's duty to give disclosure in any proceedings would extend to the requested documents; and
- the disclosure is desirable to dispose fairly of the proceedings, assist the resolution of the dispute and save costs. However, this is not an easy test to meet.

Furthermore, a company may argue that certain documents are privileged, although such claims will only be sustained if the document was created in connection with actual, threatened or contemplated litigation with the shareholder. Otherwise, a company has no general right of legal privilege against its shareholders.

Update and trends

The significant growth in the litigation funding market in the UK is having an increasing effect in the shareholder litigation space.

Litigation funding is where a third party agrees to finance the legal costs of a litigant in return for a fee to be paid out of any proceeds if the litigation is successful. Litigation funding is legal in the UK, and there is now even a Code of Conduct of the Association of Litigation Funders designed to regulate and undoubtedly raise the profile of litigation funding in the UK. Litigation funding can be an attractive prospect to litigants without access to significant legal budgets, those who wish to share the risk of litigation or for commercial reasons.

Litigation funding has been behind a number of shareholder class actions in recent times, and it has the potential to get M&A litigation off the ground where it otherwise wouldn't.

As already mentioned above, there have also been a number of recent actions where shareholders have taken action collectively. Such collective action can be facilitated, in part, by the presence of litigation funding, and there is also an increasing market for boutique law firms who specialise in identifying cases ripe for collective action. Enormous tactical advantage can be achieved by taking collective action, and it has resulted in some positive settlements for shareholder litigants in the past few years.

Finally, while the number of shareholder activism campaigns has remained relatively static in the UK, there is evidence that shareholders are adopting more US-style tactics to challenge issues such as remuneration and corporate governance. Such action is not necessarily litigious, but shareholder claims may be used if traction is not being gained by other methods.

Finally, a shareholder may be able to rely on a right to copies of documents or other information contained in a shareholders' agreement or the articles of association. Conversely, the articles of association or any shareholders' agreement may place additional restrictions on a shareholder's access to information.

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

A company's articles of association can contain an enforceable choice of jurisdiction clause, which may dictate where any proceedings by a shareholder against the company or a director can be brought.

Otherwise, the appropriate forum would ordinarily be the company's place of incorporation.

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

A court is able to expedite proceedings using its general case management powers, but this is a matter of judicial discretion and requires grounds of genuine urgency.

Generally, parties to English proceedings are obliged to give disclosure. This is usually on the basis of what is called standard disclosure, comprising a reasonable search for and production of documents that:

- are within that party's control and on which he or she relies;
- adversely affect or support his or her or another party's case; or
- he or he is otherwise required to disclose under the English civil procedure rules.

Parties are not obliged to disclose documents that are legally privileged: see question 26 in relation to the assertion of privilege by a company against a shareholder. Issues can also arise where a party alleges that a document is not disclosable because it is not within his or her control, or does not fall within the test for standard disclosure (or whichever other test is ordered to apply), either of which may be contentious areas in an M&A dispute if a shareholder is seeking documents that arguably belong to a counterparty. Disclosure can be ordered against a non-party if the documents sought are likely either to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and such disclosure is necessary to dispose fairly of the claim or to save costs, which may prove useful to a shareholder in relation to a dispute over an M&A transaction.

If a party considers that inadequate disclosure has been given by another party, he or she can apply to the court for an order for specific disclosure requiring either the disclosure of particular documents that are currently absent, or that the party conduct specific searches for further documents that he or she is then obliged to disclose. If a party is still dissatisfied with the disclosure given, he or she has the following options:

- an application for contempt against the party giving disclosure, on the basis that the disclosure statement confirming the adequacy of disclosure given was falsely signed; or
- an application for disclosure of specific documents on an 'unless' basis: ie, unless the disclosure is made, that party will be sanctioned, for example by having all or part of his or her claim struck out.

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

The calculation of damages depends on the nature of the claim, the alleged wrongdoing and the particular remedy that was sought at the outset.

The court has a wide discretion to order an appropriate remedy in respect of a successful derivative claim. The court could order a payment to the company in compensation for any loss suffered, an account of profits or an appropriate order against a third party joined to the proceedings.

In relation to an unfair prejudice petition, the court has a similarly wide discretion, but its purpose in granting relief is specifically to remedy the unfair prejudice suffered by the shareholder. This is a very wide discretion, and could result in, for example, an order for the purchase of the minority shareholder's shares by the majority at a fair value or price to be determined by the court or otherwise, (rarely) an order for the purchase of the majority's shares by the minority, an order for an inquiry for the benefit of the company, an order to authorise the bringing of civil proceedings on behalf of the company or an order to regulate the company's affairs in the future.

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

There are no special issues.

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

Third parties are unlikely to have any direct causes of action in respect of an M&A transaction, but they may seek to intervene, for example, on the basis that the transaction is in breach of competition law, or that the board is acting improperly or not in the shareholders' best interests.

Such third parties might seek to buy shares in the company concerned in order to advance such arguments as a shareholder.

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

No.

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?

Where an M&A transaction involves the acquisition of assets from the company concerned, the directors of the company will need to determine whether entry into the transaction is in the company's interests and that there is no statutory or other legal requirement for the directors to involve shareholders in the decision (unless the company is party to an agreement that requires this or the transaction otherwise requires shareholder approval, for example under the UK Listing Rules).

Where the proposed M&A transaction is the acquisition of the company's existing share capital (which would normally be affected by an offer to the company's shareholders in the case of most private companies), the directors of the company will normally not have any specific involvement in the transaction unless the company is subject to the UK City Code on Takeovers and Mergers (Code) or the company has a significant number of shareholders. The rules and general principles of the Code regulate the conduct of UK public takeovers, as well as certain takeovers where there is a shared jurisdiction between the UK and other EEA countries, and is administered by the Panel on Takeovers and Mergers. Under the Code, the directors of a target company must, inter alia:

- provide shareholders with their opinion on the offer and their reasons for forming their opinion;
- obtain competent independent advice as to whether the financial terms of the offer are fair and reasonable; and
- make known the substance of that advice to the shareholders.

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

Litigation between counterparties to an M&A transaction may involve warranty claims and, in rare cases, misrepresentation claims. Where there are earn-out entitlements following an M&A transaction, litigation can ensue if the entitlements are disputed.

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

Litigation between counterparties does not tend to involve issues concerning the correct claimants and defendant, which is a common feature of shareholder litigation. In addition, the issue of reflective loss (explained further in questions 1, 6 and 11) does not arise between counterparties.

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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 claims typically asserted by shareholders in connection with M&A transactions arise out of the fiduciary duties owed by boards of directors to companies and their constituents. Corporate directors owe a corporation and its shareholders two principal fiduciary duties: the duty of care and the duty of loyalty. These two duties generally encompass a number of related duties, such as the duty of disclosure (or candour), the duty of oversight and the duty of good faith.

After an M&A transaction is announced, the seller's shareholders frequently assert breach of fiduciary duty claims alleging that the board of directors agreed to sell the company for an inadequate price following the conclusion of an unfair and/or conflicted sales process. In addition, shareholders often challenge the adequacy of the seller's disclosures in connection with a transaction, including, in particular, disclosures provided in the materials used to solicit shareholder votes on the transaction.

The law governing a board of directors' fiduciary duties is the law of the state where the company is incorporated. In the United States, the majority of large public companies are incorporated in Delaware, which has a well-developed and widely followed body of case law concerning M&A transactions. Other states have broadly similar fiduciary duty rules, but may differ on particular points of law. In the interest of brevity, this chapter discusses the most common or generally applicable US legal concepts in the context of an M&A litigation and not the law of any particular state.

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

To successfully bring a breach of fiduciary duty claim, shareholders generally must show the existence of a fiduciary duty and a breach of that duty. For claims alleging a breach of the duty of care, shareholders must show that the defendant did not use the amount of care that an ordinarily careful and prudent person would use in similar circumstances. For claims alleging a breach of the duty of loyalty, shareholders must show that the defendant failed to act in the best interest of the corporation and its shareholders. To successfully bring a disclosure claim under state law, shareholders must show that the defendant failed to disclose fully and fairly all information that is material to a shareholder's decision.

In recent years, many courts have become increasingly sceptical of disclosure claims brought under state fiduciary duty law. As a result, many shareholders now bring disclosure claims under the US federal securities laws. Such claims require shareholders to demonstrate that a disclosure document failed to accurately disclose material information relating to an M&A transaction. In certain cases, the false or misleading statement must be intentional and not merely negligent or inadvertent.

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

Yes. In the context of public M&A transactions, shareholder claims typically are brought derivatively, on behalf of the corporation, or as a class action, and the claims are premised on the fiduciary duties owed by the company's directors to the company or the requirements of US federal securities laws governing disclosures to shareholders. By contrast, in the context of privately held corporations, claims typically are brought by the buyer or buyers, or the seller or sellers, and arise out of the parties' contract or direct dealings. Claims in private M&A transactions most frequently involve purchase price adjustment or earn-out disputes, indemnification disputes arising from contractual representations and warranties, and fraud claims based on alleged misstatements or omissions that induced one party to enter into the contract.

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

In certain cases, yes, but not in others. For example, in the public M&A context, shareholder claims alleging state law breach of fiduciary duty will not necessarily differ if a transaction is structured as a merger instead of a tender offer. For disclosure claims brought under federal law, however, shareholder claims will vary depending on the structure of the transaction. For example, shareholders challenging disclosures in connection with a tender offer under section 14(e) of the Securities Exchange Act of 1934 typically must show that the speaker acted with *scienter* or the intent to deceive investors and otherwise satisfy heightened pleading standards. In contrast, in a merger structure where shareholders challenge proxy disclosures under section 14(a) of that same statute, most courts hold that shareholders do not need to establish that a false or misleading statement was intentional.

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

As a general matter, the fiduciary duties of a board of directors do not differ depending on whether the transaction is negotiated or is the result of a hostile or unsolicited offer. In both circumstances, the board is required to act in a fully informed manner, with the requisite level of care, and in the best interests of the company and its shareholders. In the context of a hostile or unsolicited offer, it is generally accepted that a target board may, in appropriate circumstances, act consistently with its fiduciary duties by resisting or rejecting a hostile or unsolicited offer. However, where shareholders challenge affirmative conduct by a company to resist a hostile or unsolicited offer, such as the implementation of a 'poison pill' or shareholder rights plan, the board's conduct will be evaluated under more rigorous standards of review designed to ensure that the board is acting to protect shareholder interests.

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

Yes. Claims for losses suffered by a corporation typically belong to the corporation. Therefore, for the shareholder to bring claims on behalf of the corporation – that is, derivatively – the law imposes several threshold requirements that a shareholder must satisfy to have standing to bring corporate claims. Shareholder derivative actions seek recovery for the benefit of the corporation as a whole. In contrast, where the loss is suffered by shareholders, as distinct from the corporation itself, one or more shareholders may seek to pursue direct recovery from the alleged wrongdoers. Such 'direct' actions frequently seek recovery on behalf of a group (or class) of shareholders, and thus must satisfy different procedural requirements that apply to class actions. Recovery in a class action belongs to the shareholders, not the corporation.

In M&A transactions, courts typically hold that shareholders have direct claims when asked to vote based on misleading disclosures or when forced to exchange shares for inadequate consideration.

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?

Yes. In instances where a loss is suffered directly by individual shareholders, as distinct from losses suffered by the corporation, shareholders may seek to bring a class action lawsuit on behalf of themselves and other similarly situated shareholders. To commence a class action lawsuit, the named plaintiff must meet several requirements designed to ensure that prosecution of claims on a class-wide basis is necessary and practical, and that the named plaintiff is properly situated to act on behalf of the class.

Among other things, a proposed class representative must show that:

- the class members are so numerous that it would be impracticable to join them all in a single litigation;
- there are common questions of law or fact applicable to all class members;
- the proposed representative's claims are typical of all class member claims; and
- the proposed representative will adequately represent the interests of the absent class members.

In addition, the proposed class representative must show that common questions predominate over any individualised issues applicable to the class members.

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?

Yes. Where a loss is suffered by the corporation, rather than shareholders individually or as a group, shareholders may bring derivative actions on behalf of the corporation. To have standing to bring a derivative claim on behalf of the corporation, a shareholder must meet strict requirements intended to determine whether it is appropriate to vest the shareholder with authority to bring claims belonging to the corporation. A shareholder must either make a demand on the board that is wrongfully refused, or demonstrate in the complaint that any such demand would have been futile. Further, a derivative plaintiff must remain a shareholder from the time of the challenged transaction until the conclusion of the litigation.

Derivative claims arise more frequently in connection with failed M&A transactions (eg, where a board of directors terminates a deal or changes its recommendation and thereby causes the company to pay a substantial termination fee to the counterparty).

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?

Due to the impracticability of unwinding a transaction after it has closed, US courts have the discretion to issue an injunction to prevent the closing of an M&A transaction in certain circumstances, including where the disclosures fail to provide shareholders with adequate information, or the deal protection provisions in the M&A agreement improperly preclude other potential bidders from coming forward or coerce shareholders into voting in favour of the transaction. Although the injunction standard differs slightly from jurisdiction to jurisdiction, most courts consider whether there is a reasonable probability that the movant will succeed on its claim, whether the movant will suffer imminent and irreparable harm, and the balance of the equities. Rather than enjoin a transaction, courts also in limited circumstances may strike objectionable deal terms.

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

Yes. Defendants may seek early dismissal of a shareholder complaint by filing a motion to dismiss. Defendants may seek dismissal of shareholder derivative and class actions on the ground that the shareholder plaintiffs fail to meet one or more of the procedural requirements for commencing such an action. Defendants also may seek dismissal of shareholder claims on the ground that the complaint fails to adequately state an actionable claim.

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

Yes. Claims against third-party advisers have become increasingly common in recent years – in particular, claims based on financial advisers' undisclosed conflicts of interest. Typically, such claims have been asserted on the theory that conflicted financial advisers aided and abetted breaches of fiduciary duty by the board of directors. For example, shareholders have asserted claims against financial advisers who provided fairness opinions to the target, but had undisclosed financial incentives related to the buyer.

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

Yes. Generally, efforts to achieve a better deal through arm's-length negotiations will not give rise to liability, but liability for aiding and abetting may arise in very limited circumstances where, for example, a party intentionally creates or exploits a conflict of interest. In addition, shareholders may bring claims against a counterparty based upon allegedly false or misleading disclosures, such as where a joint proxy is issued or in connection with a tender offer.

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?

Many state corporation statutes permit corporations to include in their charter a provision eliminating director monetary liability for breaches of the duty of care. Such provisions make it difficult for shareholders to prevail in post-closing damages cases where the core contention is that the directors should have or could have obtained a better price when selling the company.

However, exculpatory provisions of this kind do not eliminate director monetary liability for breaches of the duty of loyalty or for actions undertaken in bad faith. Nor do these provisions prevent a shareholder from pursuing a claim for non-monetary relief (eg, an injunction against consummation of an M&A transaction), or from pursuing a claim for monetary damages for actions undertaken by an officer of the corporation.

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?

As a general matter, there are no statutory or regulatory provisions precluding such claims, but as noted above there are procedural rules applicable to shareholder class and derivative actions challenging M&A transactions. A shareholder class action asserting claims under the federal securities laws also must comply with the requirements of the Private Securities Litigation Reform Act of 1995.

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

Under traditional common law, most decisions by disinterested directors receive the protections of the business judgment rule. This doctrine provides a presumption that directors making a business decision acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company. A plaintiff can rebut the business judgment rule by demonstrating a breach of the directors' obligations of good faith, loyalty or due care (eg, by proving corporate waste). When the business judgment rule applies and is not rebutted, a court will not second-guess director decisions.

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

There are three primary standards for assessing director conduct in M&A transactions: the business judgment rule, enhanced scrutiny and entire fairness.

Business judgment rule
As discussed above, when the business judgment rule applies, courts generally will not second-guess the decisions of directors.

Enhanced scrutiny
An intermediate standard of review applicable to M&A transactions involving control of a company that requires directors to satisfy certain conditions before they will enjoy the benefits of the business judgment rule. For example, forms of enhanced scrutiny apply to transactions involving a break-up of a corporation and to defensive measures adopted by directors in response to a potential change-in-control.

Entire fairness
Courts will require directors to prove the entire fairness of an M&A transaction in which a majority of directors are interested or that involves a controlling shareholder. The defendants bear the burden of proving entire fairness.

In many litigations involving M&A transactions, the standard of review that the court chooses to apply will be dispositive. Where a court applies the business judgment rule, decisions made by a board of director are upheld in the vast majority of cases. In contrast, an entire fairness review strongly favours plaintiff shareholders because it forces the directors to affirmatively prove that all aspects of the process and price were fair.

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

Yes, in certain cases. For example, enhanced scrutiny applies and 'Revlon duties' are implicated when a company initiates an active bidding process involving a clear break-up of the company; when, in response to an offer, a target abandons its long-term strategy and seeks an alternative transaction; or when approval of a transaction results in a 'change of control'.

Interested transactions (eg, a going private transaction with a controlling shareholder) are subject to the entire fairness test. Other M&A transactions (eg, a merger of equals between two public corporations with no controlling shareholder) generally are subject to the business judgment rule.

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

Yes, in certain cases. In a cash-out merger where shareholders will have their investment in the ongoing enterprise terminated, Revlon duties will apply and courts will consider whether directors have taken reasonable steps to provide shareholders with the best transaction reasonably available. A stock-for-stock merger in which control of the combined entity will remain in a fluid market, by contrast, generally will not trigger enhanced scrutiny. Transactions involving a mixture of cash and stock are assessed on a case-by-case basis, although enhanced scrutiny will generally apply when 50 per cent or more of the consideration that shareholders receive is in cash.

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

A transaction in which a majority of directors are interested will be subject to the test of entire fairness. Under the entire fairness test, the burden of proof is on the board of directors to show that the transaction was the product of an arm's-length fair process that resulted in an objectively fair price. The entire fairness test is fact-intensive by nature and often requires resolution by trial (and not pre-trial motion practice).

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?

Yes. A transaction in which a controlling shareholder is a party or has an interest different from other shareholders ordinarily will be scrutinised under the entire fairness test. However, the business judgment rule can apply to a transaction with a controlling shareholder if the transaction is conditioned upon approval by a fully empowered special committee of disinterested and independent directors; and the transaction is conditioned upon approval by an informed and non-coerced vote by a majority of the minority shareholders.

Where only one of these two conditions is met, the entire fairness test will continue to apply, but the burden will shift to the plaintiff to prove the unfairness of the transaction.

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?

Indemnification may be required, permitted or prohibited depending on the facts and circumstances of a particular case. To the extent a director or officer has been successful on the merits in connection with an M&A litigation, indemnification for attorneys' fees and expenses is typically mandatory. At the other extreme, directors and officers may not be indemnified for a claim, issue or matter in which they are found to be liable to the corporation (eg, a shareholder derivative action) absent court approval. In all other cases, directors and officers may be indemnified if it is determined that they acted in good faith in a manner reasonably believed to be in, or not opposed to, the best interests of the corporation and, in a criminal action or proceeding, where there is no reasonable cause to believe the person's conduct was unlawful.

Corporations may advance legal fees to a director or officer if the person receiving advancement furnishes an undertaking agreeing to repay the corporation if it is ultimately determined that the standard for indemnification has not been met.

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

Yes, shareholders challenging an M&A transaction often will focus on deal-protection devices (eg, termination fees, matching rights, 'no-shop' clauses). These devices will be evaluated under the enhanced scrutiny standards described above. Courts generally allow parties to include such devices in their M&A transaction agreements provided that they do not, separately or in the aggregate, preclude other bidders from making offers to acquire the seller or coerce shareholders into approving a transaction favoured by management.

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

In a transaction that does not involve a controlling shareholder, a fully informed and uncoerced shareholder vote approving the transaction will result in the irrebuttable application of the business judgment rule. Courts conclude that such a vote will 'cleanse' any breach of fiduciary duty that took place in connection with the deal approval process.

In transactions involving a controlling shareholder, and absent satisfaction of the other prerequisites described above, shareholder approval will shift the burden to a plaintiff to prove the unfairness of a transaction.

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

Companies typically have insurance for their directors and officers that will cover the types of claims generally asserted in shareholder litigation arising from M&A transactions. The most important role of directors' and officers' insurance is minimising the risk that a director or officer will be subject to personal liability in connection with shareholder litigation. Directors' and officers' insurance also can influence the parties' willingness or ability to settle shareholder claims. Insurers generally play a small role in the preliminary phases of litigation, but may become more involved if a matter progresses or enters into formal settlement negotiations, such as mediation.

Update and trends

M&A litigation in the US has changed significantly in recent years, largely driven by several notable decisions issued by the Delaware Supreme Court and the Delaware Court of Chancery. For example, in the public company M&A litigation context, many shareholder suits previously were resolved through 'disclosure-only' settlements. In a typical case, a shareholder plaintiff would file a complaint alleging that the target's board of directors breached its fiduciary duties of care and loyalty in approving an unfair merger, and that the target's proxy statement seeking shareholder approval was misleading or failed to disclose important information. The parties often resolved such cases by causing the target to provide its shareholders with supplemental disclosures regarding the proposed transaction (but not an increase in the sale price or other material changes to the deal terms). The defendants in turn would receive a broad release binding on all of the target's shareholders, while paying a substantial attorneys' fee award to the plaintiffs' counsel. Such disclosure-only settlements contributed to a widely publicised increase in the number of public company M&A deals that were challenged in litigation: at one time, more than 90 per cent of large public company transactions in the US resulted in shareholder lawsuits.

In *In re Trulia, Inc Shareholder Litigation*, the Delaware Court of Chancery concluded that disclosure-only settlements typically failed to provide real benefits to shareholders and would no longer be approved by the Court unless the alleged disclosure deficiencies were 'plainly material.' The Chancery Court reasoned that the supplemental disclosures provided to shareholders frequently addressed unimportant background details that did not aid shareholders in deciding whether to approve the transaction. Plaintiffs' counsel and defendants, on the other hand, received substantial benefits in the form of attorneys' fees and broad releases, respectively. The *Trulia* decision caused an initial decline in the total number of M&A suits filed. In addition, *Trulia* has caused many shareholders to challenge M&A transactions under US federal securities law rather than through state fiduciary duty and disclosure claims.

Another important recent development concerns the impact of a shareholder vote on M&A litigation disputes. In *Corwin v KKR Financial Holdings LLC*, the Delaware Supreme Court held that certain M&A transactions would be reviewed under the deferential business judgment standard once the transaction was approved by an uncoerced and fully informed shareholder vote. Owing to the 'cleansing' effect of a shareholder vote, the *Corwin* decision has made it more difficult for shareholders to pursue post-closing damages claims against target boards.

The combined impact of the *Trulia* and *Corwin* decisions has caused certain shareholders to pursue a different strategy. Rather than challenge M&A transactions prior to a vote, a number of shareholders are now first pursuing statutory books and records demands in order to obtain internal company documents and other non-public material relating to the transaction. These shareholders then use the documents obtained through the books and records process to craft more detailed complaints asserting that important details were not disclosed to shareholders, and therefore that the *Corwin* business judgment analysis should not apply. These cases are working their way through the court system.

Another important decision that has changed the M&A litigation landscape is *Kahn v M&F Worldwide Corp*, where the Delaware Supreme Court affirmed a Delaware Court of Chancery ruling that going-private mergers with a controlling shareholder, which typically had been reviewed under the strict 'entire fairness' test, instead would be subject to a deferential business judgment review if certain procedural protections were part of the deal structure. First, the controlling shareholder must agree at the outset that the transaction will be subject to approval by a fully informed and independent special board committee empowered to retain its own financial and legal advisers and, if necessary, decline the transaction. Second, the transaction must be conditioned at the outset on a 'majority of the minority' vote, meaning that a majority of shareholders who are unaffiliated with the controlling shareholder must separately vote in favour of the deal. The M&F decision makes it more difficult for shareholders to challenge going-private transactions structured in accordance with this framework.

One final current trend in US M&A litigation that merits mention involves the appraisal process. As noted above, in many US M&A transactions, shareholders have statutory appraisal rights, which allow dissenting shareholders to petition a court to determine the fair value of their ownership interest. Previously, certain investors pursued an 'appraisal arbitrage' strategy in which the investor would purchase stock upon the announcement of a deal, and then pursue an appraisal claim. The goal was to obtain a court award finding that the fair value was substantially in excess of the deal price, while also taking advantage of favourable statutory interest rates, with the deal price serving as a worst-case floor for the investment. Several recent appraisal cases, most notably the Delaware Supreme Court's decision in *Dell, Inc v Magnetar Global Event Driven Master Fund Ltd*, have resulted in the investor being awarded substantially less than the deal price. In addition, recent cases emphasise that in the public company context, courts in most instances should give significant weight to the deal price as evidence of fair value and less to after-the-fact valuations created for the purpose of appraisal litigation. Collectively, the recent cases have increased the risk to investors pursuing appraisal arbitrage strategies.

In recent years, many insurance carriers have substantially increased the deductible or retention applicable to M&A litigation such that a significant part of defence costs and early-stage settlement payments are made by the insured.

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 business judgment rule protects the decisions of officers and directors of a corporation if those decisions are made in good faith, informed and believed to be in the best interests of the corporation. Where the business judgment rule applies, the plaintiff has the burden to rebut the presumption. The plaintiff may do so by showing, for example, that the board of directors failed to consider relevant material information or rushed to a decision without a legitimate business justification. If a plaintiff is able to overcome the business judgment rule presumption, then the burden shifts to the defendants, who must demonstrate 'entire fairness', which requires that the transaction be entirely fair to the corporation and its shareholders.

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

Shareholders have a qualified, statutory right to inspect a corporation's books and records. To do so, a shareholder must make a demand that includes a proper purpose for the inspection. A proper purpose is one reasonably related to an individual's interest as a shareholder, such as investigating alleged mismanagement or corporate waste. If the shareholder can state a proper purpose, then he or she may seek books and records that are necessary to accomplish that proper purpose. The scope of documents available to a shareholder pursuant to a books and records demand is narrower than is available during discovery between litigation parties.

Shareholders increasingly are making books and records demands in response to M&A transactions (rather than proceeding directly to litigation) for two reasons. First, Delaware courts have encouraged shareholders to obtain books and records in order to plead more detailed complaints. Second, to successfully proceed with a post-closing damages case, shareholders need to show that a vote or tender was not made on an informed basis or was the product of material conflicts.

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

A shareholder must bring M&A litigation in a forum that has subject matter jurisdiction over the claims as well as personal jurisdiction over the parties. A federal court generally may exercise subject matter jurisdiction over state law claims if a shareholder also asserts valid federal claims or if the parties' citizenship is diverse. A state court generally does not have subject matter jurisdiction over federal claims. Personal jurisdiction over a corporation exists, at a minimum, in its state of incorporation and principal place of business, and may exist elsewhere depending on the corporation's business contacts with the jurisdiction. Whether a court has personal jurisdiction over a director or officer is a more detailed inquiry, and turns on the contacts between that director or officer and the forum. A corporation also may control where suits can be brought by adopting a forum selection clause in its by-laws or articles of incorporation.

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

Shareholders may seek expedited proceedings for the purpose of setting expedited discovery deadlines and the date for an injunction hearing. The court generally has broad power to permit expedited proceedings, and the plaintiff 's burden is relatively minimal, that is, the plaintiff need only demonstrate a colourable claim and a sufficient possibility of irreparable harm to obtain expedition. When expedited discovery is allowed, the seller typically is required to produce presentations from its financial adviser, board minutes relating to the transactions, and management projections or forecasts, among other things.

The most common discovery issues concern attorney–client privilege. Some jurisdictions recognise a fiduciary exception to the attorney–client privilege, which, under certain circumstances, allows shareholders to invade the corporation's attorney–client privilege to prove fiduciary breaches by officers and directors upon a showing of good cause. In addition, if the corporation is based outside of the US, issues may arise regarding applicable blocking or privacy statutes.

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

Damages typically are designed to restore the shareholder to the position he or she would have been in if the alleged misconduct had not occurred. In M&A litigation, shareholders generally seek the difference between the deal price and what the deal price would have been absent the alleged misconduct. To litigate damages, plaintiffs and defendants usually retain experts, who typically employ one or more generally accepted valuation methodologies (eg, discounted cash flow analysis, an analysis of comparable transactions) to support an opinion that the deal price should have been higher or lower (on the plaintiffs' side) or that the deal price was fair and reasonable (on the defendants' side).

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

Settlements of shareholder class actions and derivative cases require court approval. Typically, the plaintiff shareholder, through counsel, will file a motion seeking the court's preliminary approval of the proposed settlement. The motion will request that the court approve, among other things, a process for providing notice to the shareholders; the content of a notice to be mailed or published in a newspaper or trade journal, or both; and the deadline for shareholders to object in writing, at a final approval hearing, or both.

Often, the lawyers for the shareholder plaintiff also will seek the court's approval of an attorneys' fees award to be paid from the common settlement fund. At a final settlement hearing, the court will assess whether the settlement is fair and reasonable, subject to any objections it receives.

Over the past decade, M&A litigation has become increasingly common. At one point, complaints were filed in connection with approximately 95 per cent of public company deals valued at more than US$1 billion. These filings often were followed by what became known as 'disclosure-only' settlements in which the seller's shareholders received supplemental disclosures prior to a vote or tender, the defendants received a broad class-wide release covering all claims relating to the transaction and plaintiffs' counsel received a substantial fee award.

US courts have become increasingly sceptical of disclosure-only settlements, concluding that shareholders receive no real benefit in the majority of cases. As a result, courts now prefer in most instances that parties pursue mootness resolutions without court involvement in which the defendants agree to address the shareholders' disclosure claims, the release given to defendants is narrowed and the attorneys' fees paid to shareholders' counsel are lower.

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

Third parties – increasingly, activist hedge funds – can employ a variety of strategies to stop or break-up proposed M&A transactions, some of which involve filing litigation (in their capacity as shareholders) and some of which do not (such as publicly criticising the transaction or soliciting shareholder proxies opposing the transaction). Activist investors may seek to enjoin a proposed transaction by, among other things, attacking the motives and financial interests of the target company's board of directors and management team, challenging deal-related disclosures or asserting that deal protection measures agreed to with the buyer interfere with or preclude a superior bid. In certain circumstances, activist investors may pursue one or more of these strategies in collaboration with other financial or strategic buyers.

In addition, potential purchasers have in the past pursued M&A litigations to break-up agreed transactions and acquire the target away from the preferred buyer. Purchasers in such situations typically need to be shareholders in the target company to have standing. Such cases have become less common in recent years as courts have clarified the law concerning permissible anti-takeover and deal protection measures.

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

Activist investors also may pursue litigation or other tactics to force or pressure corporations to enter into unsolicited transactions. Generally, defensive measures taken by a board of directors to resist unsolicited offers are subject to enhanced judicial scrutiny, and thus are subject to challenge by shareholders who wish to see the transaction proceed. In addition, activist investors may pursue non-litigation alternatives to exert pressure, such as instituting a proxy contest to obtain board control or making an unsolicited offer in the hopes that additional, superior offers will emerge.

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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?

As a general matter, the fiduciary obligations of a target company's management and directors in response to an unsolicited or unwanted proposal are to act in good faith, with due care and loyalty, in what they believe to be the best interests of the corporation. A board of directors has no fiduciary duty to negotiate or sell in response to an unsolicited offer – the board also may 'just say no'. In appropriate circumstances, the board of directors may implement defensive measures to resist an offer that the board believes represents a threat. However, to be upheld by a court, such defensive measures must be in response to a legitimate threat to corporate interests, and must be reasonable and proportional in relation to the threat. Once a company elects to consider an alternative involving a break-up of the company or initiates an active bidding process, the board is required to take steps reasonably calculated to obtain the best price available.

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

In the context of private M&A transactions, the most common claims arise out of the terms of the purchase agreement, including claims for breaches of contractual representations, covenants and warranties. These claims often are subject to indemnity provisions, and may be made against merger consideration held in escrow. In addition, purchase agreements frequently contain a mechanism for a post-closing purchase price adjustment whereby the purchase price may be adjusted to account for variations in the target's value or a depletion of its working capital. These claims typically are resolved by arbitration. In addition, buyers may assert claims premised on fraud, including claims for fraud in the inducement.

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

Shareholder litigation arising out of M&A transactions generally is commenced in a representative capacity, that is, by an individual shareholder as a class action (on behalf of a larger class of shareholders) or as a derivative action (on behalf of the company), and seeks to enforce fiduciary duties owed by a company's board of directors to the shareholders. In contrast, litigation between parties to an M&A transaction is brought directly between the parties. Private M&A litigation typically relates to the terms of the negotiated agreements and the veracity of the representations made by the parties prior to closing. Contractual counterparties do not owe each other fiduciary duties.

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